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Komisja Wolności Obywatelskich, Sprawiedliwości i Spraw Wewnętrznych

WERSJA TYMCZASOWA
2005/0095(CNS)

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PROJEKT SPRAWOZDANIA

w sprawie projektu decyzji Rady dotyczącej zawarcia porozumienia pomiędzy Wspólnotą Europejską a Rządem Kanady w sprawie przetwarzania zaawansowanych informacji o pasażerach (API) oraz zapisu danych dotyczących nazwiska pasażera (PNR)
(COM(2005)0200 – C6-0184/2005 – 2005/0095(CNS))

Komisja Wolności Obywatelskich, Sprawiedliwości i Spraw Wewnętrznych

Sprawozdawca: Sophia in 't Veld

Objaśnienie używanych znaków

*	Procedura konsultacji *większość oddanych głosów*
**I	Procedura współpracy (pierwsze czytanie) *większość oddanych głosów*
**II	Procedura współpracy (drugie czytanie) *większość oddanych głosów by zatwierdzić wspólne stanowisko większość głosów ogólnej liczby posłów do PE by odrzucić lub wprowadzić poprawki do wspólnego stanowiska*
***	Procedura zgody *większość głosów ogólnej liczby posłów do PE, za wyjątkiem przypadków ujętych w art. 105, 107, 161 i 300 Traktatu WE oraz w art. 7 Traktatu UE*
***I	Procedura współdecyzji (pierwsze czytanie) *większość oddanych głosów*
***II	Procedura współdecyzji (drugie czytanie) *większość oddanych głosów by zatwierdzić wspólne stanowisko wymagana większość głosów ogólnej liczby posłów do PE by odrzucić lub wprowadzić poprawki do wspólnego stanowiska*
***III	Procedura współdecyzji (trzecie czytanie) *większość oddanych głosów by zatwierdzić wspólny projekt*

(Wskazana procedura opiera się na podstawie prawnej zaproponowanej przez Komisję.)

Poprawki do tekstu legislacyjnego

W poprawkach Parlamentu zmiany zaznaczone są wytłuszczonym drukiem i kursywą. Oznaczenia zwykłą kursywą są wskazówką dla służb technicznych, że proponowana jest, w celu opracowania tekstu końcowego, korekta elementów tekstu legislacyjnego (np. elementów w oczywisty sposób błędnych lub brakujących w danej wersji językowej.) Sugestie korekty wymagają zgody właściwych służb technicznych.

SPIS TREŚCI

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(COM(2005)0200 – C6-0184/2005 – 2005/0095(CNS))

(Procedura konsultacji)

Parlament Europejski,

– uwzględniając projekt decyzji Rady (COM(2005)0200)[1],

– uwzględniając (projekt) decyzji Komisji w sprawie odpowiedniej ochrony danych dotyczących nazwiska pasażerów lotniczych przekazywanych do Agencji Służb Granicznych Kanady, jak również zobowiązania Agencji Służb Granicznych Kanady, załączone do tejże decyzji Komisji,

– uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 95 wraz z art. 300 ust. 2, akapit pierwszy, zdanie pierwsze,

– uwzględniając art. 300 ust. 3, akapit pierwszy Traktatu WE, na mocy którego Rada skonsultowała się z Parlamentem (C6-0184/2005),

– uwzględniając art. 51 oraz art. 83 ust. 7 Regulaminu,

– uwzględniając sprawozdanie Komisji Wolności Obywatelskich, Sprawiedliwości i Spraw Wewnętrznych (A6-0000/2005),

1. zatwierdza projekt decyzji Rady po poprawkach;

2. zobowiązuje swojego Przewodniczącego do przekazania stanowiska Parlamentu Radzie i Komisji, jak również rządom i parlamentom Państw Członkowskich i Kanady.

Tekst proponowany przez Komisję	Poprawki Parlamentu
Poprawka 1 Odniesienie 3	
uwzględniając ***opinię*** Parlamentu Europejskiego,	uwzględniając ***zgodę*** Parlamentu Europejskiego, ***udzieloną na mocy art. 300 ust. 3, drugi akapit, Traktatu WE,***

[1] Dotychczas nieopublikowany w Dzienniku Urzędowym.

