



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Briefing Paper on the Common Travel Area Reforms for the Tynwald Standing Committee on Constitutional Matters**

**April 2010**

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the United Kingdom Parliament through the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> and advising on whether a Bill is compatible with human rights.<sup>2</sup> In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission has from time to time given formal evidence, or made presentations, to legislatures other than the Northern Ireland Assembly or the UK Parliament, and while this is the first occasion on which it has addressed a submission to the Court of Tynwald, it is on a matter that clearly engages the human rights of people in Northern Ireland who benefit from the current freedom of movement between our islands. The Commission therefore welcomes the opportunity to provide this briefing to the Standing Committee on Constitutional Matters in relation to the Common Travel Area (CTA) reforms and the introduction of e-borders relating to the Immigration (Isle of Man) (Amendment) Order 2010.

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid*, s.69(4).

3. The Commission has engaged extensively with the Home Office and Westminster parliament in relation to the proposed CTA reforms (including e-borders) in relation to which we have a number of human rights compliance concerns. Reforms to the CTA relating to the Isle of Man will impact on Northern Ireland both directly in relation to routes between Douglas and Belfast, but also more broadly as the Home Office may seek to replicate reforms introduced in relation to the island elsewhere. Likewise, much of what we say below, drawing from our past submissions, that concerns checks on the land border on the island of Ireland could have relevance for the application of controls on the Isle of Man.
4. The Common Travel Area between the UK, the Republic of Ireland, the Channel Islands and Isle of Man has existed essentially as a free movement zone since the 1920s.<sup>3</sup> The CTA is described by the British Government as permitting British and Irish citizens “to move freely between the jurisdictions without the requirement to carry a passport”.<sup>4</sup> Section 1(3) of the Immigration Act 1971 provides for arrival in and departure from the UK from or to elsewhere in the CTA not to be subject to control and for persons not usually to require leave to enter the UK from elsewhere in the CTA, subject to certain exceptions.
5. Far-reaching reforms to the CTA were first consulted on by the UK Home Office in July 2008. The reforms would end the CTA as a passport-free zone, by introducing routine passport control at CTA ports on air and sea routes. The UK government also planned to introduce targeted mobile checks along the land border between the Republic of Ireland and Northern Ireland.<sup>5</sup> In order to do this the UK Government sought to include a clause in what is now the Borders, Citizenship and Immigration Act 2009 to remove the exemption of all CTA journeys from passport control.<sup>6</sup> The powers would also have enabled the UK government to

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<sup>3</sup> The CTA was given full statutory recognition in the UK under the Immigration Act 1971 and Immigration (Control of Entry through the Republic of Ireland) Order 1972 (as amended). The CTA is not a bilateral treaty-based commitment but is referenced in the EU Amsterdam treaty.

<sup>4</sup> Final Impact Assessment of Common Travel Area Reform published with the Bill [paragraph 1.3 Evidence Base].

<sup>5</sup> *Strengthening the Common Travel Area: Government Response to the Public Consultation*, Home Office, UKBA, 15 January 2009.

<sup>6</sup> By amendment of section 1(3) of the Immigration Act 1971 which reads: “Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act...”.

introduce the e-borders scheme on CTA routes, involving the swiping of passports and UK/EEA identity cards. In addition to noting that this would compel many persons to obtain UK identity cards, the Commission's primary concern has been that the type of enforcement activity proposed in Northern Ireland, on the land border with the Republic of Ireland, would considerably increase the scope for racial discrimination. This concern was also shared and articulated by a number of peers when the Bill was discussed in the House of Lords. The CTA reform clause was then heavily defeated in a House of Lords vote and was subsequently withdrawn from the Bill in the Commons.

