

ARTICLE 29 Data Protection Working Party



Brussels, 11 July 2013

Ms Cecilia Malmström
Commissioner for Home Affairs
B - 1049 BRUSSELS
Belgium

Subject: Advance Passenger Information (API)

Dear Commissioner Malmström,

Further to discussions between the Article 29 Working Party and the European Commission, the Working Party decided to analyse the legal basis for the transfer of Advance Passenger Information (API) data from the EU to third countries by air carriers.

As opposed to API data transfers concerning flights from third countries to the EU, which is regulated by the provisions of Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data¹, no specific legislation has been created in European law for API data transfers from the EU to border agencies in third countries. This lack of specific legislation raises concerns regarding the protection of passengers' personal data.

The Article 29 Working Party has discussed the legal basis of such transfers. The result its analysis is that the existing legal framework does not give a clear answer to the question whether a proper legal basis for API data transfers exists. National practices vary and are not coherent. The Working Party stresses that discrepancies concerning the interpretation and application of the existing provisions constitute a problem, not only with regard to the protection of personal data, but it can also significantly affect the internal market.

The Chicago Convention is considered by some to serve as a valid legal basis for API transfers to third countries. This would only be possible if the Chicago Convention is interpreted very broadly and favourably and is taken to satisfy the requirements of Article 25 and Article 26 of Directive 95/46/EC.

The Working Party recalls that any provision infringing upon the fundamental right of data protection should be binding and specific in order to provide a proper legal basis for the processing of personal data. The obligations of the Chicago Convention are of a general nature, and the Working Party is therefore concerned that the provisions of the Chicago

¹ Official Journal L 261 , 06/08/2004 P. 0024 – 0027

Convention do not provide sufficient legal basis for such processing. The Chicago Convention does not explicitly refer to API data which apparently are collected by airlines on request of third countries authorities and not as a part of their business necessity. It also does not directly provide for the transfer of data prior to either landing at its intended destination or, intentionally or unintentionally, entering the airspace of another country whilst en route to its destination (“overflight”). At the same time, the Working Party is aware of the historical context of the Chicago Convention, originally drafted in 1946, as well as of changes in traveling volumes and technological progress since. The data currently considered as API data are the same data that would in general be collected at the border by the competent authorities as part of the regular border control upon entry into a third country. It remains questionable however whether data collection by airlines in the EU territory and the transfers to a third country could find a legal ground in the broad interpretation of a general text.

In order to avoid any misunderstanding, the Working Party wishes to make clear that even if the Chicago Convention was to be interpreted as giving a basis for the processing of API data, this should never allow for function creep and be applied to other kinds of transfers, such as those of PNR data. The Working Party would like to stress that the processing of API and PNR data differ in their amount, sensitivity and in their purpose. The Working Party is of the view that even a broad interpretation of the Chicago Convention would in any case always be limited to the scope of data which are normally required to be presented by a passenger upon entrance into a state on presentation at the border, i.e. including travel documents.

As a conclusion, in order to remove legal uncertainty and ensure consistency, the Working Party is of the view that it is necessary and urgent that the European Commission takes steps to introduce an explicit legal base into European law.

When establishing this legal basis, these are the considerations to take into account:

- API data should be collected and transferred only if required under the laws of the country of destination;
- API data should be collected and transferred by the airlines upon check-in only for the purpose of fulfilling border control obligations of the third country and be deleted without delay once the aircraft has reached its final destination;
- The scope of transferred data should be limited to the information contained in the Machine Readable Zone of the passport or another travel document;
- Biometric data may not be transferred;
- Airlines' passengers should be informed of the transfer before purchasing their ticket as well as at the moment the API data are collected. The Working Party also advises the European Commission to take initiatives on the EU level in this regard.
- The new legal basis should also provide for adequate safeguards for data subjects, including modalities to exercise their rights.

The Working Party requests that the European Commission takes action to initiate proceedings to create a solid legal basis for transfer of API data to third countries at EU level and examine the feasible solutions, for instance during the evaluation and revision of Directive 2004/82/EC.

The Working Party furthermore requests the European Commission and the Member States to commence a dialogue with the international community, especially within ICAO, in order to establish an international legal instrument on the global conditions for API data transfers and to provide necessary data protection safeguards.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman