

EU holds firm over airline data rift

Top level officials at the European Commission have called for urgent action over US demands for access to European airline passenger information. Alan Pedersen reports.

Internal Markets Commissioner, Frits Bolkestein, recently conceded that months of dialogue with US authorities have failed to resolve the conflict between its anti-terrorism measures and EU citizens' privacy rights. Since May 5th this year, the US has been demanding access to passenger records on flights travelling to the US as part of efforts to identify potential terrorists. Although much of the information collected includes fairly benign details, such as names and passport numbers, the US has also had access to more sensitive information, including credit card details, dietary habits, and medical requirements.

So far, US authorities have focussed on major air carriers such as British Airways and Air France. But the stakes are rising as it piles the pressure on smaller European carriers. Finnair has already caved in to US demands, while the Swiss Civil Aviation Office has managed a temporary reprieve from its September 12th deadline pending further discussions.

AIRLINES IN LIMBO

The situation is leaving airlines torn in two directions. Failure to meet US demands could result in loss of landing rights and fines of up \$6,000 per passenger – an unthinkable scenario for a sector still recovering from a slump in the North Atlantic route. At the same time, they risk falling foul of EU data protection laws and a backlash from customers.

Some have attempted to find their own way out of the legal predicament. Finnair, for example, announced it would only pass on customer details with their consent – although those who refuse are denied flight tickets. But Professor Peter Blume, head of law at the University of Copenhagen, was sceptical about this approach. "It is doubtful, to say the least, whether consent is voluntary and thereby valid," he said. "But besides consent, processing also must be fair and this is probably not the case. The Finnair practice is dubious, but understandable due to the US reactions."

US DEMANDS BREACH EUROPEAN PRIVACY LAWS

In a speech to a European Parliament citizens' rights committee on September 9th, Bolkestein said: "It is clear that the present situation, which is at best legally fragile, cannot be allowed to continue...what is urgently needed, in my view, is a coherent EU policy..."

Bolkestein revealed that the US has been unwilling to narrow down its purposes for using passenger data – not only will it be used to combat terrorism, but also other 'serious criminal offences'. He branded the 6-7 year data storage plans as too excessive, despite having previously bargained a significant reduction from the 50 years originally proposed

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- Frits Bolkestein, European Commission

by the US. The amount of data collected – 39 separate categories – was dismissed as disproportionate, while Bolkestein voiced further concerns that US undertakings to provide "adequate" protection were insufficiently legally binding.

COURSE OF ACTION

Bolkestein outlined three possible solutions. One would be to "persevere" with talks. Previous dialogue, he said, had achieved some success through further US undertakings to restrict third party access and filter out sensitive data. But, it is debatable whether the Commission will be able to squeeze any further concessions out of the US. Tom Ridge, US Secretary for Homeland Security, recently indicated that he felt the US had done enough to ensure EU citizen's rights are protected.

A more drastic solution would see EU data protection authorities moving in to block the transfer of passenger records. But although "superficially attractive", such action could result in travellers being subjected to 'secondary inspections' at US airports, while disparities in the way data protection authorities enforce their laws would create an uneven playing field for national air carriers. "Some would press on with enforcement actions against the airlines," said Bolkestein. "Others, it is clear, would not."

The third solution he suggested would involve establishing a bilateral agreement with the US, bridging the gap between the two legal systems and allowing for "narrowly targeted derogations to be made from the [EU] Data Protection Directive."

COMMISSION UNDER FIRE

While trying to thrash out a compromise with US authorities, Bolkestein is also having to fend off criticism from the European Parliament. Dutch MEP Johanna Boogerd-Quaak, rapporteur for the Parliament's citizens' rights committee, lambasted the Commission's efforts in a paper published on September 2nd. "The Commission has made very little progress with regard to ensuring that data protection legislation is observed," she said. "Neither the negotiations nor the pressure from the European Commissioner have resulted in an acceptable solution."

Failure to resolve the issues, she warned, could result in an official warning for the Commission and even lead to legal action in the European Court of Justice.

