

EDWARD HASBROUCK

1130 Treat Avenue, San Francisco, CA 94110, USA
phone +1-415-824-0214
edward@hasbrouck.org
http://hasbrouck.org

11 August 2010

Landesbeauftragter für Datenschutz und Informationsfreiheit Nordrhein-Westfalen
(North Rhine-Westphalia Commissioner for Data Protection and Freedom of Information)
Postfach 20 04 44
40102 Düsseldorf
GERMANY

telephone 0+49-211-38424-0
poststelle@ldi.nrw.de

Complaint of Data Protection Violation

This is a complaint against the airline Deutsche Lufthansa Aktiengesellschaft (“Lufthansa”) for violation of its obligations under the Bundesdatenschutzgesetz (German Federal Data Protection Act, “FDPA”) and the applicable laws of Nordrhein-Westfalen.

On 5 May 2010 I made a request to Lufthansa for access to the personal data about me processed by or on behalf of Lufthansa. After an exchange of e-mail messages from Lufthansa to me on 10 June 2010, and from me to Lufthansa on 14 June 2010, Lufthansa replied to my request by letter and e-mail on 5 July 2010. Copies of this correspondence are attached.

Lufthansa has failed to provide all of the information required by German law, for the reasons discussed in my e-mail message to Lufthansa of 14 June 2010, and as follows.

(1) Lufthansa claims that it is not required to provide an explanation of the logic used in making automated decisions on the basis of my data, because “the processing of passenger data by Lufthansa does not involve automated individual decision making in the sense of the FDPA.”

Lufthansa's error is to try to limit its responsibility to accounting for the logic of processing “by” Lufthansa, when both the German law (in the unofficial English translation) and the European Data Protection Directive refer to automated processing and decision-making “on the basis of” personal data obtained from them. Data obtained from Lufthansa (directly or through Lufthansa's agents and contractors) was provided to the U.S. Government, and automated processing was conducted by the U.S. Government “on the basis of” this data about me obtained from Lufthansa. Lufthansa is required to provide me with a full accounting of the logic used for this processing “on the basis of” my data. (I have suggested that this could best be done through provision of the source code for the relevant processing software.) If Lufthansa is unable to provide such an accounting of the logic used for this processing, it was a violation of the law for Lufthansa to allow this data to be transferred to the U.S. Government.

(2) Lufthansa claims that the EU Code of Conduct for Computerised Reservation Systems “supersedes any German law that could be applied concerning these matters” and “assigns the controllership of PNR's generated by travel agencies to the respective system vendor, in our case Amadeus.... We are not the controller of this data.”

This is erroneous, as a matter of law: (A) The code of conduct for CRS's does not, and could not, “supersede” or define the meaning of German law. The Council of the European Union has no authority to enact, amend, or interpret German law. (B) There can be more than one controller of the same data. The fact that Amadeus is a controller of some of this data has no effect on whether Lufthansa is also a controller of some or all of this data. Both the FDPA and the EU Data Protection Directive define “a” data controller, not “the” data controller.

As I discussed in my e-mail to Lufthansa, the only way to interpret the Code of Conduct for CRS's, consistent with its legislative history (in which I was a participant) and the authority of the EU and with the FDPA, is as imposing additional responsibilities on the CRS's (enforceable by the European commission), without having any effect on the existing responsibilities of the data controller or controllers – including Lufthansa – as defined under the FDPA (enforced by German authorities such as your agency). The only relevant issue is whether Lufthansa satisfies the definition of a data controller in the FDPA, which it clearly does.

(3) Lufthansa claims that, “we only have access to the Amadeus system with the RT or RTH transaction to retrieve your PNR or PNR-History. No more information is available to us because we are not the controller of this data.” There are at least four problems with this claim: (A) Lufthansa has not provided me with the Amadeus PNR or PNR History, which it admits it could retrieve. (B) Lufthansa is, as discussed above, a controller of this data, as defined in German law. (C) Lufthansa's agents and contractors – including both Airtrade International (Vayama.com) as Lufthansa's agent, and Amadeus as a contractor acting on behalf of Amadeus – have access to additional information which Lufthansa has not provided to me. Lufthansa is responsible for their actions as its agents and contractors, just as Lufthansa is responsible for the actions of Lufthansa employees. (D) Whether Lufthansa is legally defined as a data controller has no effect on what information is, in fact, available to Lufthansa. What information is available to Lufthansa is determined by the technical capabilities of the various interconnected systems, and by the terms of Lufthansa's contracts with Amadeus and with Lufthansa's agents. These contracts are not available to me, but I believe that when, in the course of your investigation, you review Lufthansa's agency appointment agreement with Airtrade International (Vayama.com) and Lufthansa's contract(s) with Amadeus, you will find that they define Lufthansa as the owner of this data and entitle Lufthansa to demand this information from Lufthansa's agents and contractors, including Amadeus.

(4) Lufthansa claims that, “No travel agency in the United States neither Airtrade International (Vayama.com) nor your own company represents themselves as Lufthansa agencies. They are both IATA agencies that have no direct relation (except for marketing purposes like our expert program) and do not process data for us. Lufthansa is not responsible in any way for the handling of personal data by these agencies in the U.S.A.”

