

Opinion of the European Data Protection Supervisor

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

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

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,¹

Having regard to Article 41 of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data,²

HAS ADOPTED THE FOLLOWING OPINION

I. Introduction

1.1. Consultation of the EDPS

1. On 19 May 2011 the Commission adopted a Proposal for 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 Service³. The proposal was sent to the EDPS on 23 May.
2. The EDPS has been consulted informally in the course of May 2011, in the context of a fast track procedure, on the proposals relating to an agreement between the European Union and Australia on the processing and transfer of PNR data.

¹ OJ L 281, 23.11.1995, p. 31

² OJ L 8, 12.01.2001, p. 1

³ COM(2011) 281 final.

3. Considering that his comments remain valid with regard to the substance of the Proposal adopted by the Commission and submitted to the Council and the Parliament, the EDPS has decided to make his observations more widely available in the form of a public opinion. In this way, the observations can be taken on board in the further debates on the proposal.
4. The EDPS uses this occasion to raise some further issues and encourages Council and Parliament to take these views into account when deciding on the proposal under Article 218 TFEU.

1.2. Context of the Proposal

5. The agreement between the EU and Australia on PNR data is a further step in the EU agenda, which includes global PNR guidelines, setting-up an EU-PNR scheme and negotiating agreements with third countries⁴.
6. The EDPS has closely followed the developments relating to PNR and has recently adopted two Opinions on the "PNR package" of the Commission and on the Proposal for a Directive on EU-PNR⁵. The views expressed by the EDPS on PNR schemes complement and are to a great extent consistent with those of the Article 29 Working Party⁶, but also with other recent documents including the opinion of the Economic and Social Committee⁷ and the opinion of the Fundamental Rights Agency⁸.
7. As developed below, the consistent approach of the EDPS has always been to confront the purpose of PNR schemes with the fundamental requirements of necessity and proportionality, and to analyse in a second stage the details of the provisions in order to suggest improvement where relevant.

1.3. Preliminary observation

8. The EDPS welcomes the general approach which aims at harmonising data protection safeguards in the various PNR agreements with third countries. However, some observations still need to be raised.

⁴ See in particular the Communication of the Commission of 21 September 2010 on the global approach to transfers of Passenger Name Record (PNR) data to third countries, COM (2010) 492 final.

⁵ - Opinion of the EDPS of 25 March 2011 on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime;

- Opinion of the EDPS of 19 October 2010 on the global approach to transfers of Passenger Name Record (PNR) data to third countries.

Both opinions are available at <http://www.edps.europa.eu/EDPSWEB/edps/cache/off/Consultation>

⁶ WP29 Opinion 10/2011 of 5 April 2011 on the proposal for a Directive of the European Parliament and of the Council on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime:

http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2011_en.htm

⁷ Opinion of the European Economic and Social Committee of 5 May 2011 on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM(2011) 32 final

⁸ Opinion of the European Union Agency for Fundamental Rights of 14 June 2011 on the Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011) 32 final).

9. A consistent remark reiterated in EDPS Opinions and in Opinions of the Article 29 Working Party equally applies to the Australian PNR proposal: the necessity and proportionality of PNR schemes have to be demonstrated.
10. These two fundamental requirements are essential aspects of data protection law, under Articles 7 and 8 of the Charter of Fundamental Rights and Article 16 TFEU. The EU has to ensure that the requirements of EU data protection law are met, also in cases where data of European citizens are processed and transferred from the EU- territory to a third country. In such cases, the necessity and proportionality have to be evaluated and established, before any agreement can be signed. In addition to elements supporting the *necessity* of the PNR scheme, *proportionality* requires an adequate balance between the purpose followed and the processing of massive amounts of data resulting in a serious intrusion in the private life of individuals.
11. As far as PNR schemes are concerned, the purpose is to fight terrorism and serious (transnational) crimes, using the collection of massive amounts of data relating to all passengers, in order to perform risk assessment on these passengers. Up to now, the EDPS has not seen any convincing elements in the justifications presented for existing PNR schemes or for those being envisaged, such as the EU PNR scheme which he analysed in detail in his opinion of March 2011⁹.
12. Besides, would necessity be established, the EDPS emphasises that the proportionality test still needs to be met. He questions the balance between the processing of personal data on a large scale and the purpose followed, especially in view of the variety of crimes included in the scope of application of the draft agreement. He takes into account that for the fight of terrorism and serious crime other effective instruments are available.
13. The specific comments below are without prejudice to this preliminary and fundamental observation. The EDPS welcomes the provisions which foresee specific guarantees such as data security, enforcement and oversight, as well as those relating to onward transfers. At the same time, he expresses concern, in addition to the necessity and proportionality of the scheme, about the scope of definitions and the conditions of retention of data.