6. In addition to practical issues and the Commission's concerns relating to racial discrimination, peers also raised concerns that the logical outcome of the reforms would be the introduction of controls on air and sea routes from Northern Ireland to Great Britain. This would constitute internal immigration control and impact on freedom of movement within the UK. Reportedly the British government had proposed to introduce checks on flights from Belfast to Great Britain, but facing opposition did not include this in the Bill.<sup>7</sup> Subsequently Government proposed document checks on domestic journeys (between Northern Ireland and Great Britain only)<sup>8</sup> through powers under alternative immigration legislation, namely, the Immigration, Asylum and Nationality Act 2006 (as amended by section 14 of the Police and Justice Act 2006). Within such a measure, document checks would not be conducted by UKBA officers but the responsibility would in effect be delegated to carriers. Government indicated that it intended to consult separately on this matter, including on which identity documents will be accepted; this consultation has yet to take place.
7. Since the defeat of the measures in Westminster the Home Office has indicated the CTA reforms are merely 'on hold' and that it will seek alternative legislative vehicles for their introduction. Over a long period of time the Home Office has continued to indicate that the matter is still under consideration, and no clauses were included in the Draft Immigration Bill published in November 2009,<sup>9</sup> the UKBA indicating at that time that clauses would be included in the

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<sup>7</sup> "UK-Irish travellers to face passport checks", *Guardian Online*, 19 January 2008.

<sup>8</sup> Written Answer: Lord West of Spithead, *Hansard* 11 May 2009, column WA154.

<sup>9</sup> Command Paper 7666.

final Bill.<sup>10</sup> The British Government has expressly not ruled out using secondary legislation (an Order in Council under Section 10 of the 1971 Immigration Act) to introduce the land border checks.<sup>11</sup> This would bypass the level of parliamentary scrutiny involved in primary legislation, and peers were so concerned that the *ad hoc* land border checks would be introduced through this mechanism that they pressed for division and voted through an amendment to prevent such checks being introduced by Order in Council.<sup>12</sup>

8. The risks of racial discrimination are furthered by selective checks, either directly by UKBA or when duties are in effect subcontracted to carriers. Selective checks could occur if persons are singled out and expected to prove their identity (nationality, migration status etc.) when there is no legal requirement to do so. Selective checks could also take place where power is taken to demand the presentation of ID but it is only selectively enforced, or particular forms of ID are accepted from some but not others.<sup>13</sup>
9. In addition to planning checks to be phased in on air and sea routes, the Home Office proposed not to reintroduce permanent, fixed checkpoints on the Irish land border but to introduce mobile checks on a 'risk led' basis. The CTA consultation proposals envisaged "ad hoc immigration checks on vehicles to target non-CTA [British/Irish] nationals".<sup>14</sup> The Home Office subsequently stated that such checks would be 'intelligence led' on persons both arriving in and leaving Northern Ireland<sup>15</sup> and stated that while there would be 'no *fixed* document requirement' on the land border for British and Irish citizens, persons who were 'unable to satisfy the UKBA' that they were British or Irish citizens would be 'subject to investigation.'<sup>16</sup>
10. If operations are 'intelligence led' the Commission is

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<sup>10</sup> Command Paper 7730, *Simplifying Immigration Law, the Draft Bill*, UKBA, November 2009, paragraph 4.8.

<sup>11</sup> *Hansard* 20 July 2009, column 1395.

<sup>12</sup> Clause 51 in the Bill as introduced to the Commons, subsequently removed by Government amendment at Commons Committee stage.

<sup>13</sup> Despite Government stating its intention for CTA passport control to only be introduced on air and sea routes, this was not explicit in the Borders, Citizenship and Immigration Bill when introduced, which sought to remove entirely the prohibition on (passport) control being introduced in CTA journeys.

<sup>14</sup> *Strengthening the Common Travel Area* consultation paper, UKBA, 24 July 2008, paragraph 2.6.

<sup>15</sup> CTA Impact Assessment, Annex B.