Poprawka 2
Odniesienie3a (nowe)

uwzględniając opinie grupy roboczej przewidzianej w art. 29 dyrektywy 95/46/WE oraz europejskiego inspektora ochrony danych,

Poprawka 3
Punkt uzasadnienia -1 (nowy)

(-1) Kanada przyjęła akty prawne zezwalające Kanadyjskiej Agencji Służb Granicznych (CBSA) na zbieranie zaawansowanych informacji o pasażerach (API) oraz danych dotyczących nazwiska pasażera (PNR) od linii lotniczych.

Poprawka 4
Punkt uzasadnienia -1a (nowy)

(-1a) Obowiązek ten uzupełnia obowiązki nałożone na linie lotnicze na mocy rozdziału II dyrektywy 95/46/WE i nie jest sprzeczny z tymi obowiązkami, o ile wszystkie przekazywane dane są w odpowiedni sposób chronione.

Poprawka 5
Punkt uzasadnienia -1b (nowy)

(-1b) Kanadyjskie władze zobowiązały się do ochrony tych danych poprzez uzupełnienie swojego prawodawstwa o zobowiązania załączone do Porozumienia załączonego do niniejszej decyzji.

Poprawka 6
Punkt uzasadnienia -1c (nowy)

(-1c) Na podstawie zobowiązań Kanady Komisja, działając na podstawie art. 25

dyrektywy 95/46/WE, oświadczyła[1], że dane API i PNR są odpowiednio chronione przez władze kanadyjskie.

Poprawka 7
Punkt uzasadnienia -1d (nowy)

(-1d) Konieczne jest zapisanie zobowiązań linii lotniczych w wiążących umowach prawnych pomiędzy Wspólnotą a Kanadą.

Poprawka 8
Punkt uzasadnienia 1

(1) Dnia 7 marca 2005 r. Rada upoważniła Komisję do rozpoczęcia w imieniu Wspólnoty negocjacji z Kanadą na temat porozumienia w sprawie przetwarzania i przekazywania Kanadyjskiej Agencji Służb Granicznych zaawansowanych informacji o pasażerach (API) oraz zapisu danych dotyczących nazwiska pasażera (PNR) przez przewoźników lotniczych.	(1) Dnia 7 marca 2005 r. Rada upoważniła Komisję do rozpoczęcia w imieniu Wspólnoty negocjacji z Kanadą na temat porozumienia w sprawie przetwarzania i przekazywania Kanadyjskiej Agencji Służb Granicznych zaawansowanych informacji o pasażerach (API) oraz zapisu danych dotyczących nazwiska pasażera (PNR) przez przewoźników lotniczych. ***Negocjacje zostały zamknięte w dniu .***

Poprawka 9
Punkt uzasadnienia 1a (nowy)

(1a) Załączone do niniejszej decyzji Porozumienie powinno zostać poddane rewizji w świetle zasad określonych przez Trybunał Sprawiedliwości Wspólnot Europejskich w sprawie C-317/04.

Poprawka 10
Punkt uzasadnienia 1b (nowy)

(1b) Załączone do niniejszej decyzji Porozumienie nie może stanowić uzasadnienia dla jakichkolwiek środków

[1] Deklaracja ta powinna zostać załączona do decyzji.

Wspólnoty umożliwiających przetrzymywanie danych pasażerów bądź też bezpośrednią lub pośrednią kontrolę osób, w sprawie których nie jest prowadzone dochodzenie policyjne ani postępowanie sądowe.

