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IMPORTANCE OF PERSONAL DATA PROTECTION LAW FOR COMMERCIAL AIR TRANSPORT

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Abstract

In the review below the author presents a general overview of the selected contemporary legal issues related to the present growth of the aviation industry and the development of aviation technologies. The review is focused on the questions at the intersection of aviation law and personal data protection law. Massive processing of passenger data (Passenger Name Record, PNR) in IT systems is a daily activity for the contemporary aviation industry. Simultaneously, since the mid-1990s we can observe the rapid growth of personal data protection law as a very new branch of the law. The importance of this new branch of the law for the aviation industry is however still questionable and unclear. This article includes the summary of the author`s own research conducted between 2011 and 2017, in particular his audits in LOT Polish Airlines (June 2011-April 2013) and Lublin Airport (July - September 2013) and the author`s analyses of public information shared by International Civil Aviation Organization (ICAO), International Air Transport Association (IATA), Association of European Airlines (AEA), Civil Aviation Authority (ULC) and (GIODO). The purpose of the author`s research was to determine the applicability of the implementation of technical and organizational measures established by personal data protection law in aviation industry entities.
Keywords: aviation industry, aviation law, aviation security.

1. INTRODUCTION

2014 marked the 100th anniversary of the first commercial passenger flight. It took place on January 1, 1914 between St. Petersburg and Tampa (Florida, USA). This date can be considered as the symbolic beginning of commercial air transport (CAT, *commercial air transport*). The world has undergone vast changes over the ten decades that have passed. The growth of the aviation industry played a vital part in – and in a great measure stimulated – the development of the economy, technology, and law. The advances made in these fields dramatically changed the lives of the statistical citizen of Earth, making him a potential passenger, able to quickly travel across the globe thanks to the commercial passenger air transport services provided by airlines. The many benefits brought by the development of the aviation industry were soon followed by new challenges and risks. The appearance of a new means of global passenger transport necessitated the creation of adequate legal norms in the fields of public law and private law, both national and international, which would regulate the rights and obligations of the suppliers of transport services and those of the consumers

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of such services. Already in the 1930s civil aviation (and later its ground infrastructure as well) became the victim of but also tool of terrorists and common criminals. The apogee of aviation terrorism came with the attack on the World Trade Center on September 11, 2001 perpetrated in the United States by Islamist terrorists from the Base organization (Al-Quaeda), and which sparked a wave of terror aimed mainly at Western states and societies. These events had an enormous impact on the entirety of modern law in view of combating terrorism, including the regulations pertaining to airport security and the protection of civil aviation worldwide, including Poland [1]. They also influenced the defining of a series of new legal and technological instruments currently used to counteract phenomena that are a threat to public security. Many of these instruments consist primarily of the gathering and analysis of passenger personal data. Considering the fact that "personal data" is understood as any and all data concerning an identified or identifiable individual, airlines are forced to analyze new challenges, among others resulting from the rapid and uninterrupted 20 year increase of personal data protection law.

2. SECURITY ISSUES IN CIVIL AVIATION

Aviation law (both national and international) on its many levels, regulates different aspects of the functioning of the aviation sector. In the subject of aviation safety, there has been a swift increase in regulation and a spreading of safety culture, based on the idea that "man is the weakest link in the aviation safety system" [2]. Currently, in the European Union (EU) the key legal act regulating this question is Regulation (EC) 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA) [3]. This agency is responsible for aviation safety in the whole EU. Equally voluminous law currently regulates the question of aviation security. Without a doubt the phenomenon of aviation terrorism influenced the development of national and international criminal regulations concerning the aviation sector, its security, and the protection of civil aviation [4]. This process began in the 1960s [5] and a key international act of law in this area is still Annex 17 to the Chicago Convention [6], which first appeared in 1975. In the European Union this regulation has been supplemented by an array of directives, the most prominent of which is Directive 300/2008 on common rules in the field of civil aviation security [7].

In the Republic of Poland's domestic law the subject of civil aviation security is regulated by the Aviation Law [8] and a series of implementing acts, among which a key role is played by the Regulation on the National Civil Aviation Security Programme [9].The most radical solution adopted at the time by the Aviation Law was the right to destroy a civilian aircraft which "is used in an illegal manner, in particular as a means to perform a terror attack from the air". This regulation was adopted in 2004 but was annulled in 2008 when the Polish Constitutional Court decided it was unconstitutional [10].