II. Analysis of the Proposal

2.1. Legal basis

14. The EDPS notes that the agreement is based on Article 82 (1)(d), Article 87 (2)(a) and Article 218 (6)(a) of the Treaty on the Functioning of the European Union. He recalls that the objective factors to be considered for the choice of the legal basis include in particular the aim and the content of the measure¹⁰. If examination of an EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded

⁹ Opinion of the EDPS of 25 March 2011 on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; see also the opinion of the Article 29 Working party, mentioned *supra*.

¹⁰ Case C-491/01, British American tobacco, in particular paragraphs 92-93.

on a single legal basis, namely that required by *the main or predominant purpose or component*.¹¹ By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases.¹²

15. Against the background of the settled case law, as briefly summarized, and apart from Article 218(6)(a), the EDPS argues that the agreement should not be based on Article 82 (1)(d) and Article 87 (2)(a), but on Article 16 TFEU.
16. With regard to the purpose, it has to be recalled that the PNR agreements being negotiated by the EU have all been triggered by the need to reconcile the airlines' obligation to provide PNR data to third countries' authorities with the fundamental right to data protection.¹³ Moreover, the text of the proposal refers at many occasions to the *purpose* of the protection of personal data¹⁴.
17. As to the content, the predominance of data protection provisions in the agreement is self-evident. Apart from Articles 3, 4 and 6, it seems that data protection pervades almost the totality of the provisions of the agreement. This is obvious in Article 1 (purpose), Article 2 (definitions), Article 5 (adequacy), Article 7 to 19 (safeguards applicable to the processing of PNR data).
18. When it comes to the safeguards provisions (Articles 7 to 19), it should be noted that they contain provisions typical to data protection legislation¹⁵. The fact that an act contains provisions typically belonging to a specific field of law was considered by the Court as an element justifying one specific legal basis¹⁶.
19. In short, the EDPS considers that the purpose of the agreement, rather than improving police cooperation, is to mandate and authorise a transfer of personal data by private operators in view of the request of a third country. While such a transfer to a third country would in principle not be possible according to EU rules, the PNR agreement aims at enabling the transfer of personal data according to EU data protection requirements via the adoption of specific safeguards.

¹¹ Case C-42/97 Parliament v Council, paragraphs 39 and 40

¹² See, to that effect, Case C-491/01, British American tobacco, paragraphs 92-93, Case C-42/97 Parliament v Council, paragraph 38.

¹³ This is recognised by the Court in the factual part of the PNR judgments, Joined Cases C-317/04 and C-318/04, paragraph 33.

¹⁴ - The explanatory memorandum recognises that data protection laws of the EU do not allow the carriers to transmit PNR data to countries which do not ensure adequate level of protection. Hence, "a solution is required that will provide the legal basis for the transfer [...] in order to ensure [...] respect of individuals' rights to the protection of personal data".

- The objective of ensuring respect for the right to protection of personal data emerges also quite clearly from preamble, namely the recital citing Article 6 TEU, Article 16 TFEU, Article 8 ECHR, Convention 108, etc.

- The preamble also cites the relevant data protection provisions of Australian law, recognising that they provide for data protection, rights of access and redress, rectification and annotation and remedies and sanction for misuse of personal data.

- Article 1 of the Agreement – entitled "Purpose of the Agreement" –states that the agreement provides for the transfer of PNR data. It adds that the agreement "stipulates the conditions under which such data may be transferred and used *and the manner in which the data should be protected*" (emphasis added).

¹⁵ Such as provisions on sensitive data, data security, accountability, transparency, right of access, rectification and erasure, right of redress, automated processing, etc.

¹⁶ Opinion 2/00, Cartagena Protocol, paragraph 33

20. For these reasons, the EDPS believes that the agreement should - in any case primarily - be based on Article 16 TFEU¹⁷.

