

Emails requested (NB with the exception of those covering letters above)

-----Original Message-----

From: [Redacted contact details – European Commission]

Sent: 25 October 2009 10:39 PM

To: [Redacted name - UKBA]

Cc: [Redacted contact details]; [Redacted contact details]

Subject:

Dear [redacted contact details],

As a follow-up to my e-mail of 12 October and to our phone conversation last Thursday, I would like to provide you the following information.

1. Legal basis

Thank you for sharing with us your reasoning regarding the legal basis for the collection of personal data in the Member State of departure on a journey to the UK.

1.a. Territorial restrictions and Article 7 of the directive

As I told you at our meeting earlier this month, we cannot accept your reading of directive in this respect. A legal obligation created by a Member State's legal instrument cannot be considered *per se* as a legal obligation for the collection and processing of personal data in another Member State. The legal basis for the collection of personal data in a Member State has to exist within the legal order of the Member State in which the data are collected and prior to this collection. Only personal data lawfully collected can be in free circulation between Member States.

Accepting your reading and applying it in any future similar situations which might appear in other Member States would lead to practical consequences the difficulty of which is easy to understand and that are incompatible with the purposes of Community law.

1.b. Wider legitimate interests

Setting aside the "legal obligation imposed on the controller" (Article 7(c)), our reflection focuses on Article 7(e) (task carried out in the public interest by the controller or a third party to whom data are disclosed) and (f) (balance of interests and legitimate interest). We are examining this matter in detail with other Commission's services.

Your message provides us with useful elements to explore as to what could be a "public interest" or a "legitimate interest".

Before the Art 29 WP's sub-group on travellers meets mid-November (see below), we will have a definite opinion about whether one of the two provisions can be relevant and about the extent to which the services of the Commission can interpret it in a way that can be brought to the knowledge of the appropriate authorities of the Member States.

I will keep you informed of the results of our analysis.

2. Position of Art 29 WP

On 12 October 2009, the Article 29 Working Party discussed the file. As we have anticipated during our discussions, the reception of our preliminary assessment was cold.

As the main issue to be solved is that of the legal basis for the collection of travellers' data in the Member State of departure, we have insisted that the national DPAs consider the issue in the light of their national legal orders.

This highlights, if necessary, the usefulness of continuing to have clarifications with the appropriate authorities in the appropriate Member States. I believe that such discussions remain appropriate to seek solutions for the collection of personal data in the Member States of departure of journeys to the UK and I would be grateful if you could keep me informed about the results of these discussions.

The WP decided that the "travellers' data subgroup" would deal with the issue in order to arrive at a "position paper" for December's plenary (1-2 December 2009). We are liaising with the subgroup in order to address the right questions so that constructive solutions can be found.

3. Other issues

In the e-mail of my services to [redacted name] of 7 October 2009 we expressed our wish to obtain some clarifications on the collection of travellers' data in the context of train carriers (Eurostar) and also on the question of onward transfers to third countries. It is highly desirable to obtain these clarifications and assurances and, where appropriate, to see them clearly enshrined in the applicable legal acts. They will help to make clear that there is no hindrance to the free movement of persons and, therefore, to facilitate the clarification of the data protection issue.

Dear [redacted name],

It goes without saying that I remain available to meet you or to talk over the phone in order to further clarify these matters.

Best regards,

Aurel

-----Original Message-----

From: [Redacted name - UKBA]

Sent: 06 November 2009 8:49 AM

To: [Redacted contact details – European Commission]

Subject: RE: URGENT FW: Follow-up of today's meeting

Importance: High

Thank you Aurel, here are our responses to your final questions – in the attached. I very much look forward to your response back later today.

Kindest regards,

[Redacted name]

[Redacted contact details]

[Redacted contact details]

Tel: [Redacted contact details]

Mob: [Redacted contact details]

Email: [Redacted contact details]

details]

-----Original Message-----

From: [Redacted contact details – European Commission]

Sent: 06 November 2009 5:29 AM

To: [Redacted contact details - UKBA]

Subject: RE : URGENT FW: Follow-up of today's meeting

[Redacted name]

I will get back to you on this until the end of TODAY. You are right.

Bests,

Aurel

De: [Redacted contact details - UKBA]

Date: jeu. 11/5/2009 15:17

À: CIOBANU-DORDEA Aurel (JLS)

Objet : URGENT FW: Follow-up of today's meeting

Aurel, as we just discussed, these were the three sets of questions – as set out in Marie-Helene's email below. And you reiterated the same questions in your email to me in your most recent email (of 26 Oct) when you said: "3. Other issues

In the e-mail of my services to [redacted name] of 7 October 2009 we expressed our wish to obtain some clarifications on the collection of travellers' data in the context of train carriers (Eurostar) and also on the question of onward transfers to third countries. “

We have drafted our responses on these and they are with Jonathan Sedgwick to clear.