<sup>16</sup> Correspondence to the Commission from Lin Homer, CB, Chief Executive, UKBA, 9 October 2008; emphasis added.

concerned that the level of 'intelligence' information used may be as low as a member of the public telephoning the UKBA because he or she 'thinks' that he or she has spotted persons who might be immigration offenders. During parliamentary scrutiny the Minister gave the clearest details to date on how *ad hoc* checks would operate. Arguing that passengers will be selected on the basis of "intelligence and risk", he outlined that on the busy main Belfast-Dublin route the UKBA would "...target the odd bus, minibus or taxi, because our experience has shown that those are much more likely to be a threat" and added that a broader range of vehicles would be targeted on quieter roads.<sup>17</sup> Regardless of whether an actual duty to carry 'a' document is brought in, clearly *all* those stopped under enforcement operations will be expected to 'satisfy' UKBA officers that they are British or Irish citizens through producing passports, other ID documents or otherwise. Non-CTA nationals would also be expected to satisfy UKBA officers through similar means.

11. The Home Office argues that *ad hoc* checks would target non-CTA citizens. The clear question, in the context of ethnic diversity, is how those policing the land border are going to be able to determine who is a British or Irish citizen and who is not. Who, on indicating that they are not carrying any documents (given that they may have no obligation to do so), will be allowed to proceed, and who will be subject to further examination and even arrest and detention until identity is verified? If a document requirement is introduced, which documents will be accepted and from whom? If non-CTA nationals are expected to carry passports or national ID cards, and British or Irish citizens to carry 'a' document, how will UKBA patrols know who is compelled to carry a passport or national ID card? For example, a Northern Ireland driving licence (rightly) does not state nationality; from whom will it be accepted as proof of CTA nationality?
12. Any practice of singling out persons visibly from a minority ethnic background is not acceptable. The Commission expressed deep concern at measures that lead to any form of racial profiling and, therefore, impact on minority ethnic persons who are crossing or even just living, or working, near the land border. The potential outcome is that minority ethnic persons would have to constantly carry identity papers of a nature likely to satisfy officers as to their nationality, or face frequent questioning regarding their status and, potentially,

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<sup>17</sup> Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office, *Hansard*, HL 4 Mar 2009: Column 758.

be subjected to detention.

13. Racial profiling is not a human rights-compliant exercise.<sup>18</sup> The Commission has consistently raised concerns at measures that may directly or indirectly constitute racial profiling. Racial profiling engages Articles 8, 10, 11 and 14 ECHR, and other international standards to which the UK is a party. Racial profiling in immigration enforcement has been held by the UN Human Rights Committee to breach the internationally recognised human right to non-discrimination.<sup>19</sup> The Commission was therefore concerned that the proposed enforcement activity on the Irish land border could lead to racial profiling, as could selective checks conducted elsewhere as part of the broader CTA reforms.

### **Motivation for the Common Travel Area reforms**

14. The Commission has noted that empirical evidence relating to the CTA was not provided to justify the necessity of the CTA reforms, the case for which appeared to rely on general statements or assumptions. The two published documents in relation to the Common Travel Area consultation focused entirely on routine immigration control matters and did not mention either terrorism or crime.<sup>20</sup> In addition, another published document, the final impact assessment, stated that the CTA "is purely an immigration arrangement; other

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<sup>18</sup> The concept of racial profiling (also termed ethnic profiling) relates to a form of racial discrimination involving the use of ethnicity rather than focusing on individual behaviour for singling out individuals. For definitions see: UN Declaration and Programme of Action (the Durban Declaration) adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, A/CONF.189/12 [paragraph 72] and Article I(2), ECRI (Council of Europe) *General Policy Recommendation no. 11 on Combating racism and racial discrimination in policing*, adopted on 29 June 2007, CRI(2007)39. Other definitions of profiling are discussed in a paper for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, *Working Document on problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control*, 30 September 2008. From the Council of Europe see also: Hammarberg, Thomas (2009) "Stop and searches on ethnic or religious grounds are not effective", *Viewpoints of the Council of Europe Commissioner for Human Rights*, 20 July 2009.

<sup>19</sup> UNHRC, *Rosalind Williams Lecraft v Spain (Human Rights Committee)*, Communication No. 1493/2006 UN Doc CCPR/C/96/D/1493/2006, 30 July 2009 [5.2].

