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*Committee on Civil Liberties, Justice and Home Affairs*

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**2011/0126(NLE)**

10.10.2011

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## **DRAFT RECOMMENDATION**

on the draft Council decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service  
(09825/2011 – C7-0000/2011 – 2011/0126(NLE))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Sophia in 't Veld

***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the draft Council decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service (09825/2011 – C7-0000/2011 – 2011/0126(NLE))**

**(Consent)**

*The European Parliament,*

- having regard to the draft Council decision (09825/2011),
- having regard to the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service annexed to the above-mentioned draft Council decision,
- having regard to the Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries (COM(2010)0492),
- having regard to its resolutions of 14 February 2007 on SWIFT, the PNR agreement and the transatlantic dialogue on these issues<sup>1</sup>, of 22 October 2008 on the evaluation of the Australia-EU PNR agreement<sup>2</sup>, of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada<sup>3</sup>, and of 11 November 2010 on the global approach to transfers of PNR data to third countries<sup>4</sup>,
- having regard to the opinions of the European Data Protection Supervisor of 19 October 2010 on the Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries<sup>5</sup> and of 15 July 2011 on the proposal for a Council Decision on the conclusion of an Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service<sup>6</sup>,
- having regard to Opinion 7/2010 of 12 November 2010 on the European Commission's Communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries adopted by the Article 29 Data Protection Working Party,
- having regard to the request for consent submitted by the Council in accordance with Article 218(6), second subparagraph, point (a) in conjunction with Article 82(1), second subparagraph, point (d) and Article 87(2), point (a) of the Treaty on the Functioning of the European Union (C7-0000/2011),

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<sup>1</sup> OJ C 287 E, 29.11.2007, p. 349.

<sup>2</sup> OJ C 15 E, 21.1.2010, p. 46.

<sup>3</sup> OJ C 81 E, 15.3.2011, p. 70.

<sup>4</sup> Texts adopted, P7-TA(2010)0397.

<sup>5</sup> OJ C 357, 30.12.2010, p. 7.

<sup>6</sup> Not yet published in the Official Journal.

- having regard to Article 16 of the Treaty on the Functioning of the European Union and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union,
  - having regard to Rules 81 and 90(7) of its Rules of Procedure,
  - having regard to the recommendation of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee of Foreign Affairs (A7-0000/2010),
1. Consents to the conclusion of the Agreement;
  2. Considers that procedure 2009/0186(NLE) has lapsed as a result of the 2008 PNR Agreement between the European Union and Australia being replaced by the new PNR Agreement;
  3. Instructs its President to forward its position to the Council, the Commission and the governments and parliaments of the Member States and the government of Australia.

## EXPLANATORY STATEMENT

### **I. Background**

The European Union is negotiating three international agreements, with Australia, Canada and the US, on the processing and transfer of Passenger Name Record (PNR) data. PNR data is provided by passengers, collected by air carriers and used for their ticketing, reservation, and check-in systems. Given its commercial nature, PNR contain several kinds of information, ranging from names, addresses, passport numbers, and credit card information to information on other passengers, travel routes, and travel agents.

The present agreement with Australia follows from the Australian border protection legislation, which empowers Australian Customs to risk assess international airlines' Passenger Name Record (PNR) data prior to passenger arrival in Australia. Under this legislation, airlines are obliged to provide Customs with access to the PNR data they hold. Compliance with these Australian requirements by the airlines, however, created problems with European data protection legislation. To solve these problems, the Commission entered into negotiations with Australia in order to establish the conditions that would allow access to the PNR data.

A European legal framework allowing airlines to transfer passengers' PNR was put in place by a European Council Decision 2008/651/CFSP/JHA of 30 June 2008 that concerned the signing of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service. As Council could not reach the required unanimity on the conclusion of the Agreement, the Agreement applied provisionally as from 30 June 2008, in 17 EU Member States.<sup>1</sup>

With the entry into force of the Lisbon Treaty on 1 December 2009, the ordinary legislative procedure started to apply with regard to negotiating international agreements including a right to consent for the European Parliament. After having received Council's request for consent on 15 February 2010, the European Parliament adopted a resolution on 5 May 2010 to postpone the vote on this request for consent. In its resolution it urged the European Commission to come up with a coherent approach to the use of PNR, based on a single set of principles - bearing in mind the two other PNR Agreements with the US and Canada and the rise in requests for the use of PNR data, from countries like Saudi Arabia, South Korea, New Zealand.<sup>2</sup> This approach, embraced by both Council and Commission, seemed to be the pragmatic option when more and more countries are requiring the transfer of PNR.

With a Communication on the global approach to transfers of PNR data to third countries, and new negotiation mandates approved by Council, the Commission and Australia started new negotiations in January 2011. The Commission initialled the Agreement and sent a

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<sup>1</sup> Ten EU Member States, namely Belgium, Czech Republic, Germany, Ireland, Latvia, the Netherlands, Hungary, Poland, and Finland issued statements to the effect that they had to comply with their own constitutional procedure.

<sup>2</sup> To date, 11 countries have filed a request at the European Commission for PNR data.

recommendation to Council on 19 May 2011 to sign and conclude the Agreement. Council adopted the Agreement on 22 September 2011, and the Agreement was signed on 29 September 2011. On the same day the European Parliament received Council's request for consent.

## **II. Assessment of EU-Australia PNR Agreement**

It must be borne in mind that third countries are sovereign states that determine the requirements for persons to enter their country. Therefore, the European Union cannot ban the collection, storage and use of PNR data by third countries. The European Union only gets to decide whether the conditions for the transfer of those data are in line with EU data protection standards. In the absence of an agreement, third countries will continue to collect and store PNR data of European citizens.