All of this is clearly and unquestionably false, as a matter of fact and of U.S. and German agency law. (A) Lufthansa has appointed thousands of travel agencies in the U.S.A., including Airtrade International (Vayama.com) to represent it as agents for Lufthansa. These agencies represent themselves, correctly, as Lufthansa agencies. They are called “travel agents” because they are appointed by the airlines to act as the airlines' agents. (B) Lufthansa describes its agents as its agents in Lufthansa's terms and conditions of carriage and in the tariffs it has filed with the German, U.S., and numerous other governments. (C) Some of these agents are appointed directly

by airlines such as Lufthansa. Others are appointed by intermediaries to whom carriers have delegated authority to appoint sub-agents. Whether the agency relationship is “direct” is legally irrelevant. (D) While IATA accredits and assigns numeric codes to travel agencies, each IATA member airline retains the authority to decide which agents to appoint to represent them. IATA describes its rules as applying to “IATA Member Airlines and their appointed agents”, making clear that IATA-accredited travel agencies are appointed by, and act as agents for, IATA member airlines. See: <<http://www.iata.org/whatwedo/travel-tourism/Pages/faq.aspx>>. (E) I am not privy to these agreements, but I believe that, upon investigation, you will find that Lufthansa is party, either directly or through an intermediary, to an agency agreement appointing Airtrade International (Vayama.com) as a Lufthansa agency authorized to act as an agent for Lufthansa, to hold itself out to the public as an agent for Lufthansa, and to accept reservations and payments and issue tickets as an agent for Lufthansa. (E) I dealt with Airtrade International (Vayama.com) and provided personal information to them solely in their capacity as an agent of Lufthansa, and solely for the purpose of making a reservation and buying a ticket from Lufthansa as the principal for whom they acted as agent. At all times in the transaction, Lufthansa was the sole principal, and my contract of carriage was solely with Lufthansa. (F) Lufthansa charged my credit card, and the charge appeared on my credit card bill as being from Lufthansa. If Airtrade International (Vayama.com) had not been appointed by Lufthansa as an agent authorized to execute contracts on behalf of Lufthansa as principal, it would have been a violation of Lufthansa's merchant agreement with the credit card company to process the charge in the name of Lufthansa on behalf of a third part who was not acting as Lufthansa's agent. (G) Lufthansa charged my credit card, accepted my payment, and accepted my tickets. Even if Lufthansa had not already explicitly appointed Airtrade International (Vayama.com) as a Lufthansa agent, Lufthansa ratified their authority to act as an agent for Lufthansa by processing the credit card charge, accepting payment, and honoring the tickets issued through them.

For all of these reasons, Lufthansa is fully responsible for the conduct of its agents, including their collection and processing of personal data on Lufthansa's behalf and their compliance with German law, including the FDPD and any other data protection laws.

Lufthansa is required to provide, on request, access for data subjects to personal data collected, processed, or held by Lufthansa's agents on Lufthansa's behalf, as well as an accounting of who has or might have accessed this data and any transfers of the data to entities outside the EU. Lufthansa has failed or refused to do this, in violation of the law.

(5) Lufthansa has ignored my request for an accounting of who has received my data, or might have received it, and in particular what entities (including both government agencies and commercial or private entities) outside the territory of the EU might have done so. It is unclear whether Lufthansa (and its agents and contractors) don't keep access logs, or whether they do keep such logs but have withheld them from me. Either action violates the law.

I request that you take appropriate action to investigate and act on this complaint, to compel Lufthansa to provide the information I have requested and which is required by law, to prohibit any further transfers of personal data by Lufthansa in violation of the law, and to impose sanctions on Lufthansa for its failure to comply with the law.

Should you have any questions or require further information from me to facilitate your investigation and action on this complaint, please feel free to contact me by telephone at +1-415-824-0214 in San Francisco (German time – 9 hours) or by e-mail at <edward@hasbrouck.org>. If you believe that a face-to-face meeting with me would be useful, please let me know, as it is possible that I will be in Europe at some time during your investigation of this complaint.

I apologize for writing to you in English. I know no German. My contract with Lufthansa was entered into in English, through the English-language Web site of an agent for Lufthansa in the USA. All of my dealings with Lufthansa have been in English. If anything in this complaint is not clear, please let me know and I will do my best to clarify it.

Sincerely,

Edward Hasbrouck

Attachments:

- A. Letter from Edward Hasbrouck to Lufthansa, 5 May 2010
- B. E-mail from Lufthansa to Edward Hasbrouck, 10 June 2010
- C. E-mail from Edward Hasbrouck to Lufthansa, 14 June 2010
- D. Letter and e-mail form Lufthansa to Edward Hasbrouck, 5 July 2010

cc: Dr. Barbara Kirchberg-Lennartz
Konzern-Datenschutzbeauftragte (Corporate Data Protection Officer)
Deutsche Lufthansa AG
FRA DSB
Lufthansa Aviation Center
D-60546 Frankfurt/Main
GERMANY
(by e-mail to <barbara.kirchberg-lennartz@dlh.de>)