I am now getting very concerned we are going around in circles here. We have already, in my view, given very clear answers on the Free movement issues and had the indication that the commission were ok with us on this. In our original response to the commission, dated 21 May we said:

“11. Data must be provided electronically by the carrier. Some carriers collect information from passengers in advance, for example, via the internet or ticketing process; alternatively carriers can collect the data by swiping the travel document at check-in. The chosen process is down to the individual carrier and should not affect the travel experience of the passenger. There is no question of passengers having to complete any form of questionnaire at check-in.

12. By working with carriers we have developed a flexible system capable of receiving advance passenger information through a number of interfaces and in a range of formats. Information collected from passengers as part of the booking process and at check-in can be submitted from 24 hours prior to departure of the service. A departure confirmation message is required within 30 minutes of departure. There is no question of passengers being prevented from making last-minute journeys due to information not being supplied sufficiently far in advance of travel.

13. It should also be noted that e-Borders does not currently function as an authority to carry scheme. That is to say that no passenger will be directly refused leave to enter on the basis of failure to provide information to e-Borders. A passenger who had not provided the data in advance would be treated as an unexpected arrival.”

And in our more recent and very detailed response we went even further to ensure this was clear:

“On free movement, we can confirm categorically that carriers will not be asked to deny boarding to EU citizens or their family members as a result of data received under e-Borders. As is currently the case, the right of such persons to be admitted to the UK will be assessed by an immigration officer at our border controls. Admission will only be refused in accordance with Directive 2004/38/EC and the rights set out in Chapter VI of the Directive will be respected.”

...”**1. Denial of entry by carriers: could the UK authorities confirm that carriers would not be asked to deny boarding to EU citizens or their family members on any grounds?**

1. We can confirm that carriers will not be asked to deny boarding to EU citizens or their family members as a result of data received under e-borders. As is currently the case, the right of such persons to be admitted to the UK will be assessed by an immigration officer at our border controls. Admission will only be refused in accordance with Directive 2004/38/EC and the rights set out in Chapter VI of the Directive will be respected. The advantage of e-borders is that immigration officers will have advanced warning of the person’s arrival and as a result should be able to deal with the case more efficiently.

2. Sanctions: could the UK authorities confirm that they would not enforce sanctions against carriers which do not provide the requested data due to no fault on their part (e.g. where the EU citizen does not provide the data or the carriers are not authorised to collect and transfer the data)?

2. Yes, we can confirm this. The overall intention is that sanctions are aimed at carriers who do not cooperate with e-borders and carriers who have in place systems to collect data will not need to fear prosecution where they are prevented from supplying data in an individual case due to no fault on their part. Further, in all cases there is a statutory defence available to a carrier of having a reasonable excuse for failing to comply with a request to provide data (which is set out in section 27(2)(b)(iv) Immigration Act 1971 as amended in respect of a request made by an immigration officer and section 34(1) Immigration, Nationality and Asylum Act 2006 made by a police officer).

3. Availability and collection of data: Could the UK authorities confirm this? (That an EU national will not be refused entry on the basis that their passenger data is unavailable to the border control officer for whatever reason).

3. Yes, we can confirm this. Provision of data in advance is absolutely not a condition for EU citizens and their family members to exercise their right to free movement. As confirmed in the UK’s first response to the Commission pilot complaint at paragraphs 29 and 31 respectively:

“29. More generally, the right of EU citizens to enter the UK with a valid identity card, passport or to prove by other means their right of free movement,

as required by Article 5(1) and (4) of Directive 2004/38, is set out in UK law in regulation 11 of the Immigration (European Economic Area) Regulations 2006 No. 1003. The UK's border authorities check the documents presented on the arrival of EU citizens at the UK's border crossing points. [...]

31. EU passengers to the UK will not be required to carry any additional documentation as evidence of their free movement right other than that as required by the Directive. Their right to enter or leave the UK under the conditions set out in Articles 4 and 5 of the Directive is not affected.”

It would appear that the questions about sanctions etc we have already – and very explicitly – answered. Please let me know urgently if you do not agree.

Of course, the Art 29 group will not be as aware of these clarifications because they have not been sighted on our most recent response to the commission. Unless of course you have shared our commitments with them?

