

Brussels, 3 March 2003

Mr. Jorge Salvador Hernandez Mollar

Chairman

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

European Parliament

B-1047 Brussels

Dear Mr. Hernandez Mollar

It is the European Union's and United States' common interest, at a difficult time for the protection of domestic and international security and the fight against terrorism, that all personal data transfers take place in a fully lawful manner so as to prevent uncertainties and conflicts that might jeopardise achievement exactly of the purposes sought.

This is the spirit in which national data protection supervisory authorities within the framework of the Working Party provided for by Article 29 of EC Directive no. 95/46 considered, some time ago, the request submitted by US Customs to directly access airline databases pursuant to the Aviation and Transportation Security Act and related regulations, which had been passed in the USA on 19 November 2001 and is commonly referred to as APIS/PNR legislation.

It is appropriate to refer, on a preliminary basis, to the circumstance that the protection of personal data is considered an autonomous fundamental human right under Article 7 of the Charter of Fundamental Rights of the EU, which is expected to also become an integral part of the future European Constitutional Treaty based on the unanimous opinion issued by the Convention. Thus, the contents of the Charter should already serve as a reference point for the decisions taken by the Commission, pursuant to the Communication issued in 2001 by President Prodi and Commissioner Vitorino on implementation of the Charter.

On 24 October 2002, the Article 29 Working Party unanimously adopted a first, timely opinion on the proposed transmission by airlines of information on passenger lists and other data to the United States, by highlighting several problems that were to be coped with exactly to ensure that data transfers could be fully lawful (see Opinion no. 6/2002).

Following the preliminary opinion issued last year, which should not be regarded as a final assessment document by the Working Party, officials from the European Commission agreed in Brussels, on 17 and 18 February 2003, on a Joint Statement concerning European Commission and US Customs Talks on PNR Transmission during a meeting with US Customs representatives.

The Commission submitted the above Statement on 20 February during a meeting of the Council's Aviation Group and confirmed it to the Coreper of 26 February, which was apparently followed by a technical meeting on 28 February.

Personal data protection supervisory authorities, which closely monitor this issue at

national level, were invited to take stock of the Joint Statement during the meeting of the Aviation Group.

On that occasion, the attempt to devise a joint solution for the issue was duly taken note of. However, many delegations attending the meeting raised doubts and concerns in respect of the legal nature, contents or actual force of the Joint Statement with regard to national law, so that the request was made, in particular by the Revolving Presidency of the Aviation Group, for the Article 29 Working Party to be enabled to re-consider this issue in light of a new, detailed document as well as on account of the specificity and sensitivity of the matter at stake.

The Working Party is holding continuous consultations on this issue and had already scheduled a meeting on 20 and 21 March next.

After issuing of the Statement, the Working Party was not formally consulted; based on its rules of procedure, it is not legally in a position to convene, even for reasons of urgency, prior to the very close deadline of 5 March 2003 - when the APIS/PNR legislation is expected to take effect.

Given the above premises, the possibility for such a sensitive solution to be rapidly implemented without duly considering all the issues raised in Opinion no. 6/2002 in greater detail leads the national supervisory authorities represented in the Working Party to wonder whether enforcing the above provisions on 5 March next is actually practicable, even though note is taken, further to an initial analysis, that in the Joint Statement some steps forward have been made and assurances are given in respect of data processing arrangements.

The Joint Statement takes account of some of the considerations made in Opinion no. 6/2002. This is to be evaluated positively and points to the possibility that continuation of the EU/USA exchange of views may lead to an outcome such as to meet US requirements without giving rise to conflicts with European regulations.

However, consideration should be given in earnest to compatibility with the individual national laws of a solution in which a formal finding as per Article 25 of Directive 95/46/EC - which is possible according to the Commission, though only starting from the month of September 2003 - would be reached in advance as of 5 March 2003 on the basis either of merely factual circumstances devoid of legal base or of a Joint Statement to be construed as a formal agreement, whose legal value in respect of the national measures implementing Directive 95/46 is far from clear.

Under point 4 of the Joint Statement, *"in view of the above process, the Commission side considered that the EU data protection authorities may not find it necessary to take enforcement actions against airlines complying with the US requirements"*.

In fact, national data protection supervisory authorities and judicial authorities of Member States are not free to apply or not national laws merely on the basis of the relevant advisability, and it has not yet been clarified how the Joint Statement might provide a sound legal base to justify an exception to that rule.

Airlines based in the Community territory are bound to fully comply with national measures implementing EC Directive 95/46 in their capacity of data controllers.

Therefore, there is the risk that the acceleration in dealing with an issue requiring careful consideration and cooperation by all the entities concerned will not be helpful in solving the relevant problems and may actually give rise to claims at national level - which may also be lodged at the request of individual citizens who might apply either to DPAs or to judicial authorities if they consider they have suffered damage on account of data transmission. DPAs and judicial authorities would be obliged to take

steps with a view to ensuring full respect for citizens' rights, differently from what is referred to in the Joint Statement. Though meant to simplify the relationships between EU and USA, the Joint Statement would therefore be in danger of giving rise to new, more marked conflicts.

At the Coreper meeting of 26 February, the Commission suggested that a provisional solution could be adopted, i.e. obtaining the passengers' consent, pending finalisation of the second phase referred to in the Joint Statement with the eventual conclusion of an agreement pursuant to Article 25 of the Directive. This approach would also require additional consideration in light of domestic laws as well as definition of a suitable deadline for airlines to develop and implement effective measures aimed at informing passengers and laying down the initial filtering criteria to protect PNR data that are not necessary to fulfil the obligations referred to in US legislation.

Being aware of these risks and taking note of the concerns raised by many national authorities as also related to equality in the working conditions of airline companies, I would like to stress the Working Party's full commitment towards contributing to the proposed agreement in a timely, constructive manner.

At the same time, since there appear to be no reasons absolutely preventing postponement of the 5 March 2003 deadline, I would also like to call upon the Community authorities to draw the US authorities' attention to the need for further postponing said term for as long as required in order to finalise a quick formal procedure in line with the Directive, or else to allow the Working Party to consider this issue also at its next meeting of 20 and 21 March 2003.

Yours faithfully

Stefano Rodotà

Chairman, Article 29 Working Party