

OPINION OF THE EUROPEAN DATA PROTECTION AUTHORITIES ON THE TRANSFER OF PASSENGERS' DATA TO THE UNITED STATES

The Data Protection Authorities convened in the European Working Party in Brussels have set out the safeguards applying to the transfer of data concerning passengers of airline flights to the USA, requested by the US Authorities.

The opinion sets out the concerns of the Working Party from a data protection perspective in assessing the level of protection ensured in the US with a view to a possible Commission Decision. The overall objective is to establish as quickly as possible a clear legal framework for any transfer of airline data to the US in a way which is compatible with data protection principles. While recognising that ultimately political judgements will be needed, the Working Party urges the Commission to take its views fully into account in its negotiations with the US authorities.

The fight against terrorism is both a necessary and valuable element of democratic societies. Whilst combating terrorism, respect for fundamental rights and freedoms of the individuals including the right to privacy and data protection must be ensured. Such rights are protected in particular by Article 8 of the European Convention on Human Rights and Directive 95/46/EC, and are enshrined in Article 7 and 8 of the Charter of Fundamental Rights of the European Union

In the aftermath of the events of 11 September 2001, the United States adopted a number of laws and regulations requiring airlines flying into their territory to transfer to the US administration personal data relating to passengers and crew members flying to or from this country. The Working Party is of the opinion that, pursuant to the provisions made in Directive 95/46/EC, such personal data may only be transferred in the presence of adequate safeguards afforded by the US Authorities.

The Working Party has highlighted the following requirements:

- Transitional nature of an adequacy finding by the Commission.
- Proportionality, in terms of categories of transferable personal data (the Working Party has proposed a much shorter list than the one envisaged by the US Authorities, excluding unnecessary information and, in any case, sensitive data), time of data transfer (no earlier than forty-eight hours prior to departure), and data retention time (data should only be retained for a short period that should not exceed some weeks or even months following the entry to the US, rather than for the 7-8 years requested by the US side).
- Method of transfer: the sole data transfer mechanism whose implementation does not raise major problems is the “push” one – whereby the data are selected and transferred by airline companies to US authorities – rather than the “pull” one – whereby US authorities have direct online access to airline and reservation systems databases. This solution should be substituted for the present mechanism as soon as possible.
- Purposes: should be limited to fighting acts of terrorism without expanding their scope to other unspecified “serious criminal offences”.
- Need for effective enforcement of data subjects' rights and independent third-party supervision.

An evaluation of the adequacy of the level of protection cannot be made with respect to areas of the US administration whose regulatory framework concerning processing of PNR data may not be regarded as stable or adequately clarified in terms of data access rules and entitlement to process such data. The Working Party makes particular reference to the Transportation Security Administration and its CAPPS II (Computer Assisted Passenger Pre-Screening) programme. Nor should the evaluation of the adequacy of the level of protection apply to those systems capable of performing mass data processing operations, whose actual functioning and features involve wide-ranging issues yet to be clarified - in particular, the Terrorism Information Awareness Initiative.

17.6.2003