2.2. Purpose and definitions

21. The EDPS notes the fact that the purposes for which PNR data can be processed are precisely defined in Article 3 of the Proposal. He regrets however that the present definitions are wider than the definitions of the Proposal for a Directive on EU-PNR, which itself should still have been further narrowed down, especially with regard to minor offences.

22. While in the EU-PNR Proposal definitions take into account the *consequences* of activities defined as "terrorist", such as concrete damages to persons or governments (death, attacks upon the physical integrity, destruction to a transport system, an infrastructure facility, etc), the present Proposal is less specific and more *purpose* oriented when it refers to intimidating persons, governments, or seriously destabilising fundamental political or economic structures.

23. The EDPS considers that more precision is needed in relation to the notions of "intimidating, compelling and coercing", as well as the "fundamental *political, constitutional, economic, or (especially) social* structures of a country or an international organisation". This would prevent the application of the PNR scheme in cases which it should in any event not target, such as legitimate activities (for instance peaceful demonstrations) in a social, cultural or political context¹⁸.

24. The possibility to process data in other exceptional cases raises additional questions, especially as it extends to "threat to health". The EDPS considers that such an extension of purpose is disproportionate, especially as alternative and more specific procedures can be available to deal with important threats to health where needed on a case by case basis. Besides, PNR data is not the most appropriate tool to identify passengers: more reliable data do exist, in particular API data.

25. The EDPS also notes that the list of PNR data annexed to the Proposal exceeds what has been considered as proportionate by Data Protection Authorities in Article 29 Working Party Opinions¹⁹. This list should be reduced. In particular the inclusion of the field "General remarks" which can contain irrelevant -and potentially sensitive- data is not justified and should be deleted.

2.3. Sensitive data

26. The EDPS welcomes the exclusion of the processing of sensitive data from the scope of application, as stated in Article 8 of the Proposal. However, the drafting of this provision still suggests that sensitive may be "processed". The provision

¹⁷ In this context, reference should also be made to Declaration 21 "on the protection of personal data in the fields of judicial cooperation in criminal matters and police cooperation", attached to the Lisbon Treaty. The clear wording of Declaration 21 confirms that, even in cases where there is some element of police cooperation, a data protection instrument in this area should still be based on Article 16 TFEU (where appropriate with other provisions). This analysis would in no way prejudice the division of tasks within the European Commission.

¹⁸ In this respect, e.g. the fundamental right to freedom of assembly (Article 12 of the Charter of Fundamental Rights) should not be chilled by an overbroad drafting.

¹⁹ Opinion of 23 June 2003 on the Level of Protection ensured in the United States for the Transfer of Passengers' Data, WP78.

allows that these data are *sent* in a first stage by the airlines, and then *deleted* by public authorities in a second stage. The sending by the airlines is an act of *processing*. The EDPS considers that airlines should be obliged to filter out sensitive data at the source of the processing.

2.4. *Data security*

27. The Proposal includes in Article 9 a comprehensive provision on data security and integrity, which is welcome. The EDPS supports in particular the obligation to report security breaches to the Office of the Australian Information Commissioner. With regard to the further sending of information to the European Commission, further explanations would be needed on the procedure to be followed. In addition, the EDPS considers that Data Protection Authorities are also relevant recipients of this kind of information and should be explicitly mentioned in the Proposal.

2.5. *Supervision and enforcement*

28. The system of supervision, including oversight and accountability measures and insisting on the absence of discrimination based on nationality or place of residence, is welcome. The EDPS also strongly supports the fundamental right of every individual to administrative redress and effective judicial protection. He considers the role of the Office of the Australian Information Commissioner as an important guarantee as far as redress possibilities and exercise of data subjects' rights are concerned.

2.6. *Automated individual decisions*

29. According to Article 15, interpreted *a contrario*, an automated decision which does *not* "significantly affect or produce an adverse legal effect on a passenger" *can* be taken on the basis of the automated processing of data. The safeguards apply only when the decision would significantly affect the passenger. Considering the broad scope of automated processing of personal data envisaged in the PNR scheme, this restriction is questionable in the view of the EDPS. To avoid any flexible interpretation of this provision, he recommends deleting "significantly" and ensuring that no automated decision at all is allowed which produces an adverse effect on an individual.

