

**TRANSATLANTIC CONSUMER DIALOGUE (TACD)**  
**2004 RECOMMENDATIONS REPORT**

**AND**

**EUROPEAN COMMISSION SERVICES' RESPONSES**

May 2005

# TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE  
CONSUMER DIALOGUE DES CONSOMMATEURS

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## **TACD 2004 RECOMMENDATIONS REPORT**

As part of its role as a consultative forum to the EU and US, TACD makes policy recommendations on issues of concerns to its European and American members.

This report brings together the recommendations made in 2004, to allow the governments to formally respond. For this reason, TACD's September 2003 recommendations on Agricultural Dumping have also been included, because it has not yet been responded to.

This report will begin an annual pattern of collecting TACD's recommendations in a year-end report to governments and the public.

TACD represents the demand side of the two biggest economic blocks in the world - the 735 million U.S. and EU consumers. Its network of 65 EU and U.S. national consumer organisations (and growing in the new Member States) has a direct paid-up membership of some 20 million consumers.

On both sides of the Atlantic, these groups have long track records of achievement in the consumer protection and safety fields. Many have successful publishing, research and product testing operations as well as advocacy and policy activities and are self-financed; others, according to their cultural traditions, are financed from public or foundation funds. All are independent.

More information can be found at [www.tacd.org](http://www.tacd.org) .

### **INDEX**

The 2004 Recommendations Report covers TACD recommendations on

- Multilateral Disciplines to Phase out Agricultural Dumping (pages 2-3)
- Unsolicited Commercial Email (pages 4-5)
- Food Advertising and Marketing to Children (pages 6-9)
- Adoption of the WHO Global Strategy on Diet and Public Health (page 9-10)
- Passenger Name Records (pages 11-14)
- REACH – EU Chemicals Policy (pages 15-18)

## **Multilateral disciplines to phase out agricultural dumping**

### **September 2003, Trade-13-03**

(the full briefing paper, from which these recommendations were drawn, can be found at : [www.tacd.org/docs/?id=199](http://www.tacd.org/docs/?id=199) )

The TransAtlantic Consumer Dialogue believes that agricultural export dumping is a scourge that must be eliminated if developing countries are to have the opportunity and means to strengthen their food security and increase rural employment. TACD therefore calls on the United States and the European Union governments to:

1. lead a shift in orientation in the WTO negotiations on the Agreement on Agriculture towards developing enforceable rules to stop agricultural dumping
2. support the development of the OECD's ongoing work on the costs of agricultural policies to develop a uniform methodology for calculating agricultural dumping margins based on the cost of production, and the annual publication of a report on agricultural dumping by OECD countries
3. ensure that both the OECD and WTO agricultural export dumping discussions and negotiations provide a scheduled and formalized opportunity for comment by all interested parties on discussion and negotiating texts.

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### **EUROPEAN COMMISSION SERVICES' RESPONSE**

The services of the European Commission take good note of the recommendations of the TACD regarding agricultural policies and would like to make the following comments:

Whereas the term "agricultural dumping" may be considered as an attractive communication tool, in academic and legal terms, "dumping" is not an appropriate term when talking about subsidies. Dumping has a clear and well-established meaning in both economic and legal literature, which is different from the meaning of "subsidy". Misusing such terms can lead to misunderstandings and misrepresentation.

As far as agricultural subsidies are concerned, not all farm subsidies have to be treated equally as far as their trade-distorting impact is concerned. This cannot be qualified as a political declaration since it has been explained and endorsed in the economic literature. As a matter of fact, the structure of the current WTO agreement of agriculture reflects this difference in distinguishing between *trade-distorting support* which has to be reduced (amber box); *less trade-distorting support* under production limiting program, with no reduction requested (blue box) and *non-trade-distorting support* (green box). Additionally, other provisions of the agreement deal with export subsidies, i.e. subsidies contingent upon export performance.

Ad 1. On the WTO negotiations, it is fair to stress that – thanks to the progress already made in the EU in the reform of its farming policies, the EU had a key role in the negotiations which led to the adoption of the Framework agreement on 1 August 2004 in Geneva and hence prevented the Doha development agenda from collapsing.

Previous farm reforms in the EU, i.e. moving support from products to producers, have already demonstrated their usefulness by decreasing the level of production intensity (e.g. cereals), increasing domestic demand and reducing EU net export surpluses in all reformed sectors. The result has been less trade-distortions and less pressure on world prices – developments clearly demonstrated not only by statistical facts but also by OECD analysis. The recent reform is expected to reduce even further trade-distortion. The decline of price supports and the establishment of a system which is much more market based clearly benefits consumers. In addition, the EU system of a multifunctional agriculture guarantees that the payments will be linked to the respect of environmental, food safety, animal and plant health and animal welfare standards, as well as the requirement to keep all farmland in good agricultural and environmental condition ("cross-compliance"). All these conditions directly address consumer interests.

