

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.05.2005
COM(2005) 200 final

2005/0095 (CNS)

Proposal for a

COUNCIL DECISION

on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information (API)/Passenger Name Record (PNR) data

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

The attached proposal calls on the Council to authorise the conclusion of an agreement with Canada for the processing and transfer of Advanced Passenger Information (API) and Passenger Name Record (PNR) data for journeys by air carriers between the EU and Canada. It aims to ensure respect for fundamental rights and freedoms, notably the right to privacy, while supporting the fight against terrorism and serious transnational crime. The Council of the European Union adopted a set of negotiating guidelines and authorised the Commission to negotiate such an Agreement with Canada on 7 March 2005.

- **General context**

After September 11 2001, Canada adopted legislation authorising the Canada Border Services Agency (CBSA) to obtain and collect API and PNR data relating to all persons on board flights bound for Canada. CBSA phased in the requirement to provide PNR data relating to persons on board flights bound for Canada between March 2003 and September 2004, and from February 2005 introduced a system of monetary penalties for non-compliance. The EU has a temporary derogation from this requirement until 1 July 2005, in order to allow negotiations on an international agreement with Canada to take place. The Canadian measures potentially conflicted with Community and Member States' legislation on privacy and data protection, and in particular with Directive 95/46/EC (OJ L 281, 23.11.95, p.31). From July 2005, airlines will potentially face sanctions for non-compliance on both sides, without being able to solve the legal problems at stake. A solution is thus urgently required which will avoid legal uncertainty for airlines while ensuring the protection of citizens' personal privacy as well as their physical security.

- **Existing provisions in the area of the proposal**

There are no existing provisions in the area of the proposal

- **Consistency with other policies and objectives of the Union**

The Commission has worked with Canada to put in place a sound legal framework for the transfer of API/PNR data to CBSA, along the lines of the model outlined in the Commission's Communication to the European Parliament and the Council of 16 December 2003 (COM (2003) 826 final, "Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach") and already followed with the United States.

This legal framework consists of three elements. It is based: (i) on the Commitments made by CBSA with respect to the additional protection to be afforded to API/PNR data; (ii) a Commission Decision finding protection adequate under Article 25 paragraph 6 of the Data Protection Directive (95/46/EC), and; (iii) a bilateral agreement between the European Community and Canada.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

The proposal follows the policy established in COM (2003) 826 final.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposed international agreement does not create additional obligations. Rather, it provides the basis in Community law (see "Summary of the proposed action" below) for air carriers operating journeys from the EU to Canada to comply with existing Canadian requirements to process and transfer API/PNR data to Canada's competent authority, CBSA. It allows further competent authorities on either side to be designated at a later stage with the mutual agreement of the Parties.

Since the proposed agreement creates no additional obligations, and urgent action is required on the basis of established policy guidelines, the proposed agreement has not been the subject of an impact assessment.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposed agreement provides a legitimate basis for the transfer of data to Canada in accordance with the requirements of Article 7 of Directive 95/46/EC, that is, the creation of a legal obligation within the Community to obey requirements under Canadian law. The application of this legal obligation is subject to the Commission Decision on adequacy being in force, in such a way as to ensure that any persistent non-compliance by Canada with its Commitments would lead to suspension of the Decision and automatically to suspension of the agreement.

The proposed agreement also enshrines the general principles of non-discrimination and reciprocity, and provides for annual joint review of its implementation.

- **Legal basis**

Articles 95 and 300(2) of the Treaty establishing the European Community

- **Subsidiarity Principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

The proposed international agreement represents the simplest, quickest and most efficient means of providing, as part of the overall legal package, a legally sound solution.

The proposed agreement does not create additional financial burdens for the Community or national governments. The administrative requirement to hold an annual Joint Review of the implementation of the agreement is proportional to its aim of providing for the processing and transfer of API/PNR data consistent with data privacy and security requirements, and will be fulfilled using existing staff resources.

- **Choice of instruments**

Proposed instruments: other.

Other means would not be adequate for the following reason(s).