Boogerd-Quaak has called for all transfers to be stopped as of October 1st 2003.

How this situation is eventually resolved is still unclear. Negotiations continue, but the gravity of the situation was summed up by Bolkestein in a letter to Tom Ridge in July this year. "If current efforts fail," he wrote, "we risk a highly charged trans-Atlantic confrontation with no obvious way out."

RFID - the saga continues

Retail businesses are showing continued interest in the commercial use of 'smart' tracking technologies, but **Eugene Oscapella** finds that privacy activists are still on the warpath and are now calling for legislation to be introduced.

In the last issue of *PL&B International* (May/June 2003, p.14), we examined the privacy concerns over the potential introduction of Radio Frequency Identification (RFID) technology in the marketplace. Those concerns – and the debate surrounding the utility and possible dangers of RFID – continue to gather momentum. And, like the clothing company, Benetton, other businesses may begin to feel the sting of consumer boycotts in response to their use, or planned use, of RFID.

PROPOSED LEGISLATION

On June 11th, the US-based consumer group, CASPIAN (Consumers Against Supermarket Privacy Invasion and Numbering) unveiled its proposal for federal legislation that would require mandatory disclosures on consumer products containing RFID chips.

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CASPIAN claimed that its "RFID Right to Know Act of 2003" would protect consumers against unwittingly purchasing products embedded with remote surveillance devices. Besides requiring mandatory labelling to alert consumers to the presence of RFID chips, the legislation would make it illegal for companies to link the chips with personally identifiable information.

The *Associated Press* reported on June 13th that Wal-Mart Stores, the world's largest retailer, was requiring all of its top 100 suppliers to have "smart tags" on their pallet shipments by early 2005. This will reportedly enable the company to track its inventory more efficiently.

DAMAGE LIMITATION

The technology news service, *Wired News*, reported on August 8th that the largest food companies and retailers in the US will try to win consumer approval for RFID by portraying the technology as an essential tool for keeping the US food supply safe from terrorists. It reported that the companies are banding together and through an industry association are lobbying to have the Department of Homeland Security designate RFID as an anti-terrorism technology. They will argue that the technology would help recall products that might be contaminated or laced with poison during a terrorist attack.

CASPIAN claims that Gillette has been hiding RFID chips in the packaging of its shaving products and that these tags are being used to monitor unsuspecting customers (see *PL&B UK*,

August 2003, p.6). According to CASPIAN, the tracking system uses sensors hidden under Gillette shelves to detect when products are picked up. Whenever a shopper picks up a packet of razor blades from a "spy shelf", a hidden camera secretly takes a close up photograph of the shopper's face. A second photograph is allegedly taken at the cash register to make sure that the product has been paid for.

CASPIAN has advised consumers to avoid all Gillette products, including shaving items, Duracell batteries, Braun appliances, and Oral B products until further notice. Readers will remember that CASPIAN was also

behind the call for a consumer boycott of Benetton when it showed interest in using RFID technology.

And after attempting what one technology report described as "surely the world's stupidest anti-shoplifting initiative," UK supermarket chain Tesco, which had tried using RFIDs in packets of razor blades to trigger a security camera, has reportedly backed away from using RFID tags to monitor customers.

WORKSHOP TO ADDRESS PRIVACY CONCERNS

The concern about RFID appears to be growing alongside the apparent growth of interest in the commercial, and possibly security, uses of the technology. On November 15th, an RFID privacy workshop is to be held at the Massachusetts Institute of Technology (MIT) - one of five university "partners" of the Auto-ID Center, which has been criticised by CASPIAN for its work on RFID.

The announcement for the workshop states that the deployment of RFID technology is quickly becoming mired in a variety of non-technical privacy issues. "While some of the critique is dead-on target," it says, "much of what is being said about RFID is technically impossible, and some complaints are mis-focused on RFID, applying equally well to many other technologies." The organisers are soliciting papers that explore the interaction of RFID technology and public policy.



FURTHER INFORMATION: Details on the MIT privacy workshop can be found at: <http://rfidprivacy.org>.

For more details on CASPIAN, see: www.nocards.org