Since 2003, the EU has undergone an important reform of its agricultural policy in the sense wished by the entire WTO Membership. The EU has decoupled the vast majority of its direct aids. Economic literature is unanimous in recognising the positive effects that this has and will have in reducing trade distortions. We have provided a substantial contribution towards a more market-oriented world agricultural trade and to the work process in Geneva, which should benefit developing countries. The above-mentioned Framework agreement foresees special and differential treatment for developing countries, including the fact that the least-developed countries do not have to undertake any commitments. The EU has translated its internal reform into very ambitious commitments when accepting the Framework agreement which foresees *inter alia* a substantial reduction in the trade distorting support, the elimination of export subsidies and long-term export credits as well as the development of disciplines on other trade-distorting export practices (e.g. short-term export credits, State Trading Enterprises, Food Aid).

To conclude, the European Commission services believe that these are meaningful commitments consistent with the long-term objective of substantial reductions in support and protection, which is enshrined in the WTO agreement on agriculture. The EU thus greatly contributed to the success of the Framework Agreement which has the potential to deliver further farm trade liberalisation since it foresees substantial reductions in trade-distorting agriculture support, the elimination of the most trade distorting export competition practices as well as the development of disciplines on other instruments to support exports as well as substantial improvements in market access.

Ad 2. The Community/Commission actively contributes to the work of the OECD, notably on farming policies, which is very useful in particular to analyse the composition of support from different categories of measures and hence the evolution of the reform process. This analytical work is relevant in the context of the WTO negotiations on agriculture in the present Doha Round, which is a political process involving the whole membership of the WTO and encompassing various sectors.

Ad 3. In the course of the negotiations, the positions of the civil society are of course taken into account when elaborating the Community position and it is the Commission's policy to be fully transparent during this process.

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## **Resolution on Unsolicited Commercial Electronic Mail**

### **January 2004, Internet-29-04**

(this is limited to the recommendations – for the full resolution, including a description of the issue and the TACD survey, [www.tacd.org/docs/?id=224](http://www.tacd.org/docs/?id=224) )

Unsolicited commercial electronic mail (Spam) continues to place a heavy burden on people who use email. TACD coordinated an international online survey from September 8, 2003 to December 8, 2003, and made the following recommendations as a result.

1. TACD calls upon the US government to create a national “do not email” registry so that any email user in the US who does not wish to receive unsolicited commercial electronic mail may exercise that right. TACD further calls on both the US and the EU governments to work cooperatively to bring their laws regulating unsolicited commercial electronic mail into harmony where such consistency would provide the strongest protection for email users, and to actively promote common legislative approaches based on respect for the fundamental right of privacy in other regions of the world.
2. TACD urges Internet access and service providers to use all appropriate technological and legal measures to block unsolicited commercial electronic mail to the extent possible. TACD also urges Internet access and service providers to provide consumers with user friendly filter software, and inform them about their options and rights in respect to unsolicited commercial electronic mail.
3. TACD calls upon the US and EU governments to work in close cooperation with consumer organizations, Internet access and service providers, online marketers, educators, and others to provide children and younger people with more effective protection from unsolicited commercial electronic mail.
4. Finally, TACD urges the US and EU governments to implement effective means to enforce the legal requirements relating to unsolicited commercial electronic mail nationally, regionally, and on a transatlantic basis, and to promote effective global enforcement mechanisms.

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### **EUROPEAN COMMISSION SERVICES' RESPONSE**

The European Commission services consider unsolicited communications or ‘spam’ as an important issue for consumer confidence and hence the development of e-commerce and e-services.

The work undertaken by the Commission services, not least on the basis of the Communication on unsolicited commercial communications or ‘spam’ (COM (2004)28, [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004\\_0028en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0028en01.pdf)), reflects to a great extent the recommendations made by the TACD.

Turning to the specific recommendations addressed to the EU, the services of European Commission respond as follows:

Ad 1. Despite the fact that the US CAN-SPAM Act does not mirror the consent-based approach taken in the EU, the legislation on both sides has various elements in common. US authorities will however need further legislation to be able to cooperate on enforcement with international counterparts. More importantly, both the EU and the US work a lot together in international forums so that other regions in the world also have effective legislation in place and have effective enforcement policies. Examples of international discussions range from OECD and ITU to bilateral discussion forums. As an illustration, the Asia-Europe forum ASEM has adopted a joint statement on international anti-spam cooperation in February 2005.

Ad 2. Not applicable since the request is addressed to Internet access and service providers.

Ad 3. The European Commission services generally promote self-regulatory and technical solutions, as well as greater user awareness on spam. With regard to the specific target of children and younger people, the Safer Internet Plus Programme (2005 - 2008) will build on the results achieved via the previous Safer Internet Action Plan and aim to further protect children with e.g. funding of self-regulatory and awareness-raising initiatives.

Ad 4. As mentioned above, enforcement is at the heart of the Commission's policy on spam, although enforcement does belong in the first place to Member States and competent national authorities. The Commission has set up a Contact Network of Spam Authorities (CNSA) to exchange information and best practices. In this context, several of these authorities have agreed a cooperation procedure to facilitate the handling of cross-border complaints. Regular discussions also take place on enforcement at the international level, not least with the USA and in the OECD Task Force on spam, which the Commission has helped create in July 2004.