The instrument proposed is an international agreement, forming part of a legal package as described above. This instrument has been chosen because it represents the simplest and most efficient means of providing a legally sound solution.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof, in conjunction with the first sentence of the first subparagraph of Article 300 (2) thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Parliament[2],

Whereas:

(1) On 7 March 2005 the Council authorised the Commission to negotiate on behalf of the Community an Agreement with Canada on the processing and transfer of Advanced Passenger Information (API) and Passenger Name Record (PNR) data by air carriers to the Canada Border Services Agency (CBSA).

(2) The Agreement should be approved.

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Community and the Government of Canada on the processing of API/PNR data is hereby approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the European Community.

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1 OJ C , , p. .
2 OJ C , , p. .

Article 3

This Decision shall be published in the *Official Journal of the European Union.*

Done at Brussels,

For the Council
The President

ANNEX

**AGREEMENT BETWEEN
THE EUROPEAN COMMUNITY AND THE GOVERNMENT OF CANADA ON THE PROCESSING OF API/PNR DATA**

THE EUROPEAN COMMUNITY AND THE GOVERNMENT OF CANADA, hereinafter referred to as the "Parties":

RECOGNIZING the importance of respecting fundamental rights and freedoms, notably the right to privacy, and the importance of respecting these values while preventing and combating terrorism and related crimes and other serious crimes that are transnational in nature, including organized crime;

HAVING REGARD to the Government of Canada requirement of air carriers carrying persons to Canada to provide Advanced Passenger Information and Passenger Name Record (hereinafter "API/PNR") data to the competent Canadian authorities, to the extent it is collected and contained in carriers' automated reservation systems and departure control systems (DCS);

HAVING REGARD to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in particular Article 7(c) thereof;

HAVING REGARD to the Commitments made by the relevant competent authority with regard to the way in which it will process API/PNR data received from air carriers (hereinafter "the Commitments");

HAVING REGARD to the relevant Commission Decision, pursuant to Article 25(6) of Directive 95/46/EC, (hereinafter "the Decision"), whereby the relevant Canadian competent authority is considered as providing an adequate level of protection for API/PNR data transferred from the European Community (hereinafter "the Community") concerning passenger flights to Canada, in accordance with the relevant Commitments, which are annexed to the respective Decision;

HAVING REGARD to the Revised Guidelines on API adopted by the World Customs Organisation (WCO), the International Air Transport Association (IATA) and the International Civil Aviation Organisation (ICAO);

COMMITTED to work together to assist the International Civil Aviation Organization (ICAO) in the development of a multilateral standard for the transmission of PNR data obtained from commercial airlines;

HAVING REGARD to the possibility of effecting modifications to Annex I to the present Agreement in the future by simplified procedures, particularly with regard to ensuring reciprocity between the Parties;

HAVE AGREED as follows:

Article 1

Purpose

1. The purpose of this Agreement is to ensure that API/PNR data of persons on eligible journeys are provided in full respect of fundamental rights and freedoms, in particular the right to privacy.

2. An eligible journey is a passage by an air carrier from the territory of one Party to the territory of the requesting Party.

Article 2

Processing of API/PNR data

1. The Parties agree that API/PNR data of persons on eligible journeys will be processed as outlined in Commitments made by the competent authority obtaining the API/PNR data.

2. Commitments set forth the rules and procedures for the transmission and protection of API/PNR data of persons on eligible journeys provided to a competent authority.

3. The competent authority shall process API/PNR data received and treat persons on eligible journeys to which the API/PNR data relates in accordance with applicable laws and constitutional requirements, without discrimination, in particular on the basis of nationality and/or country of residence.

Article 3

Access, correction and notation

1. A competent authority shall afford to a person who is not present in the territory in which that authority exercises jurisdiction, to whom the API/PNR data processed pursuant to this Agreement relates, access to the data as well as the opportunity to seek correction if it is erroneous or add a notation to indicate a correction request was made.

2. The opportunity provided by the competent authority for access, correction and notation with respect to such data shall be afforded in circumstances similar to those where it would be available to persons present in the territory in which that authority exercises jurisdiction.

Article 4

Competent authorities

A competent authority of a requesting Party is an authority responsible in Canada or in the European Union for processing API/PNR data of persons on eligible journeys as specified in Annex I to this Agreement, which forms an integral part thereof.