<sup>20</sup> *Strengthening the Common Travel Area* consultation document, Home Office, 24 July 2008, and *Government Response to Consultation*, Home Office, 15 January 2009. While emphasising immigration control, the CTA partial impact assessment did make some passing references to the reforms also being aimed at reducing organised crime; these were repeated in the full CTA impact assessment, which also contained a reference to terrorism.

agencies such as HMRC still operate controls on passengers and traffic entering the UK from another part of the CTA".<sup>21</sup> The discourse appeared to change during parliamentary debate when the Minister stated "The point of doing it [the CTA reforms] is to get at the criminals and the terrorists."<sup>22</sup> Also in the run up to the vote on the CTA clause, the Serious and Organised Crime Agency (SOCA) provided extensive reports to a Belfast newspaper, highlighting alleged terrorism and organised crime threats facilitated by the land border.

15. The Commission expressed concern about the implications of the sudden shift in discourse. It first asked why, if agendas unconnected with immigration control were part of the CTA reforms, the British Government overlooked mentioning this in the CTA consultation documents, and in addition how the proposed routine immigration control activity on the land border 'targeting non-CTA nationals', could in any way address crime or security issues that, on past experience, are much more likely to involve British and Irish citizens. The Commission was concerned at the risk such discourse could feed racially-constructed stereotypes by appearing to conflate migration with criminality, or migrants with terrorism, and urged Government to put considerable thought and care into the way it was attempting to justify the CTA reforms. Secondly, the Commission was concerned at the implications if UKBA officers were actually given any further role in relation to counter-terrorism and organised crime matters that are properly the role of police officers, for whom there are different training and accountability structures.

## **E-borders**

16. The desire to introduce of e-borders on CTA routes would appear to be a significant factor in the attempted CTA reforms. As E-borders involve the swiping of passports (or EEA/UK ID cards being used as passports within the EEA) its introduction on CTA routes would effectively end the CTA as a passport free zone. It is difficult to see how the UK Government could do this without first securing parliamentary support to amend the restriction on (passport) control being applied to CTA routes contained in the Immigration Act 1971. The intention set out in the Explanatory Notes to the Immigration (Isle of Man) (Amendment) Order 2010 is for passports 'as a matter of policy' not being required for Isle of Man journeys to Northern Ireland (or Great Britain and the

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<sup>21</sup> Final Impact Assessment of Common Travel Area (CTA) Reform, p1.

<sup>22</sup> Lord West of Spithead: *Hansard* 4 March 2009, column 770.

Channel Islands) but being required on (the present) CTA-route to the Republic of Ireland in the future.<sup>23</sup> It is notable that this is not set out on the face of the proposed legislation and the power to direct the form and manner of information and specify which passenger information is required resides with the Governor.

17. The Commission has not examined in detail any UKBA implementation proposals should Tynwald decide to approve the Immigration (Isle of Man) (Amendment) Order 2010. However we note the correspondence to the Committee from the Steam Packet Company.<sup>24</sup> This references a 'verbal' response from UKBA officials that the identity verification duties proposed for carriers will not be applied to ferry vehicle passengers. Not only does this raise questions regarding the assertion that these measures are in any way necessary (if they can simply be bypassed by travelling in a vehicle) but also indicates that the UKBA intends to apply the powers selectively. The Commission would suggest that the Committee addresses the desirability of legal certainty as to how, when and under what circumstances any powers that are agreed to by the legislature will be exercised, so as to prevent their arbitrary use and reduce the risk of racial discrimination. In general, legal certainty can be afforded by powers– and limitations on their exercise – being set out explicitly in the legislation.
18. As the Committee will be aware, the legality of the application of the e-borders scheme in relation to European Union law has been questioned. In its most recent report on the matter the House of Commons Home Affairs Committee stated that the "e-Borders programme is ... as far as we can ascertain, likely to be illegal under the EU Treaty."<sup>25</sup> The question of incompatibility with freedom of movement within the European Union relates to the requirements for passenger information to be provided in advance, hence restricting or preventing the journeys of passengers who wish to simply 'turn up and go'. E-Borders requires the disclosure of Advanced Passenger Information (API - also known as Travel Document Information as it refers to the data held on the readable zone of the passport or identity document); it also requires disclosure of such other information on the passenger

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<sup>23</sup> Explanatory Notes, Immigration (Isle of Man) (Amendment) Order 2010.