In addition, the recently adopted Regulation 2006/2004 on consumer protection cooperation (CPC) puts in place a formal framework for cooperation between public enforcement authorities on cross-border rogue traders. Where unsolicited commercial email infringes other EU consumer laws, such as those on misleading advertising, the CPC network, will, from 29 December 2006, be competent to act. The CPC regulation also provides for the adoption of international agreements with third countries on cross-border cooperation.

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## **Food Advertising and Marketing to Children**

### **January 2004, Food-23-04**

(The recommendations can be found online here: [www.tacd.org/docs/?id=220](http://www.tacd.org/docs/?id=220))

A 2003 joint World Health Organization (WHO) / Food and Agriculture Organization (FAO) report highlighted the major public health threat of diet-related disease. The influence of advertising was among the range of factors that were identified as having a negative effect on health. The WHO states that governments have a responsibility to ensure that advertising is not misleading, is informative, and is unlikely to contribute to ill-health and obesity, a particular concern in the case of children.

There is much support for the idea of restricting advertising to children, and that support will grow if the problems are not effectively tackled.

## **Food advertising**

1. TACD calls on the European Union (EU) and US Government to recognize the potential health impact of food advertising and review existing codes of practice and / or regulations on advertising of food to ensure that advertising supports, rather than undermines, nutrition and public health goals. Such rules should ensure that food advertising does not undermine progress towards national dietary improvement by misleading or confusing consumers or by unfairly setting bad examples. In particular, advertisements, either individually or collectively, should not encourage excessive consumption of foods that are high in fat, sugar and /or salt.
2. Food advertising regulations should be consistent with food labelling regulations.

## **Food Marketing and Advertising to Children**

1. Children require special consideration and protection with respect to advertising. Childhood obesity and associated type 2 diabetes are now major issues across the EU and US and measures are needed to help tackle this and protect against health problems in later life.
2. The EU and US Government should therefore introduce restrictions on the advertising and marketing of foods to children that protect them from misleading and unfair advertising, marketing and promotional activities, through whatever media.
3. Advertising of high calorie, 'energy-dense, nutrient-poor foods [foods high in fat, sugar and /or salt] should be restricted during television programming commonly viewed by significant numbers of children.
4. Advertising regulations should take account of the age of the likely child audience, with younger children requiring greater protection.
5. The EU and US Government should use advertising and marketing tools to actively promote healthier eating among children ('social marketing'), and help them separate fact from marketing hype. This should include funding initiatives in broadcast media, in schools, and in the broader community.
6. The EU and US Government should also consider the effect of, and ensure the adequacy of controls upon, marketing that uses devices such as 'free gifts' and celebrity or cartoon link-ups to encourage consumption of energy-rich foods and drinks, high in fat, sugar and / or salt.
7. Guidelines for commercial activities in schools need to be developed and implemented to prohibit marketing of energy-rich foods and drinks high in fat, sugar and / or salt in schools, e.g. through sponsorship and collector schemes.

## **Enforcement**

1. Agencies within the US and EU Member States should ensure that systems are in place to enforce compliance with advertising regulations. Broadcast advertisements should be pre-vetted and violations should be promptly addressed so that advertisements are stopped before they are widely disseminated to the public.
2. Effectively-enforced sanctions should be imposed to deter future misleading advertisements, including corrective advertising and monetary penalties.
3. There should be greater regulatory co-operation between the EU and US governments and advertising regulatory agencies to facilitate enforcement and to notify other countries when an advertisement has been stopped.

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## **EUROPEAN COMMISSION SERVICES' RESPONSE**

The Commission is conscious of the link between health and diet, and the potential health impact of food advertising. Therefore, the Commission services are taking a number of initiatives, both regulatory and non-regulatory, in the area of food labelling and advertising.

Existing EU Directives address the problem of misleading labelling and advertising, and detailed provisions exist to regulate nutrition labelling. The Food Labelling Directive 2000/13/EC provides, as a general principle, that the labelling must not be misleading regarding the characteristics, effects or properties of foodstuffs. The Directive states that this principle also applies to advertising, so there is already a consistent approach in the regulations on food labelling and advertising.

In addition, in mid-July 2003 the Commission adopted a proposal on nutrition and health claims that may be used voluntarily on labelling and advertising of foods (COM (2003) 424 Proposal for a Regulation of the European Parliament and of the Council on nutrition and health claims made on foods). It provides a list of nutrition claims and the conditions to use them, and it ensures that health claims are scientifically substantiated. Moreover, some restrictions on the use of claims on foods based on their nutritional profile were foreseen, in particular taking into account the amount of fat, sugars, or salt. This would provide an additional protection to children. Based on the political agreement reached in June 2005, the Council should adopt unanimously a common position supporting the proposed Regulation shortly, and the European Parliament will start its second reading by the end of 2005.

Furthermore, outside food law, the Directive on Misleading Advertising (84/450/EEC) and the Unfair Commercial Practices Directive (2005/29/EC), signed by the European Parliament and the Council on 11 May 2005, are also protecting vulnerable population groups such as children.

Among non-regulatory measures, a Roundtable on Obesity has been organized, which brings together retailers, food processors, advertising business (World Federation of Advertisers), and consumer organisations.



Following on from the Obesity Round Table, the *Diet, Physical Activity and Health – A European Platform for Action* was launched on 15 March 2005. The Platform brings together all relevant players, like advertisers, food industry, retailers, restaurants and catering industry, consumer organizations and Member States with similar activities. All members of the Platform are willing to enter into binding and verifiable commitments aimed at tackling the obesity epidemic. The Platform will also contribute to the promotion and the dissemination of best practices in the area of self-regulation and voluntary commitments. The Commission encourages stakeholders to carefully consider their approach to food advertising, particularly to children, and to develop their own initiatives in this area. In a relatively short term, the efficiency of such initiatives will be evaluated. It has to be clearly stated that if the proposed objectives are not met, further measures will have to be considered.

The fight against obesity can be a prime area for effective EU/US co-operation. A plenary meeting of the Platform – to include representatives of the US Administration, the American food industry and consumer organizations – has been planned to take place in spring 2006.<sup>1</sup>

These regulatory and non-regulatory measures take account of the recommendations of the TACD, and provide a framework for food advertising and marketing, including to children, in the European Union.

The Commission gives financial support to promotion activities for agricultural products such as fruit, vegetables and milk, which represent an important part of a healthy diet (Council Regulation (EC) No 2826/2000 on information and promotion actions for agricultural products on the internal market and Council Regulation (EC) No 2702/1999 on measures to provide information on, and to promote, agricultural products in third countries).

National and EU-wide campaigns initiated by professional associations are co-funded up to 50 % by the EU. A significant part of these promotion programmes have school children or young people as their main target group. The guidelines for the preparation of co-financed promotion programmes (Annex to Commission Regulation 94/2002 laying down detailed rules for applying Council Regulation (EC) No 2826/2000 on information and promotion actions for agricultural products on the internal market) encourage operators of the programmes to focus their messages on the nutritional value of the products concerned and on their role in a healthy diet. For example, in the revised guideline for milk products (adoption in process) a requirement has been added to inform about the availability of low-fat alternatives. In programmes which address children or young people the methods of communication are adapted to the target group using for example cartoons, humour and games. Fruit, vegetables and milk are the main product sectors in the allocation of funds to promotion support.

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<sup>1</sup> Cf. also European Commission Services' Response to the TACD Recommendation on [The adoption and implementation of the WHO Global Strategy on Diet, Physical Activity and Health](#).

## **The adoption and implementation of the WHO Global Strategy on Diet, Physical Activity and Health**

### **May 2004, Food-24-04**

TACD urges the governments of the United States and the European Union to support approval of the draft World Health Organization Global Strategy on Diet, Physical Activity, and Health at the meeting of the World Health Assembly commencing on May 17, 2004.

TACD furthermore urges the governments to take steps to implement the Strategy, taking into account the relevant recommendations adopted by TACD.

These can be found at the following links:

- Resolution on Food Advertising and Marketing to Children, Food-23-04 - [www.tacd.org/docs/?id=220](http://www.tacd.org/docs/?id=220)
- Resolution on the WHO Report on Diet, Nutrition, and the Prevention of Chronic Disease, Food-21-02 - [www.tacd.org/docs/?id=198](http://www.tacd.org/docs/?id=198)
- Resolution on Misleading Food Labelling, Food-14-00 - [www.tacd.org/docs/?id=13](http://www.tacd.org/docs/?id=13)
- Resolution on Health-Related Claims, Food-12-00 - [www.tacd.org/docs/?id=20](http://www.tacd.org/docs/?id=20)
- Resolution on Nutrition Labelling, Food-08-99 -
- Resolutions on Food and Dietary Supplements, Food-20-02 and Food-04-99 - [www.tacd.org/docs/?id=181](http://www.tacd.org/docs/?id=181) and [www.tacd.org/docs/?id=8](http://www.tacd.org/docs/?id=8)

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### **EUROPEAN COMMISSION SERVICES' RESPONSE**

The Community has actively supported the WHO Global Strategy process since its beginning. The Global Strategy will serve as valuable input in the development of a comprehensive Community action on nutrition and physical activity. The scientific evidence underpinning it<sup>2</sup> will be actively used when building the rationale for a broad Community strategy in this area – going beyond the obesity issue. The European Commission services has developed the following initiatives to facilitate its implementation.

A Roundtable on Obesity has been organized, which brings together leading representatives of retailers, food processors, the catering industry, the advertising business, consumer organisations and health NGO's, the medical professions and the present and incoming EU presidencies. The main purpose is to provide a forum for open and informal discussions in order to achieve binding commitments aimed at tackling the obesity epidemic.

The EU Platform for Action on Diet, Physical Activity and Health was launched on 15 March 2005. The Platform will step up the Obesity Round Table to establish a more formal process, which will bring together all relevant players including advertisers willing to enter into binding and verifiable commitments that could help to halt and reverse current obesity trends. It will also enable individual initiatives on promoting healthier diets and physical activity to be more promptly shared amongst potential partners and emulators across the European Union as a whole.