On 5 May 2010 and 11 November 2010 the European Parliament set out its criteria for giving its consent to agreements with third countries on the transfer of PNR data.

These criteria were:

1. The necessity for mass collection and storage of PNR data must be demonstrated, supported by factual evidence for each of the stated purposes.
2. The proportionality (i.e. that the same end cannot be achieved with less intrusive means) must be demonstrated.
3. The purpose must be limited clearly and strictly on the basis of clear legal definitions based on definitions in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism and in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant).
4. The method of transfer must be only "push" (i.e., filtered data to be transmitted by airlines to the requesting authorities of third countries) instead of "pull" (whereby third countries have direct access to European databases).
5. PNR data shall in no circumstances be used for data mining or profiling.
6. The onward transfer of data by the recipient country to third countries must be in line with EU standards on data protection, to be established by a specific adequacy finding;
7. Results must be immediately shared with the relevant authorities of the EU and of the Member States (reciprocity).
8. The legal basis of the Council Decision concluding the agreement must include Article 16 TFEU.

Most of these criteria have been included in the negotiating mandate adopted by the Council.

The European Parliament has assessed the new draft EU-Australia PNR Agreement against these criteria. The European Parliament has concluded that many of the criteria have been fulfilled to a satisfactory level, and it will therefore give its consent to the conclusion of the Agreement.

The European Parliament gives a positive assessment of the following points:

- The purpose definition has been considerably tightened, to include only the purpose of preventing, detecting, investigating and prosecuting terrorist offences or serious transnational crime. Clear definitions of both terms are provided for in the Agreement,

on the basis of the relevant EU instruments. Close monitoring of the application of the Agreement will have to demonstrate that the purpose definition is sufficiently precise, and does not leave room for using PNR for other purposes.

- The method of transfer of the data is push only, with a maximum of five scheduled transfers per flight.
- The Agreement foresees sharing of relevant and appropriate analytical information, as soon as practicable, to the Member States concerned, or to Europol and Eurojust.
- EU citizens have a right to effective administrative and judicial redress in Australia, and data protection safeguards concerning access, rectification, erasure, and data security are ensured.

However, it must be pointed out that a number of criteria have not been met in full, and that a number of concerns remain. These concerns are also relevant for PNR agreements with other third countries.

The European Parliament notes that the following criteria have not been met in full:

- There is no specific mention of profiling in the Agreement, but it is not specifically excluded either. Despite repeated requests, the European Commission has refused to provide a legal definition of profiling and similar automated search methods.
- The rules on onward transfer seem broadly in line with EU data protection standards, in particular with the appended statement requested by the Council. However, there are still concerns whether the provisions regarding onward transfer are adequate. Close monitoring of the application of the Agreement will have to show if a further tightening of those provisions is needed.

The European Parliament has the following remaining concerns:

- The European Commission has only partially and insufficiently demonstrated the necessity and proportionality of the mass collection and storage of data. Anecdotal evidence and on site visits by delegations of the European Parliament have clarified the use of PNR for some purposes. However, the detailed justification for each of the stated purposes (counter terrorism and fighting serious transnational crime) and for each of the methods of processing (re-actively, real time and pro-actively), as requested by the European Parliament, has yet to be given.
- In this respect, no justification has been given for the long term storage of identifiable data of all travellers. The retention period of 5,5 years appears to be fairly random, and not based on specific evidence. This is in conflict with legal requirements of necessity and proportionality, and with relevant jurisprudence, notably rulings by national constitutional courts on the proportionality of long term mass storage of personal data, in the absence of any suspicion or charge. For this reason it is expected that the Council will be unable to approve the Agreement with unanimity, as one or more Member States may abstain or vote against. This demonstrates that the issue is problematic.
- The European Commission has insufficiently explored alternative, less intrusive measures, for example the use of API or ESTA data for the identification of suspects.
- The European Commission has failed to request an opinion of the EU Fundamental Rights Agency on the specific agreement with Australia. The European Commission has not taken on board all the recommendations of the European Data Protection

Supervisor, nor explained why certain recommendations have not been taken on board.

- The appropriate legal basis for the Agreement should be, in any case primarily, Art 16 TFEU (on data protection). However, it is not included in the legal base, but and only a general, non binding reference is included in the pre-amble. As stated above - and as stated by the European Data Protection Supervisor in its opinion of 15 July 2011, the purpose of the Agreement is to ensure that the transfer of data is in line with EU data protection standards. Therefore, the Agreement should not be based on Article 82(1)(d) and Article 87(2)(a), but on Article 16 TFEU. If the purpose were police-judicial cooperation, then the EU could theoretically decide against the collection of PNR data by Australia. But this is a sovereign decision by a third country. Therefore, it is not EU policy as it is not for the EU to decide. The chosen legal base is clearly not the correct one.

In public debates following the adoption of the resolutions, the European Parliament asked for further procedural safeguards regarding the cooperation between the EU institutions. With regard to the implementation of Art 218 TFEU on the conclusion of international agreements, and the application of Article 23 (dispute resolution and suspension of the Agreement) and Article 25 (termination) of the EU-Australia PNR Agreement, the European Parliament notably asked a public commitment by the European Commission to submit proposals for the suspension or termination of the Agreement, upon a request by the European Parliament. The European Commission has given this assurance in a public statement during the plenary session of the European Parliament on 4 July 2011.

The Commission is asked to confirm this commitment by an exchange of letters between the Presidents of the two institutions.