Article 5

Obligation to process API/PNR data

1. In relation to the application of the Agreement within the Community, as it relates to the processing of personal data, air carriers operating eligible journeys from the Community to Canada shall process API/PNR data contained in their automated reservation systems and DCS as required by the competent Canadian authorities pursuant to Canadian law.

2. The list of PNR data elements that air carriers operating eligible journeys shall transfer to the Canadian competent authority pursuant to paragraph 1 is contained in Annex II to this Agreement, which forms an integral part thereof.

3. The obligation set forth in paragraphs 1 and 2 shall only apply for as long as the Decision is applicable, ceasing to have effect on the date that the Decision is repealed, suspended or expires without being renewed.

Article 6

Joint Committee

1. A Joint Committee is hereby established, consisting of representatives of each Party, who will be notified to the other Party through diplomatic channels. The Joint Committee shall meet at a place and on a date with an agenda fixed by mutual consent. The first meeting shall take place within six months of entry into force of this Agreement

2. The Joint Committee shall, inter alia:

   a) act as a channel of communication with regard to the implementation of this Agreement and any matters related thereto;

   b) resolve, to the extent possible, any dispute which may arise with respect to the implementation of this Agreement and any matters related thereto;

   c) organise the Joint Reviews referred to in Article 8 and determine the detailed modalities of the joint review;

d) adopt its rules of procedure.

3. The Parties represented in the Joint Committee may agree modifications to Annex I to the Agreement, which will apply as from the date of such agreement.

Article 7

Settlement of Disputes

The Parties shall consult promptly at the request of either concerning any dispute, which has not been resolved by the Joint Committee.

Article 8

Joint Reviews

The Parties shall conduct on an annual basis, or as otherwise agreed, a Joint Review of the implementation of this Agreement and any matters related thereto as set out in Annex III, which forms an integral part thereof, including developments such as the definition by the International Civil Aviation Organisation of relevant PNR guidelines.

Article 9

Entry into force, amendments to and termination of the Agreement

1. This Agreement shall enter into force upon exchange of notifications between the Parties advising that the procedures required for entry into force of the Agreement have been completed. This Agreement shall come into force on the date of the second notification.

2. Without prejudice to Article 6(3), this Agreement may be amended by agreement between the Parties. Such amendment shall enter into force 90 days after the Parties have exchanged notifications of completion of the relevant internal procedures.

3. This Agreement may be terminated by either Party at any time following written notification 90 days in advance of the proposed termination date.

Article 10

This Agreement is not intended to derogate from or amend legislation of the Parties.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Agreement.

DONE, in duplicate, in _____, this _____ day of _____, in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages, each version being equally authentic. In case of divergence the English and French versions shall prevail.

For the EUROPEAN COMMUNITY

For the GOVERNMENT of CANADA

Annex I:

Competent Authorities

For the purpose of Article 3, the competent authority for Canada is the Canada Border Services Agency (CBSA).

Annex II:

PNR Data Elements to be collected

1. PNR record locator
2. Date of reservation
3. Date(s) of intended travel
4. Name
5. Other names on PNR
6. All forms of payment information
7. Billing address
8. Contact telephone numbers
9. All travel itinerary for specific PNR
10 Frequent flyer information (limited to miles flown and address (es))
11. Travel agency
12. Travel agent
13. Split/Divided PNR information
14. Ticketing field information
15. Ticket number
16. Seat number
17. Date of ticket issuance
18. No show history
19. Bag tag numbers
20. Go show information
21. Seat information
22. One-way tickets
23. Any collected APIS information
24. Standby
25. Order at check in

Annex III:

Joint Review

The Parties will communicate to each other in advance of the joint review the composition of their respective teams, which may include appropriate authorities concerned with privacy/data protection, customs, immigration, enforcement, intelligence and interdiction, and other forms of law enforcement, border security and/or aviation security, including experts from Member States of the European Union.

Subject to applicable laws, any participants in the review will be required to respect the confidentiality of the discussions and have appropriate security clearances. Confidentiality will not however be an obstacle to each Party making an appropriate report on the results of the joint review to their respective competent bodies, including the Parliament of Canada and the European Parliament.

The Parties will jointly determine the detailed modalities of the joint review