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<sup>2</sup> Diet, Nutrition and the Prevention of Chronic Diseases, *op. cit.*

A Network on Nutrition and Physical Activity composed of experts nominated by the Member States, the WHO and representatives of consumer and health NGOs has been established to advise the Commission on the establishment of a Community strategy on nutrition and physical activity planned for 2006.

Nutrition, physical activity and obesity is reflected in the Public Health Action Programme (2003-2008) and its Work Plans, which foresee strategies and measures on nutrition and physical activity as life-style related health determinants.

The Commission has asked the European Food Safety Authority to update the recommended nutrient intakes to ensure that the Community action in the area of nutrition is underpinned by the latest scientific evidence. In addition, the Authority was requested to provide guidance on the translation of nutrient-based dietary advice into guidance on the contribution of different foods or categories of foods to an overall diet that would help to maintain good health through optimal nutrition.

In the Commission services' view nutrition, diet and physical activity could be the subject of close cooperation between regulators and stakeholders, on both sides of the Atlantic. It is proposed that Commission and US-relevant administration counterparts organise for early 2006 in Europe a major review of best practices in the EU and the US, and examine the scope for more proactive cooperation.<sup>3</sup>

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<sup>3</sup> Cf. also European Commission Services' Response to the TACD Recommendation on Food Advertising and Marketing to Children.

## **Passenger Name Records**

### **June 2004, Internet-30-04**

(this is limited to the recommendations – for the full resolution, including a description of the issue and the reasons for TACD’s recommendations please go to [www.tacd.org/docs/?id=254](http://www.tacd.org/docs/?id=254) )

The Trans Atlantic Consumer Dialogue (TACD) has strong concerns about how the current disclosure of personal data in airline reservations for flights from the EU to the US will affect travelers’ privacy rights. TACD therefore urges the governments of the United States and the European Union:

1. To stop the disclosure of personal data of US-bound passengers flying from the EU, and its use by the US government, *inter alia* for testing of passenger pre-screening systems such as the CAPPs II program, until:
  - all privacy issues regarding the implementation of this program have been addressed in a satisfactory manner as recommended by the US General Accounting Office report of February 2004; and
  - EU-specific concerns have been addressed pursuant to the recommendations of the European Parliament and the Article 29 Data Protection Working Party
2. To suspend implementation of the EU-US PNR agreement of May 2004 until the Court of Justice of the European Communities has examined the compatibility of the Commission’s adequacy decision and of the EU-US PNR agreement with EU rules, and until it has ruled on whether the European Parliament’s assent is necessary before the agreement can enter into force
3. To encourage the US Congress to assess the specific privacy risks related to passengers’ personal information and passenger pre-screening programs, and determine whether they warrant any specific legislative measures
4. Not only to question the adequacy and purposes of the regime surrounding the transfer of passenger data, but also the reality of its implementation. This is because it may lead to a system of global surveillance for general law enforcement purposes, as well as to increased cooperation between the US government and commercial entities to work on data mining projects without proper privacy safeguards. The purposes for which passenger data are collected have to be strictly defined and their use limited to the fight against terrorism and terrorism-related crimes
5. To establish a strong legal framework for transferring airline data to government authorities in the US in a way that is compatible with strong data protection principles. This entails:
  - limiting the data elements to what is proportionate to the aims sought;
  - ensuring the accuracy of the records, and of the matching of passenger records against suspects’;
  - making the data retention periods short and proportionate;
  - providing clear and comprehensive information to passengers, including about the content and scope of the data required, the purpose of collection and the data recipients before their travel information is collected;
  - providing passengers with a judicially enforceable right to access, correct, modify and/or delete their personal data.
  - providing consumers with truly independent redress, compensation and appeal

mechanisms in case of governmental abuse and infringement of passengers' rights;  
- determining the US agencies and authorities to which PNR data would be disclosed

6. To make the EU-US PNR agreement and the US Undertakings legally binding in the United States in order to enable air travelers to obtain redress before US courts
7. To prohibit transfers of passenger data when they are made to non-EU government agencies or law enforcement authorities, unless they comply with the EU-US PNR agreement, or other existing third-party information-sharing rules with equivalent data protection requirements
8. To suspend the implementation of the EU-US PNR agreement until the technical mechanisms to put in place a "push" system of data transfer are available
9. To assess passenger data transfer schemes, new standards for travel documents, as well as passenger pre-screening and biometric identification systems, such as CAPPS II, US-VISIT programs, together when negotiating agreements to protect travellers' privacy. Common data protection rules should apply to interconnected programs that use or will use the same personal data
10. To modify the privacy policy applicable to the US-VISIT Program in order to provide travelers, covered by both the EU-US PNR agreement and the US-VISIT program, with the same level of privacy protections
11. To encourage all authorities involved in the PNR discussion to consult with consumer protection groups, as well as to include representatives of consumer organizations and data protection authorities in discussions of ICAO and other relevant standards proposals, and in government delegations to ICAO meetings and working groups, in particular in any cases where proposed standards would override or alter national or EU consumer protection or data protection laws or regulations.