I hope this is helpful. I am free whenever to discuss this as you know this is a priority for me – so please do feel free to call me if required.

[Redacted contact details]

[Redacted contact details]
Tel: [Redacted contact details] Mob: [Redacted contact details] Email: [Redacted contact details]

-----Original Message-----

From: [Redacted contact details - UKBA]

Sent: 07 October 2009 8:49 AM

To: [Redacted contact details – European Commission]

Cc: [Redacted contact details]; [Redacted contact details]; [Redacted contact details]; Sedgwick Jonathan; [Redacted name]; [Redacted contact details]; [Redacted name]

Subject: RE: Follow-up of today's meeting

Marie-Helene

thank you for your email. As discussed we will provide a paper on the legal basis question as soon as possible (I hope today), and will revert to you as soon as possible with answers to your questions of clarification outlined below.

[Redacted name]

[Redacted name]

[Redacted contact details]

[Redacted contact details]

Tel: [Redacted contact details]

GSM/mobile: [Redacted contact details]

[Redacted contact details]

From: [Redacted contact details – European Commission]

Sent: 06 October 2009 19:14

To: [Redacted contact details - UKBA]

Cc: [Redacted contact details]; [Redacted contact details]; [Redacted contact details]

Subject: Follow-up of today's meeting

Dear [Redacted name] ,

I thank you for the meeting we have had this afternoon on the UK -e borders. I

think that it has been useful as it has allowed both parts to freely discuss and exchange their views on the questions that the implementation of the UK e-border system raises from the data protection perspective.

As agreed at the meeting, we wait for a paper from the UK on the legal basis for the collection of travellers' data in the Member States of departures of journeys to the UK.

We would also like to obtain some clarifications on the following issues:

- Collection of travellers' data by train carriers (EUROSTAR): could you indicate us the necessity of the collection of personal data by these carriers taking into account the fact that already UK border authorities collect travellers' data before boarding the train ?

- Onward transfers to third countries: could you clarify whether the UK Data Protection Authority (ICO) shall be consulted and shall authorise the Memoranda of Understanding established with a third country for the transfer of personal data and which kind of safeguards for the rights and freedoms of data subjects shall be included in such MoU ?

We have also taken note of your commitment of adopting appropriate measures in view of providing travellers with the information required by Article 10 of Directive, as well as your intention of establishing a single contact point in the UK that will be competent to receive and deal with requests from data subject within the framework of the exercise of their data protection rights.

Marie-Hélène Boulanger
[Redacted contact details]
[Redacted contact details]

[Redacted contact details]

[Redacted contact details]

Tel: [Redacted contact details]
Fax: [Redacted contact details]

[NB to follow attachment to 6 November 8.49AM email]

Marie-Helene Boulanger

Dear Marie

I am grateful to you and Lotte for sparing the time to discuss your remaining concerns around the UK e-Borders system and data protection. I hope you found my email of 9th October on the legal basis for collection of travellers' data within the EU useful. This letter/email responds to the other three points you raised.

1. Eurostar

You asked about the necessity of collecting data from Eurostar given that the passenger would already have provided data to UKBA.

It is true that UK Border Agency (UKBA) officers at the United Kingdom juxtaposed controls in Paris, Brussels and Lille have the power to examine passengers travelling to the UK for immigration purposes. However, and significantly, the UKBA officers do not generally collect and retain the travel document information at the controls which could be requested from Eurostar under e-Borders.

When a passenger is examined at the control, his or her travel document or other evidence relied upon may be checked against the UK watch list system for immigration, crime and national security purposes. At peak periods, however, there may only be a physical examination of the document presented. This policy has been introduced to reduce the average passenger transaction time and facilitate passenger movement through the UK controls.

The provision of advance passenger information in respect of Eurostar would allow **all** passengers to be checked against watchlists in a way which did not slow down the passage of passengers through the control. Any alerts against immigration watchlists would be dealt with prior to departure for the UK. However, there may additionally be individuals who are of interest to the other border agencies (police or customs) who are not present at the point of departure and in respect of whom interventions would take place on arrival in the UK. For this reason, it is essential that in addition to the travel document information, we know from the carrier which service the individual is travelling on.

Any e-Borders solution requiring UKBA to collect and retain relevant passenger data would undoubtedly have a negative impact on transaction times at our controls. On the other hand, the solution we hope to develop will reduce transaction times still further as the submission and watchlisting of data in advance offers the opportunity of a more targeted intervention approach.