In the context of the aviation sector today, instruments based on the gathering and analysis of passenger personal data play a key role in assuring public safety. These appear most often in the form of acronyms such as API (Advanced Passenger Information) and PNR (Passenger Name Record). These acronyms represent passenger personal data gathered through the Departure Control Systems (DCS) and the Computerized Reservation Systems (used below as CRS), respectively. The development of these instruments revealed how many ambiguities and problems appear in activities of the aviation sector, when they intersect with personal data protection laws. The number of areas where such intersection appears will continue to grow, even in cases like unmanned aerial vehicles (UAV) equipped with cameras [11]. Institutions responsible for personal data protection consider that using drones opens the possibility of recording the facial features and other information on individuals [12].

3. PERSONAL DATA AND AVAITION TRANSPORT

It is a well known fact that creating customer databases is a common practice of service providers in all branches of the economy, whose objective is to maintain and develop their own services. This phenomenon occurs in the aviation industry as well, whose services were used by 3.5 billion passengers in 2015 alone, and this number is growing every year [13]. In 2016 in Poland, which is not a transportation leader, airports serviced over 34 million passengers [14]. PLL LOT, the national carrier, transported over 5.5 million passengers during the same year [15]. Airlines around the world thus have millions of records in their databases containing the personal data of their passengers. These records primarily serve the purpose of making reservations, ticket sales, and many other tasks that are part of the complicated service that is commercial international passenger air transport. Passenger data contained in these records is also transferred between airlines, which is a very common occurrence, particularly inside the so-called airline alliances, when the service is provided simultaneously by two or more cooperating airlines.

Thus it can be said that the subject of personal data protection in the scope of the aviation sector is since its beginning an integral part of the civil law aspect of the services provided to passengers (as individual persons) by the airlines based on the contract of carriage. Airlines gather the personal data of their passengers for two obvious reasons: they are essential in order to fulfill the contract of carriage in the way requested by the passenger and to fulfill the legal obligations imposed upon them regarding civil aviation protection, border protection, and combating terrorism and serious crime.

Of course the simple fact of processing passenger personal data with the aim of fulfilling the contract of carriage prompts serious consequences in view of personal data protection law. The regulations are common to all "data controllers", that is entities that autonomously define the goals and means of processing personal data. This is precisely the status of airlines, and the law requires them to respect rules regarding safekeeping personal data from unauthorized access, processing the data only for defined purposes, within a predetermined scope, and based on legal grounds. Every person concerned by this data – called the "data subject" by subject literature – should also be informed by the data controller of his rights and of everything that is done with his personal data. In practice, the fulfillment of these obligations in the case of airlines is a very difficult undertaking. Unfortunately serious debate on this matter began only in 2003 with the discussions regarding the legitimacy of sharing by European airlines of their passengers' personal data with United States border protection authorities [16].

4. PERSONAL DATA PROTECTION LEGISLATION AND THE SPECIFICITIES OF THE AVIATION SECTOR

Processing of passenger personal data by airlines accompany aviation transport services since the beginning of these services. This means that they took place even before personal data became an independent legal institution. The creators of the first legal regulation for civil aviation, which date from the first part of the 20th century, evidently could not have foreseen the directions of aviation development, the different uses for passenger personal data in the future, or even the creation of legal protections for the institution of "personal data". It was only in the 1950s [17] and 1970s [18] that international public law created the first solutions aiming for the protection of the "privacy" of natural persons.

In the case of Europe, the beginning of the legal protection of personal data can be associated with the year 1981 when the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108) was adopted [19]. In the case of the aviation

industry, the first regulation partially approaching the issue of the protection of personal data protection was the Regulation from 1989 on a code of conduct for CRS [20], in which attention was drawn to the necessity of protecting passenger data when it is amassed in reservation systems. The real revolution came with the adoption of 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 [21] (used below as Directive 95/46/EC). This directive defined a wide set of rules on processing personal data by all entities operating in the European Community or using information and communication infrastructure situated there for purposes of processing personal data.