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## **EUROPEAN COMMISSION SERVICES' RESPONSE**

Ad 1. The very aim of the PNR arrangements decided upon by the Commission and the Council in May 2004 is to address European privacy issues resulting from the transfer of air passenger data to the US. Indeed, the Commission adequacy decision together with the Department of Homeland Security Bureau of Customs and Border Protection (CBP) Undertakings and the international agreement have laid down a balanced solution that both respects European privacy concerns and duly takes account of the other important issues at stake, such as the fight against terrorism and international crime, the need for airlines to be able to comply with diverse legal requirements at an acceptable cost, the broader EU-US relationship, the security and convenience of air travellers, and border security concerns.

Ad 2. The suspension of the EU-US PNR data transfers to the US would lead to a situation of serious legal uncertainty for industry inconvenience and longer queues for

travellers, and could even threaten the security of trans-Atlantic flights. It should be recalled that it is the sovereign right of a State to introduce the security measures to be complied with for entering its territory, and that failure to comply with the US requirements would, according to US law, imply severe penalties for EU airlines, including withdrawal of landing rights. The EU-US PNR agreement ensures a level of data protection that is compatible with the requirements of the EU's Data Protection Directive 95/46/EC. The agreement is now operational, which means that the PNR data is now subject to the adequate protection measures agreed and EU airlines can therefore transfer the data in a legally secure environment.

Furthermore, as to the request to suspend the implementation of the EU-US PNR agreement, after a possible annulment by the European Court of Justice of the decision concluding the agreement, the agreement would remain in force as a matter of international law but the Commission would be under an obligation under Community law to propose renegotiation to the US. As long as the agreement has not been terminated or suspended in accordance with international treaty law, there is therefore no basis for suspending its application.

The Court ruled against the Parliament's request to use the expedited procedure available under current Court procedures. Most important, one should not forget that the EU-US PNR agreement and the Commission adequacy decision also serve to remedy the situation of considerable legal uncertainty in which airlines and passengers found themselves during 2003 and the beginning of 2004, in particular in view of the risk of fines imposed on airlines and ultimately a withdrawal of landing rights by US authorities.

Ad 3. Not applicable since the request is addressed to the US Congress.

Ad 4. The Commission services are fully aware of the importance of a strict definition of the purposes for which air passenger data are transferred. The US PNR arrangements, in particular the Department of Homeland Security Bureau of Customs and Border Protection's (CBP) Undertakings, contain precise and limited purposes for which PNR data can be transferred. Initial transfers are allowed only to CBP and only for purposes of preventing and combating: 1. terrorism and related crimes; 2. other serious crimes, including organised crime, that are transnational in nature; and 3. flight from warrants or custody for the crimes described above (Undertaking N0 2).

Ad 5. The Commission services refer to CBP's Undertakings which were instrumental for deciding on the adequacy of the data protection given to the PNR data. These Undertakings contain detailed provisions on the purposes for which the data may be sent, the data categories involved, data retention periods, the use of sensitive data (or rather the non-use thereof), security measures limiting access to the data to authorised persons, specific rules on onward transfers to government agencies other than CBP and to third countries, passengers' rights on notice, access and opportunities for redress, including information to passengers on data transfers. Together with the Commission adequacy decision and the international agreement, these instruments establish the necessary level of protection for air passenger data transferred to the US.

These instruments can be found on the Commission website ([www.europa.eu.int](http://www.europa.eu.int)) and are published also in the Official Journal of the European Union of 6 July 2004, L 235/11 (Commission adequacy decision and the Undertakings) and 20 May 2004, L 183/83 (international agreement).

Ad 6. and 7. The processing by CBP of PNR data transferred to it is governed by the conditions set out in the Undertakings (see also point 5) and in US domestic legislation to the extent indicated in the Undertakings. CBP has to respect these conditions. Article 3 of the Commission adequacy decision states very clearly that the competent authorities of the Member States may exercise their powers to suspend data flows to CBP if there were a substantial likelihood that the standards of protection set out in the Undertakings are being infringed and no adequate steps are undertaken by CBP to settle the issue. Compliance by CBP of their Undertakings will be subject to joint review by the United States and the Community. Non-compliance could be challenged as appropriate through legal, administrative and political channels and, if persistent, would lead to the suspension of the effects of the package. With regard to onward transfers from CBP to other government agencies and third countries, CBP has to respect the rules laid down in this respect in the Undertakings and this will be part of the joint review.

Ad 8. The PNR arrangements provide for transitional use of a “pull” system subject to the necessary safeguards set out in the Undertakings, and thus do not allow for suspension of their implementation until a ‘push’ solution is available. However, the arrangements do provide that there must be a transition from ‘pull’ to ‘push’ as soon as this is technically feasible. EU airlines have declared that such a system will be ready by the end of 2005.