<sup>24</sup> Correspondence to The Hon. S.C. Rodan, SHK, from Chief Executive Mark Woodward, 18 December 2009.

<sup>25</sup> House of Commons Home Affairs Committee, *The E-Borders Programme*, Third Report of Session 2009–10, published 15 December 2009, Paragraph 48.

as the airline/or ship company may hold, known as Passenger Name Record data (PNR).<sup>26</sup>

19. Following earlier concerns raised by the Home Affairs Committee the Northern Ireland Human Rights Commission sought clarification from the Home Office as to how it now intended to apply e-borders in relation to the European Union. The Home Office provided a copy of a formal response from the European Commission to the UKBA stating that the e-borders scheme would only be compatible with Directives (1995/46/EC on data protection, and 2004/38/EC on freedom of movement) if the UKBA honoured concessions (“clarifications, commitments and assurances”) that it had now given the European Commission, and only while such commitments were “met in their entirety and in a legally binding matter” and in “regulations, internal rules of conduct and all other public documents and websites”. This only covers API: the UKBA had provided an assurance that PNR would not be collected for intra-EU travel until this was provided for in EU legislation on PNR. The main concessions were listed as:
- EU citizens and their family members will not be refused entry/exit or incur any sanctions if their passenger data is unavailable to the UKBA for any reason;
  - Carriers will not incur sanctions if they cannot transmit data through no fault of their own;
  - Carriers will be instructed by the UKBA not to deny boarding to travellers of any nationality who do not communicate API to the operator, and that provision of API data to operators is neither compulsory nor made a condition of purchase and sale of the ticket.<sup>27</sup>
20. A copy of this correspondence is included as an Appendix to this submission.
21. The Commission commends the attention that Tynwald has given to this important matter and looks forward to following your further deliberations, and future legislative developments.

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<sup>26</sup> As above paragraphs 5 & 6

<sup>27</sup> Correspondence from Director General, Justice Freedom and Security, European Commission, JLS/D-5/MDF/ed (2009) D19374, received by Deputy Chief Executive, Policy and Strategy Group, UKBA on the 19 December 2009.

**April 2010**

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**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY

Director General

Brussels, **17 DEC. 2009**  
JLS/D-5/MDF/et (2009) D19374

Mr J. Sedgwick  
Home Office UK Border Agency  
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Dear Mr Sedgwick,

I am writing to you in connection with the UK e-Borders scheme that has been discussed by the European Commission and the UK Border Agency over the last months. This issue has given rise to extensive correspondence whereby your department has provided the European Commission with clarifications, commitments and assurances on the way in which implementation of the e-Borders scheme will be undertaken. I refer in particular to all the correspondence related to EU Pilot case 348/09/JLSE, the UKBA's letters of 12 June 2009, 24 August 2009, 20 November 2009 and UKBA's e-mails of 30 June 2009, 25 October 2009 and 5, 6, 10 and 20 November 2009.

In light of the clarifications, commitments and assurances given in the abovementioned correspondence, it appears that, on the basis of the facts as described by your authority, the UK e-borders scheme would not be in breach either of Directive 1995/46/EC on the protection of personal data or of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

I understand that the UKBA intends to collect only API (TPI) data at this stage, and has committed not to collect PNR (OPI) data for intra-EU travel as long as no EU PNR legislation has been adopted. Therefore the assessment only concerns the collection of API data. The legality of any PNR data collection within the UK e-Borders scheme for intra-EU travels has therefore not been assessed.