UZASADNIENIE (w języku angielskim)

Introduction

1. It has to be recalled that :

a) - According to general, non binding global standards ([1]) **API data** (Full name, date or birth, gender, passport number, country of citizenship, country of passport issuance) are the passenger data sent by airlines in advance of their arrival at their destination in order to facilitate border control in the interest of the traveling public and of border security. To facilitate the collection of these data, the information usually consists of data found in the Machine Readable Zone (MRZ) of ICAO Document 9303 and is transmitted electronically according to a format suggested by the UN ([2]). In the absence of compulsory global rules, airlines are to comply with national legislation, which can entail economic and logistical problems. In the European Community the collection of API data is regulated by the Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data **([3]).**

b) - The Passenger Name Records (PNRs) are an even more variable set of data treated by each airline (usually via a Computerized Reservation Systems (CRS) and Global Distribution Systems (GDS)([4]) for managing the transport contract with each passenger. While some passenger data systems contain a limited amount of information, others contain extensive data on individuals, including the details of past travel, car and hotel reservation plans, phone numbers, e-mail addresses, residential and business addresses, and credit card information. These differences are dependent on the choice and service provided by the airline itself and by the way the contract is established (via internet or via a transport agency).

c) - In the aftermath of September 11, the US and subsequently New Zealand, Canada and Australia, decided to use PNR data (even if not structured and comparable) as a useful tool for (a) checking as soon as possible the identity of the passenger against a "watch list" or the "no-fly" list established by the security services of these countries and (b) do a first automated "security assessment**"** by matching the same PNR data and, possibly, other data collected on commercial (non travel) databases such as credit card databases ([5]) to verify if

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[1] WTCO, IATA and ICAO are currently discussing a revised API guidelines revision see:
http://www.customs.gov/linkhandler/cgov/travel/inspections_carriers_facilities/apis/unedifact_guide/un_edifact_guide.ctt/un_edifact_guide.pdf
http://www.icao.int/icao/en/atb/fal/fal12/documentation/fal12wp015_en.pdf

[2] In 2002, a standard Electronic Data Interchange (EDI) message set was approved for use by the United Nations/Electronic Data Interchange for Administration, Commerce, and Trade (UN/EDIFACT). The International Air Transport Association (IATA) and the World Customs Organization (WCO) adopted the Passenger List (PAXLST) message set for use by all scheduled air carriers for the transmission of passenger and crew data to border control authorities.
The requirements :http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/APIGuidelinesE%20.pdf.

[3] In OJ L 261 of August 6, 2004

[4] Of the four main CRS the european one is Amadeus . CRS are under the direct supervision of the ECC according to regulation

[5] In the USA, there are essentially no legal restrictions on the ability of the government to mine commercial databases, as long as the practice is announced in a Privacy Act notice.

the “profile” of a particular passenger may require a further control by the security services at the borders (or even before take off). This approach to PNR data was also considered by the Commission in its 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")

In 2003 and 2004 the European Parliament adopted a number of resolutions which expressed serious concerns with regard to the PNR strategy. In particular, the EP stressed that PNR data is far from being effective in the fight against terrorism, that it could open the way for a mass surveillance system and that there was a serious risk of violating the data protection principles enshrined in Article 286 of the TEC, in the Directive 95/46/EC and in the Article 8 of the European Convention on Human Rights and Article 7 and 8 of the Charter of Fundamental Rights of the European Union. The EP invited the Commission to refrain from developing a similar strategy inside the Union and stressed that the transfer of PNR data to third countries could only be authorised as an exceptional measure and if the data were of a non sensitive nature (17 categories on 34 as suggested by the WG art. 29)([1]).

The proposed EC/Canada agreement

2. As outlined in the Draft agreement, Canada has adopted legislation authorising the Canadian Border Services Agency (CBSA) to collect **API and PNR** data from airlines and has introduced from February 2005 a system of fiscal penalties in case of non-compliance with the Canadian legislation. The penalties were suspended for European airlines during the negotiation on the agreement (from March 2005 to now) but will in principle be applied from 1 July 2005. Your rapporteur should like the Commission to clarify the exact situation as regards the application of penalties and to seek guarantees from the Canadian authorities not to apply penalties pending the conclusion of the agreement.