Ad 9. The Commission services are fully aware of the data protection issues raised in the context of travel documents and passenger screening and agree they deserve close attention in order to balance privacy and security concerns in a comprehensive way. For this reason, the PNR arrangement only permits very limited use of PNR for testing of CAPPS II (which has been abandoned in the mean time) or in very specific emergency situations. The range of security measures that the US has introduced or is planning to introduce (unilaterally) would have a direct impact on air transport, air passengers, and the airline industry. The Commission is in close discussions with the US to try to avoid future unilateral measures. It is also stressing the importance of making an assessment of the practicality and proportionality of any such measures in order to avoid unreasonable costs to industry and inconvenience to passengers, as well as avoiding any overlaps or duplication between different measures. In addition, the Commission has sought cooperation and coordination at international level to avoid the introduction of such measures on a unilateral basis. ICAO has already adopted a Recommended Practice on PNR and ICAO has now also developed guidelines on PNR which should be adopted by the ICAO Council in the autumn.

Ad 10. Unlike the PNR programme, which concerns European data transferred to a third State, the US-VISIT Program concerns US data processed on US territory and relating to US-domestic flights. The US has the sovereign power to decide within its jurisdiction which security measures it wants to take and which privacy rules it wants to apply.

Ad 11. The Commission services have taken due notice of the request for consultation. The EU Data Protection Directive requires the European Commission to consult the national data protection supervisors before taking any binding decision affecting citizens’ privacy, as it did before adopting its adequacy decision on PNR.

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## **REACH – proposed EU Chemicals Policy**

### **June 2004, Trade-14-04**

(the full briefing paper, from which these recommendations were drawn, can be found at : [www.tacd.org/docs/?id=253](http://www.tacd.org/docs/?id=253))

The proposed EU chemicals policy is called 'Registration, Evaluation, Authorisation and Restrictions of Chemicals' (REACH). The goals and principles of REACH have been supported by a wide array of consumer, public health and environmental groups in Europe including many members of TACD. TACD members in Europe have submitted comments to improve REACH in the consumer interest, while many TACD members in the U.S. have watched with dismay the coordinated U.S. industry and governmental effort to weaken the proposed policy.

With the following recommendations, TACD calls for REACH to be strengthened and for a trade war over the policy to be avoided:

1. **Hazardous chemicals should have no volume threshold for registration and authorization.** The main thrust of the REACH proposal is to prioritise chemicals on the basis of volume of production. However, as there is no correlation between between tonnage and hazard, the focus of the REACH instead should be on identifying the most hazardous chemicals. To accomplish this, industry should screen all their chemicals according to dangerous properties including identification of possible vPvB and PBT<sup>1</sup> properties. For these chemicals, there should be no volume threshold for registration and authorization. The screening of all chemicals can be done if the computer model QSAR is used as a screening method. The newly created European Chemical Bureau should evaluate these data files within three years from registration.
2. **The authorization procedure for chemicals of high concern should be strengthened.** This entails placing the principle of substitution as the core of the procedure to create an assumption that chemicals known to have safer alternatives will be removed from the marketplace. Furthermore, endocrine disrupting chemicals and sensitizers must be added to the group of high concern chemicals requiring authorization. Authorized substances (preparations and articles) must be clearly labeled with a hazard symbol, without regard of the concentration of the chemical.
3. **All consumer articles containing chemicals– domestic and imported – should be assessed, whether they are intended to be released or not.** Producers of consumer articles must also provide information about the chemicals used in their products. This information should be publicly available. As it currently stands, REACH grants industry excessive secrecy due to industry claims of business confidentiality and does not give citizens the right to know certain key information such as producers names, total tonnage, general exposure information etc. Furthermore REACH has no mechanism for appealing decisions on the withholding of information and such an appeals procedure should be developed in the final draft.
4. **REACH must be a horizontal measure integrated in with related product safety directives.** REACH should form the basis for all existing and future product directives, setting a horizontal obligatory minimum safety level for



chemicals in all uses, whether paints, toys, cosmetics and pharmaceuticals, foods etc.

5. **The U.S. should immediately cease its campaign against REACH and the U.S. and the EU must avoid a trade dispute over REACH.** TACD believes that open, transparent and inclusive regulatory and trade-related processes are essential precursors to the development of sound public policy, and are necessary to avoid costly, potentially embarrassing and unsuccessful trade disputes. The U.S. government should cease its campaign against REACH and reassess its position on the matter by consulting a wide variety of interested parties. TACD once again calls upon U.S. agencies to solicit public comment on REACH and other public interest policies perceived to be trade irritants by posting notice in the Federal Register, holding public meetings and soliciting opinions from a balanced group of stakeholders. The EU could also improve performance in public consultation by soliciting testimony on the public health benefits of REACH and the costs of non-implementation.
  
6. **TACD once again calls upon the governments to incorporate the Precautionary Principle in regulatory decisions involved in consumer health and safety and the environment, particularly in cases of scientific uncertainty and complexity.**<sup>ii</sup> We urge Congress to develop legislation to strengthen TSCA using REACH as a model and we urge the U.S. EPA to form a special committee to explore the overhaul of TSCA to provide for the registration and authorization of chemicals on the market that predate the U.S. law utilizing REACH as a model. We call upon the committee to solicit testimony from U.S. and EU experts on the benefits of a REACH approach as well as the costs, and to examine the costs of nonaction on U.S. public health, environment and taxpayers.