Furthermore, I understand that the UK authorities are committed to ensuring that the relevant clarifications, commitments and assurances given in order to align the e-Borders system with the EU legal framework on free movement of persons and data protection are met in their entirety and in a legally binding manner. In addition, regulations, internal rules of conduct, and all other public documents and websites must also ensure that the above clarifications, commitments and assurances are respected in the everyday operation of the e-Borders scheme.

More particularly, I refer to the following commitments and assurances:

- passengers who are EU citizens or their family members will not be refused entry/exit or incur sanctions in any way on the basis that their passenger data is unavailable to the UK authorities for whatever reason;
- carriers will not incur sanctions if they are unable to transmit data through no fault on their part;
- carriers will be instructed by the UK authorities not to deny boarding to travellers, regardless of their nationality, who do not communicate API data to the operator, and that the provision of API data to operators is neither compulsory nor is made a condition of purchase and sale of the ticket;
- UK authorities will make available to persons travelling to/from the UK the information required by Article 10 of Directive 95/46/EC and will also assist the carriers to communicate this information to travellers;
- a single contact point will be established by UK authorities to allow data subjects to exercise their data protection rights;
- appropriate safeguards will be applied to transfers of data to third countries, in line with what is requested by the UK data protection authority.

In addition, a reduction of the 10 year retention period of TPI (API) data would be highly recommended so as to not differ excessively from the retention period currently provided for in Directive 2004/82/EC.

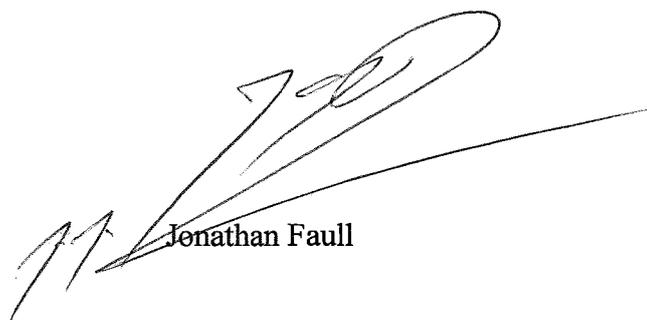
As regards the legal basis allowing the collection by the carrier of personal data in the Member State of departure, it seems to me that, pursuant to Article 4 (1) of Directive 1995/46/EC, such a legal basis must be found in the legislation of the Member States in which the processing takes place. This implies that where the processing is carried out by an establishment of the carrier on the territory of a Member State, the law of that Member State shall apply to this processing. Taking into account the specific safeguards implemented by the UK authorities, Articles 7 e) and f) of Directive 1995/46/EC could be used by those Member States to make the data collection referred to above lawful. It is necessary that the Member State in which the processing takes place expressly acknowledges that the "public interest" pursued by the third party requiring the data is shared by that Member State. A Member State might consider such a public interest on the basis of, for example, cooperation in the fight against illegal immigration or customs offences, or assisting another Member State in carrying out its law enforcement policy. As regards the precise form of such recognition, an opinion of the relevant national data protection supervisory authority or a governmental decision would seem to satisfy the requirements of Article 7 (e) of the Directive.

Similar reasoning can apply to Article 7 (f) of the Directive. Again, the legitimate interests pursued by the third party to whom the data are disclosed can include the interests of a public authority of another Member State, subject to the condition that this interest is officially acknowledged by the authorities of the Member State in which the processing takes place as referred to above. Such an acknowledgement of the balance of interest cannot be made by carriers or other private entities.

As regards the collection of personal data by Eurostar and ferries, the Member States in which data are collected will have to assess the proportionality of the processing taking into account the existing bilateral agreements with France and Belgium.

Finally, I understand that pursuant to the UK Data Protection Act 1998, UK data protection legislation is applicable in its entirety to the UK e-Borders scheme, and the UK data protection authority, the Information Commissioner's Office (ICO), is competent to monitor and enforce compliance with UK legal provisions adopted to implement Directive 1995/46/EC.

Yours sincerely,



Jonathan Faull