It is recognised that maintaining fluidity at the juxtaposed controls particularly at peak times is vital if the border is to be managed effectively. The submission and watchlisting of relevant passenger data in advance of travel offers opportunities for the control authorities to look at a range of intervention activity on an intelligence led basis and to ensure appropriate and proportionate interventions are made. Carrier provision of passenger data in advance will enable the maximum benefit to be derived from this implementation for Eurostar and the passenger as well as meeting the legitimate aims of the UK border authorities. This will improve the border crossing experience for all passengers.

As we explained in our supplementary reply in respect of Eurostar, the e-Borders programme has a staged roll out. The programme has not been applied to Eurostar. We have been in continuing engagement with them as to how it might apply to them taking into account their business model, the information they hold and the information which the UK border authorities may hold. We will consider the unique position of the UK border authorities being at some points of departure for Eurostar in

France and Belgium, as we recognise that this has a significant impact in assessing the necessity of the processing. We have explained above how this process works at present and the limited amount of data which is reviewed by UKBA. Before this mode/route is rolled out, we will need to devise a solution which ensures consistency across all borders and does not leave a gap in our border security. As we continue to finalise how e-Borders will be applied here, again we welcome the close engagement of the Commission.

2. Onward transfer to third countries.

You asked whether the Information Commissioner's Office would be consulted on a Memorandum of Understanding (MoU) with a third country for the transfer of personal data collected by the UK border agencies from the carriers and which data protection safeguards would be included in such an MoU. I can confirm that UKBA does consult the UK Data Protection Authority, the Information Commissioner's Office (ICO) when developing international data sharing arrangements. We would put in place a range of appropriate safeguards for the rights and freedoms of data subjects, in particular ensuring compliance with each of the data protection principles and other legal requirements.

I would like to use the agreement between the UK's Joint Border Operation's Centre (JBOC) and its equivalent in the US, the National Targeting Centre (NTC), on data-sharing for immigration and customs purposes as a specific example. The MoU is not about sharing bulk Passenger Name Record (PNR) data. Instead, it is about sensible operational co-operation on persons of legitimate interest being those who may pose a threat to public policy or public security such as illegal immigrants, persons smuggling illicit goods and suspected or convicted criminals. I provide some example scenarios at the end of this question to reflect the types of data exchange which may take place.

UKBA consulted the ICO whilst developing the MoU, shared drafts which we discussed with them and took their verbal and written comments into account in developing its provisions. The ICO did not formally authorise the MoU because that is not the way the process works. We understand they were content at the end of the process, and they confirmed they had no further comments.

There are a range of data protection safeguards built into the MoU, in particular those which ensure compliance with each of the data protection principles and other legal requirements. Further, it specifically provides that, to the extent that any EU PNR data is shared under it, processing of that data will also be subject to the safeguards contained within the EU-US PNR agreement. Thus any such data sharing necessarily complies with the safeguards already deemed to be adequate by the EU for the provision of this type of data to competent US authorities (as well as the additional safeguards we have specified in the MoU).

Example case scenarios where personal data might be shared:

Example 1: We know from data sharing trials that people who transit the UK en route to the USA, for example from South East Asia, but are refused entry by the US authorities, sometimes then disembark in the UK on the way back, destroy their documents and make fraudulent asylum claims. The US NTC

will be able to notify the JBOC of such persons being returned via the UK. The JBOC will then inform UKBA officers at the UK airport so they will be forewarned and be able to take the appropriate action if they encounter the person on arrival.

Example 2: We have reason to suspect a person is smuggling drugs across borders. The JBOC will be able to ask the NTC whether they have any relevant information about the person. The JBOC and NTC will be able to compare information and between them will have a better informed picture on which to decide how to act when a person arrives at the UK, or US, border.

Example 3: A false identity that is good enough to fool one country to allow a person to gain entry can equally be used to fool another. It is in all our interests to work together to help each other spot false identities that are used and take them out of circulation. This MoU will help us do that.

Example 4: We know foreign criminals sometimes commit offences in one of our countries and then move on to the other when they are no longer welcome in the first. So for example if the NTC identifies a foreign national travelling to the UK who has a serious criminal record, they will be able to warn us so we can, wherever appropriate, examine the person at the border in the UK and take appropriate action.]

3. Single point of contact for requests by data subjects.

We are committed to establishing a single point of contact within the UK e-Borders system to deal with requests from data subjects regarding information provided by carriers to the UK border agencies which contribute data to the e-borders system in accordance with their rights of access, information and redress under the UK Data Protection Act 1998. We are mapping out how this might operate in practice. The multi-agency nature of the operation means that we need to understand the responsibilities of each participating agency in order to comply with the relevant data protection legislation and provide a comprehensive answer to the data subject. At present, data subjects are directed to the particular agency which has collected the data on him or her. However, as indicated at our meeting, we will work through these issues with a view to putting the single point of contact in place as a matter of urgency.