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## **EUROPEAN COMMISSION SERVICES' RESPONSE**

Ad 1. REACH prioritises substances for registration on the basis of production volumes. Using production volumes as an approximation of risk is not a new invention; this is the approach behind e.g. the OECD work on chemicals, which focuses on high production volume chemicals. For registration, a threshold of 1 tonne per year of manufactured/imported substances has been set already in the White Paper. In the REACH proposal, there is no volume threshold for authorisation or restriction of hazardous chemicals.

The approach proposed by TACD would force authorities to assess the hazard of chemicals based on very limited knowledge. It should be recalled that each of the existing QSARs have limited field of application and are validated for substances with certain types of structure only. In other words, it is by no means certain that the screening would catch the most dangerous substances. The issue is therefore also dependent on the availability of QSARs and the resources in the Agency.

Furthermore, the proposed TACD approach would put the burden of proof on the public authorities. Public authorities would have to prove risks of chemicals before they could require full registration of the substances. Such a system would be difficult to enforce, in

contrast to REACH which gives the burden to industry to assess the safe use of the chemicals they produce, use and place on the market.

Finally, it should be recalled that substances of very high concern (carcinogenic, mutagenic and reprotoxic (CMR), persistent, toxic and bioaccumulative (PTB) and very persistent and very bioaccumulative (VPVB), etc.) can be subject to authorisation regardless of volume.

*NB: The European Chemicals Bureau has existed for many years. In the TACD statement it has probably been mixed up with the European Chemicals Agency to be created.*

Ad 2. The issue here is workability; we must consider the number of substances that the system can handle. However, REACH will facilitate research and development.

The provisions stimulate the demand for safer substances and technologies, obstacles to the development of alternatives and to the introduction of new, less risky substances on the market have been reduced, and REACH will encourage and promote substitution by making it attractive for commercial reasons. Thanks to increasing information about substances, downstream users of chemicals will be able to make informed decisions on the substances they use in their products and will be able to pursue low-risk strategies.

Currently there is no 'authorisation' label foreseen. REACH does not contain any provisions on labelling of substances used in articles. The labelling of the substances will eventually be harmonised under the new international Globally Harmonised System which is under development.

Endocrine disruptors are already in the group of substances of very high concern. They are clearly mentioned as an example of substances causing serious and irreversible effects equivalent to those of the other substances subject to authorisation, these substances will have to be included on case- by -case basis due to the lack of agreed criteria and validated test methods. Sensitizers could also be subject to authorisation if it is shown that they have effects equivalent to the others.

Ad 3. Substances in imported articles are a difficult issue. There are millions of articles imported to or produced in the EU each year. Registering all substances in all articles would completely overload the system, thus there is no way the public authorities could assess them all. Yet, ignoring them all could leave potential risks unaddressed.

Instead, under REACH, the risks of using a substance in an article should be assessed by the registrant already when the substance is registered. Hence, to address this problem, the REACH proposal strikes a balance: the first priority is given to dangerous substances that are meant to be released (e.g. the toner in a cartridge). These will need to be registered if the total volume is 1 tonne per year or more. If there will be unintended releases (e.g. formaldehyde released from fibreboard), the importer should inform the Agency. The Agency will then decide whether a registration is needed.

The public Agency database will give all essential safety information about chemicals, but will protect information that is commercially sensitive, that can be used for industrial espionage or illegal cartel building.

The same rule applies to products manufactured in the EU, though if they contain dangerous substances, these should have already been registered for this use by the manufacturers of the substances. The provisions on substances in articles in the Commission proposal are catching the articles which could cause any health and environmental problems.

Ad 4. The information gained under REACH will feed into many regulatory schemes (workers safety, environment, product safety, etc) and will make them more efficient. The legislative proposal has been carefully drafted to avoid overlaps with sectoral legislation.

Ad 5. The REACH requirements are non-discriminatory and proportional to the important aim of protecting human health and the environment and, in our view, are fully WTO compatible.

The Commission services have undertaken studies to measure the health and environment benefits of REACH. Furthermore, in the EU Internet consultation stakeholders have been able to provide input in any issue. The Commission services have studied the information submitted by stakeholders and Member States. The idea of making a public consultation soliciting testimony on the public health benefits of REACH is interesting. However, no such action is currently planned.

Ad 6. There are on-going efforts to improve EU-US dialogue and better mutual understanding on regulatory issues. As an example, a Roadmap for EU-US Regulatory Co-operation and Transparency was drawn up in 2004 and will be updated in view of the EU-US Summit of 20 June 2005. The Roadmap lays down a possibility to continue informal discussions on chemicals related issues of mutual interest and explore dialogue in the area of general regulatory policy.

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## **ENDNOTES**

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<sup>i</sup> vPvB: very persistent and very bioaccumulative chemicals, PBT: persistent, bioaccumulative and toxic chemicals.

<sup>ii</sup> TACD is on record supporting the Precautionary Principle as a “priority” agenda item for the governments. In the 2001 priorities statement, TACD calls on the governments of the US and the EU to incorporate the Precautionary Principle in regulatory decisions involved in consumer health and safety and the environment.