Lack of transparency and simplicity

3. It is very regrettable to note that, as in the case of the previous agreement with the USA on the same subject, the European Parliament has been consulted by the Council at the very last moment on a highly complex and sensitive topic. Moreover, the Council fixed the July plenary session as a mandatory deadline according to Article 300, paragraph 3, first subparagraph, second and third sentences of the TEC.

It should also be noted that the EP is effectively asked to take its decision without all the appropriate information, because the Council consultation is lacking some essential elements: (a) the Commission Decision declaring that the data are adequately protected by the Canadian

[1] These categories of data were: API/PNR record locator code, date of reservation, date(s) of intended travel, passenger name, other names on API/PNR, all travel itinerary, identifiers for free tickets, one-way tickets, ticketing field information, ATFQ (Automatic Ticket Fare Quote) data, ticket number, date of ticket issuance, no show history, number of bags, bag tag numbers, go show information, number of bags on each segment, voluntary/involuntary upgrades, historical changes to API/PNR data with regard to the aforementioned items.

authorities and (b) the text of the Commitments taken by the Canadian Authorities, which is the specific legal framework on which the Commission Decision and the Agreement are founded. Moreover, the agreement makes reference to possible onward transfers where the recipients are also subject to rules affording an adequate level of protection. However, given the European Parliament's position and the pending court case inter alia on the issue of adequate protection, it would be indispensable to know if and under which conditions onward transfer to third countries, including the US, is allowed.

4. Moreover, in the negotiations with Canada, the Commission and the Council have followed the same opaque "three tier" approach that was applied for the USA PNR agreement: Instead of a proper international agreement clarifying all the main obligations of the contracting parties, the rights and the obligations of the passengers, of airlines and the duties of the public authorities, a "light international agreement" has been submitted which:

- obliges the airlines to push the data to the Canadian authorities as if it was an obligation established by the Article 7 and Article 13 of Dir. 95/46/CE (which refers to security needs of the Member States and not of a third country)
- amends (or at least derogates) indirectly the obligations foreseen in the Chapter II of Directive 95/46/EC and consequently (as indicated by the European Data Protection Supervisor) should be adopted by the Parliament under the assent procedure and not the simple consultation.
- enforces, indirectly, an administrative Decision of the Commission which defines the conditions under which the protection ensured by the Canadian authorities could be considered "adequate".
- refers (always indirectly via a reference to an annex of the Commission Decision) to the Commitments taken by the Canadian authorities and which is the actual legal framework that will govern the transferred data.
- recognises the right of the Canadian authorities to modify their legislation without previous consent of the counterpart of the agreement and which reserves only the right to withdraw from the agreement in case of persistent violation of the agreement itself.

Such legislative technique does not respect the general principle of transparency and the rule of law on which the EU is founded (Article 6.1 TEU), particularly when fundamental rights of citizens are at stake. Furthermore, as with the agreement with the US, the European Parliament is only consulted on the international agreement, while it could rightfully be argued that Parliament should have full assent. This fact could indeed be challenged according to Art. 230 of the EC Treaty as far as the parliamentary prerogatives is concerned, as the draft agreement amends Directive 95/46 and therefore should be adopted according to Art 300 p.3 with the assent of the EP.
These concerns have been raised in the case which at the moment is under the scrutiny of the Court of justice (Case C-317/04), and these concerns should have been taken into account by the Commission and by the Council. Out of respect for European citizens, our Canadian counterparts and, inter-institutionally for the European Parliament, the negotiations should have followed a more democratic and transparent route.

The improvements of the EC/Canada agreement versus the EC/USA case

5. This situation is even more disconcerting as the EP could in principle positively evaluate

the substance of the agreement reached with the Canadian authorities, as it answers to the main concerns the European Parliament raised in the US/EC case. The main positive improvements, which are indeed also noted by the European Data Supervisor and by the Article 29 Data Protection Working Party ([1]) are that:

