

CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

EU LAW: DATA PROTECTION FOR AIRLINE PASSENGERS AFTER 9/11

*European Parliament (supported by the European Data Protection Supervisor (EDPS))
v Council (supported by the Commission and the United Kingdom)*

and

*European Parliament (supported by the European Data Protection Supervisor (EDPS))
v Commission (supported by the United Kingdom)*

Joined Cases C-317 and 318/04, judgment of 30 May 2006, not yet reported (European Court of Justice, Grand Chamber)

(V Skouris, President, P Jann, CWA Timmermans, A Rosas and A Borg Barthet, Presidents of Chamber, R Schintgen, N Colneric (Rapporteur), S von Bahr, JN Cunha Rodrigues, M Ilešić, J Malenovský, J Klučka and U Löhmus, Judges)

BACKGROUND TO THE JUDGMENT

After the terrorist attacks of 11 September 2001, the United States passed legislation providing that air carriers operating flights to or from the United States, or across its territory, had to provide the United States customs authorities with electronic access to the data contained in their automated reservation and departure control systems, referred to as Passenger Name Records (PNR). The EC Commission informed the United States authorities that these provisions could come into conflict with European Community and member state legislation on data protection, but the United States authorities refused to waive the right to impose penalties on airlines failing to comply with the legislation and a number of European airlines granted them access to their PNP data. However, the United States authorities and the Commission entered into negotiations which resulted in a document containing undertakings by the United States Bureau of Customs and Border Protection (CBP) with a view to adoption of a decision on adequacy under article 25(6) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, adopted on the basis of article 95 EC.¹

The directive provides that member states must ensure that personal data is collected and processed only for limited purposes and to the extent strictly necessary for those

¹ OJ 1995 L281/31.

purposes. However, article 3(2) of the directive provides that it does not apply to the processing of data in the course of an activity which falls outside community law, such as those provided for by Titles V (provisions on a common foreign and security policy) and VI (provisions on police and judicial co-operation in criminal matters) EU and in any case to processing operations concerning public security, defence, state security and the activities of the state in areas of criminal law. Article 25(1) of the directive provides that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if the third country ensures an adequate level of protection. Article 25(6) provides that the Commission may find that a third country ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into, for the protection of the private lives and basic freedoms and rights of individuals.

The Commission adopted *Decision 2004/535/EC* of 14 May 2004 on the adequate protection of personal data contained in the PNR of air passengers transferred to the CBP (“the Decision on Adequacy”)² on the basis of the directive. Article 1 of the decision stated that the CBP was considered to ensure an adequate level of protection for PNR data transferred from the community concerning flights to or from the United States, in accordance with the undertakings of the CBP annexed to the Decision on Adequacy.

Three days after the adoption of the Decision on Adequacy, the Council adopted *Decision 2004/96 of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection*³ on the basis of Article 95 EC. Article 95 EC provides that the Council shall adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment or functioning of the internal market. Article 1 of *Decision 2004/96* stated that the agreement was approved on behalf of the Community. The agreement provided, *inter alia*, that the CBP could electronically access the PNR data from air carriers’ reservation/departure control systems located within the territory of the member states, in accordance with the Decision on Adequacy.

The European Parliament challenged both decisions and the Court of Justice gave a joint judgment on the challenges.

THE JUDGMENT

The challenge to the Decision on Adequacy

The parliament’s challenge to the Decision on Adequacy alleged *ultra vires* action, breach of the fundamental principle of the directive, breach of fundamental rights and breach of the principle of proportionality.

The Court of Justice held that the Decision on Adequacy concerned only PNR data transferred to the CBP. It was evident from the Decision on Adequacy that the requirements for that transfer were based on United States legislation relating to the enhancement of security and the conditions under which persons could leave and enter the country. The Decision on Adequacy also stated that the Community was committed to supporting the United States in the fight against terrorism within the limits imposed by Community law, and that PNR data would be used strictly for

² OJ 2004 L235/11.

³ OJ 2004 L255/168.

purposes of preventing and combating terrorism and related crimes, other serious crimes, including organised crime, that were transnational in nature, and flights from warrants or custody for those crimes. It followed that the transfer of PNR data to CBP constituted processing operations concerning public security and the activities of the state in areas of criminal law.

The Court acknowledged that PNR data might initially be collected by airlines in the course of an activities which fell within the scope of Community law, namely the sale of an airline ticket which provided entitlement to a supply of services, but held that the Decision on Adequacy itself concerned not data processing for a supply of services, but data processing regarded as necessary for safeguarding public security and for law-enforcement purposes. Although the activities mentioned in article 3(2) of the directive as examples of activities excluded from its scope were, as held by the Court in *Lindqvist*,⁴ activities of the state or of state authorities and unrelated to the fields of activities of private individuals, the fact that PNR data was collected by private operators for commercial purposes and it was they who arranged for their transfer to a third country did not mean that the transfer was not covered by article 3(2) of the directive. It fell within a framework established by the public authorities that related to public security.

The Court concluded that since the Decision on Adequacy concerned processing of personal data as referred to in article 3(2) of the directive, it did not fall within the scope of the directive. Article 3(2) had therefore been infringed and the Decision on Adequacy must be annulled. It was unnecessary to consider the parliament's other arguments in relation to the Decision on Adequacy.

However, the Court ruled that annulment of the Decision on Adequacy should not take effect immediately. First, the agreement which the decision approved could only be terminated on 90 days' notice of termination by either party, and the community could not rely on its own law as justification for not fulfilling the agreement, which remained applicable during the period of 90 days from termination. Second, the agreement provided that the CBP's right of access to PNR data and the obligation on air carriers to process them as required by the CBP existed only while the Decision on Adequacy was applicable, and thus the two documents were closely linked. It was therefore appropriate, in the interests of legal certainty and to protect the persons concerned, to preserve the decision for the 90 day period during which the agreement would continue. In addition, that account should be taken of the period needed for the adoption of the measures necessary to comply with the judgment. The Court therefore ruled that the effect of the Decision on Adequacy should be preserved until 30 September 2006, but not beyond the date upon which the agreement came to an end.

The challenge to Decision 2004/496

The parliament's challenge to *Decision 2004/496* alleged incorrect choice of article 95 EC as legal basis and breaches of article 300(3) EC, article 8 ECHR (the right to respect for private and family life, the home and correspondence), the principle of proportionality, the requirement to state reasons and the principle of co-operation in good faith.

The Court of Justice held that article 95 EC, read with article 25 of the directive, could not give the community competence to conclude the agreement. The agreement related to the same transfer of data as the Decision on Adequacy, and therefore to data processing operations which the Court had already found to be excluded from the

⁴ C-101/01 [2003] ECR I-12971.

scope of the directive. *Decision 2004/496* could therefore not have been validly adopted on the basis of article 95 EC and must be annulled. It was not necessary to consider the other pleas put forward by the parliament.

COMMENTARY

The legal dilemma here is clear; the need to balance protection of personal data with protection of public security. But it reflects an underlying moral and political dilemma, and its resolution raises fundamental questions of human rights, national security and international relations. The United States authorities have decided that the balance should lie in favour of national security.⁵ The United Kingdom, which was the only member state to intervene in these cases in support of the decisions, apparently agrees. Indeed, in the related area of detention of terrorist suspects without trial, the United Kingdom is the only member of the Council of Europe – and thus the only member state of the community – to have entered a derogation on grounds of public emergency from its obligations under article 5 ECHR to guarantee liberty and security.

The Court did not consider these fundamental issues. The judgment, correctly, concerned the legality of the decision, not their moral or political value. The task for the United States and the Commission and Council is to find a way round the legal objections.⁶ This, however, will not be easy. The fundamental difficulty is that matters of national security are not within Community competence, and so finding a legal basis for measures similar to those annulled presents a problem. One solution is for the United States to take the Community out of the equation, and deal directly with individual member states. If this approach is taken, the result in the United Kingdom is a foregone conclusion. Other states may be less enthusiastic, but at least some of them must have voted for the annulled decisions (since they were adopted by a qualified majority of the member states), and all will be influenced by the commercial reality of European airlines facing fines and loss of landing slots at US airports.⁷

The US authorities and their counterparts in Europe have a limited period of time in which to resolve the dilemma. If they fail to do so, the airlines themselves will have the unenviable choice between transferring data and breaching Community law, or refusing to transfer it and breaching US law.

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⁵ The *Pittsburgh Tribune-Review*, 2 June 2006, commented on the judgment thus: "The European Union, a 25-member mélange of malaise in the war on terror, would rather protect data than lives": (http://www.pittsburghlive.com/x/pittsburghtrib/opinion/archive/s_456292.html).

⁶ Although the Court did not consider the parliament's other objections, Advocate General Léger rejected them in his Opinion, and it is thus unlikely that the Court would uphold them.

⁷ S Boggan "Q. What could a boarding pass tell an identity fraudster about you? A. Way too much", *The Guardian*, Wednesday 3 May 2006: <http://www.guardian.co.uk/idcards/story/0,,1766266,00.html>; J Booth and agencies "EU passengers could face long queues to enter US after ruling", *The Times*, 30 May 2006: <http://www.timesonline.co.uk/article/0,,13509-2202630,00.html>.

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