The Convention No. 108, the Directive 95/46/EC and the national legislations implementing them in member states (in Poland it is The Act of 29 August 1997 on the Protection of Personal Data [22]) are of a rather general nature and regulate the protection of personal data on a higher level, leaving to sector regulations the task of adapting the general rules and logic of personal data protection to the specificities of each sector. In the case of the aviation sector, however, no comprehensive effort was undertaken in this direction. In practice it is only with the development of law and technology in the field of aviation security and of new tools for fighting terrorism and organized crime, that initiated the aviation sector's wide and conscious contact with the issue of personal data protection. The signing in 2004 of the first agreement between the European Union and the USA concerning giving access to PNR data for counter terrorism uses [23] was a true demarcation line, beyond which passenger personal data protection took on a whole new meaning and dimension. It also became the center of interest of the media and of privacy advocates.

It is a fact that the effectiveness of any legal regulations concerning personal data protection depends on their application in practice. Airlines are not normal enterprises, however, and the way how their processes passenger personal data cannot be easily compared to such processes conducted on data from any other group of consumers. Not only airlines, but a whole series of other entities are involved, on many different levels and stages of aviation transport, in the processing of passenger personal data. Such entities are sales agents, vendors of reservation systems and of departure control systems, ground handling agents, airport management companies, and even the companies that manage loyalty programs. These intermediaries and the role they play at the different stages of air transport are practically unknown to the average passenger. These entities are connected through a network of complex relationships, which impedes the unambiguous determination of such essential questions such as, for example, who the data administrator is. This is a key role from the standpoint of personal data protection, since it is the data controller who is responsible for fulfilling the requirements set by personal data protection laws. He is, for example, burdened with the obligation to inform the passenger about all the essential questions regarding the use of his personal data. In practice, the implementation of even this basic and apparently simple obligation is a great difficulty for carriers. American privacy expert Edward Hasbrouck has been disputing with North-American and European airlines for over a decade, demanding that they respect the basic principles of personal data protection. Hasbrouck demands that carriers provide the most basic information about what they do with his personal data, what data they possess, who they share it with, and who the data administrator is. The author's successive publications [24] clearly show how problematic it is for airlines t answer this type of questions. At the same time there is a whole list of doubts about the formal and legal grounding of certain actions undertaken by carriers. Such doubts exist for example in the legality of gathering certain types of information on passengers, particularly such that can reveal their ethnic and/or religious background, which are part of what is called sensitive data. Under scrutiny is also the respecting by carriers of the requirements of personal data protection laws, regarding the necessity of obtaining the passenger's consent so that the carrier can then perform certain operations using this personal data. In all these cases, the situation is immensely complicated

by the fact that the service of international air transport is, in practice, carried out under the legal framework of at least two countries, and that the carrier and his supporting service providers may function through an unlimited number of intermediaries scattered around the globe, functioning within the legal systems of many countries.

The conflict between the legal systems of two or more different countries is increasingly intertwined with the opposition between two important ideals and the legal framework protecting both of them, namely the right to privacy and public security. This aspect takes on more importance along with the development of these security instruments which base on passenger personal data analysis. This is accompanied by the development of national security legislations, but also by the appearance of international agreements pertaining to the sharing of passenger data between the security services of different countries. The European Union itself has so far signed such agreements with the USA [25], Canada [26], and Australia [27]. Mexico will soon join this group. At the same time the European Union adopted, in 2016, its own internal legal instrument – the so called directive on European PNR [29] – to assist in the fight against terrorism and organized crime by analyzing the personal data of passengers flying into European airports or departing from them. Poland was one of the countries supporting this solution and highly evaluating its effectiveness [29]. This type of security instruments are based on the passenger personal data, accumulated by reservation and border control systems. These systems are a whole different discussion, because the information technologies used by the aviation sector to process passenger data constitute from their beginning a closed and "parallel" world, known and understood practically only by the specialists in the sector [30]. These systems are defined, beyond their global reach, by the simultaneous accessibility of the same system and the passenger personal data it contains by a large number of carriers and intermediaries engaged in a single transport. In practice, this denotes a constant, automated, international transfer of passenger personal data between an undefined and often completely unknown number of entities and computer systems (reservation, border control, and other support systems), whose infrastructure is dispersed around the world and depends on a myriad of legal environments. The other side of the coin is the peculiarly archaic nature of the reservation systems, resulting from the maintaining of legacy technical systems dating from the time when the first such systems were implemented.

Use of CRS systems began in the 1960s, but the first legal regulations concerning them appeared only in 1989. They endeavored to define the basic rules for the protection of passenger data stockpiled in reservation systems. Over the next two decades, European lawmakers worked on solutions that would assure the compatibility of CRS systems with the requirements of European law regarding personal data protection as defined by Directive 95/46/EC, but would at the same time take into account the specificity of the services delivered by these reservation systems. These efforts led to the adoption of Regulation 80/2009/EC on a code of conduct for CRS [31]. A review of the effectiveness of the implementation of this ordinance, conducted in 2012 on the order of the European Commission, showed that even the leading vendors of such systems could not satisfy the requirements set by this legal act [32]. Also, according to independent experts, CRS systems still do not satisfy the basic information technology safety requirements, which means that they continue to violate the standards of personal data protection [33].

The creation and development of both the computer systems used by carriers, and of the security programs based on the use of passenger personal data, caused the multiplication of the number of processes (among which data storage) using such data. They also increased the role and the importance of carriers and other entities of the aviation sector in the context of the obligations of the market to the consumers in regards to personal data protection [34].

5. THE SYSTEMIC SOURCES OF THE CURRENT LEVEL OF PERSONAL DATA PROTECTION IN THE AVIATION SECTOR

The degree of intricacy and complexity of the practices involved in the processing of passenger personal data makes these issues unknown and hard to understand by the average passenger, but also difficult to be wholly grasped by the carriers themselves and by other entities of the aviation sector [35]. The issues created at the intersection of aviation law and personal data protection law are even more problematic and unclear for the government administration, lawmakers, and oversight agencies [36]. It is not surprising then, that in both national and international aviation law we will not find attempts at an systemic regulation of passenger personal data protection laws. The adopted legislation is fragmentary at best, but this cannot be imputed exclusively to the relative novelty of the issue. The great number of legal regulations characteristic of aviation law, their complex structure and hierarchy, and frequent modifications, make any eventual attempt by legislators at creating a unified regulation of personal data protection in the aviation sector a very difficult task. A practical obstacle is the lack of any real dialogue between practitioners from the aviation sector, lawyers, and lawmakers. Representatives of the aviation sector often claim that during the process of creating new aviation regulations lawmakers very often ignore the knowledge and experience of practitioners from the aviation sector and the specificities of the sector itself [37]. Legislators often treat in the same manner any remarks regarding personal data protection, reported to them by data protection authorities, such as the General Inspector of Personal Data Protection (GIODO) in Poland [38]. The lack of adequate regulation and of an unambiguous doctrine on passenger personal data protection creates a misplaced and dangerous conviction in the sector about the triviality of these issues, along the lines of: "*Customers don't expect it, regulators don't require it, and competitors don't do it*". This directly and negatively impacts the level of personal data protection in the aviation sector. In Edward Hasbrouck's opinion, the privacy of airline passengers is less well protected than that of the clients of any other commercial and service sector.

This state of affairs should be regarded very critically, reminding that whatever the circumstances, currently all entities of the aviation sector which are registered in European Union member states are obligated to protect personal data in accordance with the law, in particular with Directive 95/46/EC and the national legal acts adopted to implement it. In the case of Poland this is the Act on the protection of personal data. The described state of affairs must be rapidly changed, because it is also in conflict with the evolving trend in personal data protection law, an example of which is the General Data Protection Regulation (later called GDPR) [39]. This regulation will come into effect on May 25, 2018 and will replace Directive 95/46/EC. It will affect all enterprises who process the personal data of natural persons "who are in the Union", without any regard for the enterprises' place of registration or the localization of their headquarters. In consequence, practically all international air carriers will fall within the jurisdiction of GDPR.

GDPR was devised with the intention of not only creating effective and universal mechanisms of personal data protection in the individual sectors of the global economy, but also of giving the data subjects effective tools for the execution of their rights, and of creating effective oversight instruments for regulators. An expression of the latter is a system of fines included in GDPR, including administrative fines up to 20 000 000 EUR, and in the case of companies, up to 4% of their total global turnover from their last fiscal year.

The aviation industry has hoped since the start that GDPR would help sort out at least some of the problems that affect the industry. Their representatives submitted many valuable comments and proposals to the draft Regulation [40]. One of the important aspects of the new personal data protection law will be an important openness to self-regulation of specific industries. The aviation sector has already undertaken several own regulatory endeavors. The International Air Transport

Association (IATA) had already attempted in the past to create its own recommendations and guidelines in the area of processes of passenger personal data protection. The effect of this effort was a document (Recommended Practice 1774) titled "Protection of privacy and trans-border data flows of personal data used in international air transport of passengers and cargo" (used below as RP 1774) [41]. This document can be considered as the most advanced attempt at self-regulation undertaken by the aviation industry in areas where comprehensive legislation was lacking. This document was well received by European data protection authorities [42], but of course it is only a so-called drop in the ocean of needs.

The author considers that further self-regulation and the full implementation of the solutions brought by GDPR is, for the airlines and for other entities of the aviation sector, the basic condition for changing the current state of affairs, which can be described as a low sensitivity to the requirements of data protection law coupled with minimal enforcement on the side of oversight agencies. It must be understood that the right to privacy is a fundamental right of every natural person using the services of the air transport industry. Information technology must make advances as well, and guard these rights by implementing innovative solutions that will merge the functionality of reservation systems with the security of the data they contain. A wide catalog of data subjects' rights regarding his right to access his own data will require the aviation sector to find adequate technical and organizational solutions. Particularly when faced with millions and millions of passengers who have the right to ask questions about the state of their personal data. This will be a great challenge for carriers who in many cases have not even designated a company representative for personal data protection. Additionally the development of security instruments based on the transfer of passenger data to security agencies will make the implementing of GDPR in the aviation sector problematic due to pressure from both the privacy advocates and from government agencies responsible for national security. The only solution to this problem is the speedy and thorough implementation of GDPR.

6. CONCLUSION

Commercial air transport (CAT) is currently the fastest growing transportation sector [43]. The objective of successive evolutions is the fastest, cheapest, and safest providing of highest quality services to the greatest number of passengers. They are accompanied by the evolution of new technologies which aim at increasing security of air transport, and of instruments that process passenger personal data in order to increase border protection efficiency and to counteract terrorism and organized crime [44]. The current social and political situation in the world, characterized by an increased danger of terrorism, indicates that the current "shift towards more security", adopted by Western countries after 2001, will be continued. This means that successive security instruments based on the stockpiling and analyzing of passenger data are becoming a real, lasting, and integral elements of security systems. This is an additional motivation for the aviation sector as a whole, for its organizations, associations, and individual carriers, to assure the compliance of the processes in their passenger personal data processing systems with the requirements set forth by the new but rapidly growing branch of the law that is personal data protection law. The aviation industry must not fail at this task.

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ZNACZENIE PRAWA OCHRONY DANYCH OSOBOWYCH DLA KOMERCYJNEGO TRANSPORTU LOTNICZEGO

Streszczenie

W niniejszym artykule poglądowym autor przedstawia wybrane problemy prawne, jakie towarzyszą obecnie rozwojowi sektora lotniczego i technologiom używanym przez ten sektor. Szczególną uwagę autor zwraca na zagadnienia powstające na styku prawa lotniczego i prawa ochrony danych osobowych. Masowe przetwarzanie danych osobowych pasażerów (Passenger Name Record, PNR) za pomocą systemów teleinformatycznych stanowi obecnie codzienność sektora lotniczego. Równocześnie od połowy lat 90. XX w. trwa gwałtowny rozwój nowej dziedziny prawa, jaką jest prawo ochrony danych osobowych. Rola prawa ochrony danych osobowych

w działalności sektora lotniczego nadal pozostaje jednak zagadnieniem budzącym wiele wątpliwości i niejasności. Niniejszy artykuł stanowi podsumowanie wyników badań własnych, przeprowadzonych przez autora w latach 2011-2017, w szczególności zaś jego działań audytowych zrealizowanych w Polskich Liniach Lotniczych LOT S.A. (czerwiec 2011–kwiecień 2013) i Porcie lotniczym Lublin (lipiec-wrzesień 2013) oraz analizy informacji publicznych, udostępnionych przez Organizację Międzynarodowego Lotnictwa Cywilnego (ICAO), Zrzeszenie Międzynarodowego Transportu Lotniczego (IATA), Stowarzyszenie Europejskich Linii Lotniczych (AEA), Urząd Lotnictwa Cywilnego (ULC) i Generalnego Inspektora Ochrony Danych Osobowych (GIODO). Celem badań było określenie zasadności i skali potrzeb w zakresie wdrożenia przez podmioty sektora lotniczego rozwiązań techniczno-organizacyjnych wymaganych przez przepisy międzynarodowego i krajowego prawa ochrony danych osobowych.

Słowa kluczowe: sektor lotniczy, prawo lotnicze, ochrona lotnictwa cywilnego, ochrona danych osobowych.