- Canada, unlike the USA, has a legislative system of data protection which is the essential condition required by Article 8 of the European Charter and Article 8 of the ECHR according to which limitations to privacy are only admissible if they *"…are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime,…".* Furthermore the Canadian system offers legal protection to the data subject including supervision by an independent Data Commissioner (which is comparable to the European model resulting from Directive 95/46 and Article 286 of the EC Treaty). The Canadian Privacy Act provides individuals with the rights of access, rectification and opposition with regard to any personal information relating to them, under the control of a Canadian supervisory authority. However, the Privacy Act currently requires that individuals be present in Canada in order to avail themselves of these rights.
- the Canadian "commitments" (cited in a generic way in the Article 2 (1) of the agreement and detailed in the annex of the Commission Decision – art. 29, 30 and 31) create rights of access, rectification and opposition to EU citizens who are not present in Canada for the passenger and bind the Canada administration instead of being simple administrative declarations, as is the case for the US undertakings.
- the PNR-data required are more limited and more focused than those required by the US namely without "open categories" of passenger data (these categories could create confusion or could be misleading with regard to sensitive aspects of the behaviour of the passenger and of the persons accompanying him/her). Moreover, CBSA does not require airlines to collect PNR information that they do not record for their own purposes, and does not require airlines to collect any additional information for purposes of making it available to the CBSA.
- Canada accepts a 'push'-system even if Canada can already 'pull' data from the airlines reservation and departure control systems via the Societe Internationale de Telecommunications Aeronautique (SITA) network. Section 7 of the Commitments clearly states that the Canadian Passenger Information System PAXIS has been configured to receive API and PNR data pushed from airlines. This meets the European Parliaments' concerns raised in the US/EU agreement (by which the US authorities collect the data directly from the airlines reservation systems on EU territory without any filters).
- The purposes and data retention period are more limited and more specific than in the US case. From the initial receipt and up to 72 hours, all available API and PNR information will be accessible only to a limited number of CBSA targetters and intelligence officers, the Canadian data protection authority and the MS authorities could control the flow of the data.

The EP dilemma : reject the agreement or accept it under conditions ?

[1] Opinion 3/2004 : http://www.europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2004/wp88_en.pdf
1/2005: http://www.europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2005/wp103_en.pdf

6. The rapporteur is faced with a dilemma of either:
a) rejecting the agreement as it appears subject to the same weaknesses from a legal, procedural and formal point of view, which justified referral to the Court of Justice in the USA case (and by this way remain consistent with his previous position)
or
b) accepting the agreement under certain conditions :
- that the agreement should be revised (if necessary) after the Decision of the Court
- that in this case the assent procedure should be recognized to the EP.
- that the EU come forward with a global approach

7. Bearing in mind that the legal framework of the EC/Canada agreement is from a content point of view substantially better than the EC/USA agreement and that these improvements have been recognised by the Article 29 WG and by the EDPS, your rapporteur proposes:
- to annex the Canadian Commitments to the agreement
- to indicate clearly who are the counterparts from the Canadian and Community side (actually a joint committee can decide to change at any moment the counterparts.). Article 6, paragraph 3, introduces the possibility for the Joint Committee "to agree modifications to Annex 1 to the Agreement" ([1]); such decisional power to change the "data controller" create an "institutional framework" inside the agreement and would justify, under a second profile, the assent of the EP. Therefore, such modifications – which may produce considerable effects in terms of liability for the processing of personal data – must be carried out in accordance with standard negotiation mechanisms, and no simplified approach could be a sound legal solution. Any amendment and/or addition is therefore to be regarded as an amendment to the Agreement itself and the related measures.
- to annex to the agreement, for information purposes the "adequacy finding" Decision adopted by the Commission
- to indicate that with regard to API data, airlines need to respect the rules established by the Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data **([2]).**
- to approve the agreement by an assent procedure, but to declare in the same legislative resolution that such an assent does not intend to affect the position taken by the Parliament in the USA/PNR case and that the future Decision from the Court will be applied mutatis mutandis.

[1] A further element of transparency is the declaration Ad Article 6, paragraph 3 The Commission understands that the position of the Community in the Joint Committee relating to modifications to Annex I of the Agreement will be decided on by the Council, acting by a qualified majority on a proposal from the Commission.
[2] In OJ L 261 of August 6, 2004