Please do not hesitate to contact me if you have any further questions.

-----Original Message-----

From: [Redacted name - UKBA]

Sent: 10 November 2009 12:46 PM

To: [Redacted contact details – European Commission]

Subject: RE: URGENT FW: Follow-up of today's meeting

Importance: High

Aurel,

I would not want you to think we are trying to transfer any responsibility. This is extremely important to us and we would like it resolved as soon as possible. I am slightly confused by your response though because the clarifications and assurances you outline relate to those additional questions put to us from Marie-Helene and I have sent you those responses in full.

What I am trying to get is some clarity on the commission position before we attend on Thursday. I thought that would be helpful and ensure we get the best out of the discussions that will take place. If you cannot say you will have a definitive position before Thursday it would be very good for me to understand with absolute clarity what I can do within my powers to help you reach that position.

Would you still be free for a five minute catch up today?

[Redacted contact details]

[Redacted contact details]

Tel: [Redacted contact details]
[Redacted contact details]

Mob: [Redacted contact details]

Email: [Redacted contact details]

-----Original Message-----

From: [Redacted contact details – European Commission]

Sent: 10 November 2009 12:29 PM

To: [Redacted name - UKBA]

Subject: RE: URGENT FW: Follow-up of today's meeting

[Redacted name],

This is not a new request. In my same message of 25 October, from which you are quoting, I've indicated:

It is highly desirable to obtain these clarifications and assurances and, where appropriate, to see them clearly enshrined in the applicable legal acts. They will help to make clear that there is no hindrance to the free movement of persons and, therefore, to facilitate the clarification of the data protection issue.

We are entirely confident that this is your intentions, and all the more we think this should not raise many problems.

In respect of the second issue - the interpretation - while we are pretty sure it will be art. 7 e) which is applicable, at this moment we do not have the necessary answers allowing us to make such an interpretation. It is certain that the answers will not be out before Thursday.

Once we will get them, and if they are positive, we will be able to make that interpretation, but not before knowing from you how you will implement your commitments.

I hope you will not mind if I will invite you in a friendly but straightforward way not to switch the pressure from your shoulders on ours!. I also hope that not too many explanations are needed.

Yours,

Aurel

From: [Redacted contact details - UKBA]
Sent: Tuesday, November 10, 2009 9:59 AM
To: CIOBANU-DORDEA Aurel (JLS)
Subject: RE: URGENT FW: Follow-up of today's meeting
Importance: High

Thanks Aurel, I will get back to you in more detail about the new point you have raised, although you can rest assured that if we make such commitments they will be rigorously enforced.

As you are aware, I will be attending the meeting with yourselves and the art 29 sub-group on Thursday and you committed (as below) to deciding on the outstanding DP points (the innovative solution). Do you now have this? I think we need to know this before Thursday.

“Before the Art 29 WP’s sub-group on travellers meets mid-November (see below), we will have a definite opinion about whether one of the two provisions can be relevant and about the extent to which the services of the Commission can interpret it in a way that can be brought to the knowledge of the appropriate authorities of the Member States.”

I am happy to discuss if that would be easier.

[Redacted contact details]

[Redacted contact details]

Tel: [Redacted contact details]

Mob: [Redacted contact details]

Email:

[Redacted contact details]

-----Original Message-----

From: [Redacted contact details – European Commission]
Sent: 06 November 2009 5:13 PM
To: [Redacted name - UKBA]
Subject: RE: URGENT FW: Follow-up of today's meeting

[Redacted name],

Thanks for this. Your replies are satisfactory indeed.

In relation to what you told us, I am asking you about how do you plan to make sure that what you have provided in your replies will be effectively applied in practice by the border guards.

Do your authorities intend to adopt any kind of written instructions, at what level and when, that will make sure that your replies are not just an interpretation, but will be effectively followed at operational level? The prupose of our questions is to see what measures are taken by your authorities to prevent problems in the future).

I hope this is clear enough.

To reply to your question (whether it is a question ;-), no, your written committments were not shared with Art. 29. But of course we informed publicly Art 29 that we received such guarantees from the UK.

Thanks you for the other message of yesterday, that I will share with my colleagues.

All the best,

Aurel

[NB This correspondence continues as at jeu. 11/5/2009 15:17 above]