2.7. *Retention of data*

30. The EDPS considers the length of the data retention period as foreseen in Article 16 as one of the major difficulties in the proposal. A period of retention of five and a half years, including three years without any masking of data, is clearly disproportionate, especially if this retention period is compared with the previous Australian PNR scheme which did not foresee the storage of data except on a case by case basis²⁰. Extensive justification should be given to explain why such a long

²⁰ See in this respect the positive opinion of the Article 29 Working Party: Opinion 1/2004 of 16 January 2004 on the level of protection ensured in Australia for the transmission of Passenger Name Record data from airlines, WP85. The opinion takes into account the fact that "Customs applies a general policy of non retention for these data. For those 0.05% to 0.1% of passengers who are referred to Customs for further evaluation, the airline PNR data are temporarily retained, but not stored, pending resolution of the border evaluation. After resolution, their PNR data are erased from the PC of the Customs PAU officer concerned and are not entered into Australian databases".

period of retention, which was not deemed necessary in the first Australian PNR scheme, is now foreseen.

31. In line with the position advocated in his Opinion on the Proposal for a Directive for an EU-PNR, the EDPS considers that the complete (i.e. irreversible) anonymization of all data should take place, if not immediately after analysis, after 30 days as a maximum.

2.8. Onward transfers

32. The guarantees provided in Articles 18 and 19 are welcome, especially as they provide for a list of recipients of data transferred within Australia, for a transfer on a case-by-case basis and an assessment of the necessity of the transfer in each case. The EDPS notes however that this provision can be circumvented by the exception of Art. 18.1(c) which allows sharing depersonalised data even if it is not on a case by case basis. However, *depersonalisation* does not imply deleting elements allowing identification but only *masking* them out, while full access to data remains possible. For this reason, the EDPS recommends that no exception to the principle of "case-by-case" transfers should be permitted. As an additional safeguard, the EDPS suggests limiting transfers to authorities "whose task is to combat terrorism or transnational crime", rather than those authorities whose functions are "directly related to preventing (these) crimes".
33. The fact that transfers to third countries are subject to the condition that they provide the "same" safeguards as the original agreement is supported. Considering the fact that further transfers nevertheless imply a loss of control on the way data can be processed, and in the absence of an international agreement guaranteeing the effective application of the safeguards by these new recipients, the EDPS suggests in addition that these transfers are subject to a prior judicial authorisation.
34. The Proposal foresees that when data of a resident of an EU Member State are transferred to a third country, the Member State concerned should be informed where the Australian Customs and Border Protection Service is aware of this situation (Article 19 1. (f)). The EDPS considers that further details should be included explaining the purpose of such a transmission to a Member State. Would such a transmission of information have an impact on the data subject, additional justification and safeguards should be included.
35. Finally, with regard to transfers within Australia and to third countries, both Article 18 and 19 foresee a general provision according to which nothing should prevent the disclosure of PNR data where necessary for the purposes of Article 3(4)²¹, in other words in case of exceptional circumstances with a view to protect the vital interest of any individual, including a threat to health. The EDPS has already questioned the risk of broad interpretation of this exception. Besides, he does not see why any transfer in exceptional circumstances should not be subject to the safeguards foreseen in Article 18 and Article 19, especially as far as purpose limitation or data minimisation are concerned, as well as with regard to the protection of the identity of the recipients and the level of protection afforded to personal data.

²¹ As well as for the purposes of Article 10 when the data are transferred within Australia.

2.9. Transfers by airlines

36. According to Article 21.3, transfers of PNR data to authorities can take place more than five times per flight in exceptional circumstances, in case of specific threat. To enhance legal certainty, the conditions of such additional transfers should be more detailed and include notably the additional requirement of an immediate threat.

2.10. Review of the agreement

37. The EDPS considers that the conditions for the review should be more detailed on several aspects. The frequency of reviews after the initial review should be specified. Moreover, Data Protection Authorities should be explicitly included in the review team, and not simply in a conditional way.
38. Moreover, the EDPS suggests that the review also concentrates on the assessment of the necessity and proportionality of the measures, by collecting statistics on the number of individuals affected and effectively convicted on the basis of PNR data, and on the effective exercise of data subjects' rights: the assessment should include the verification of the way data subjects' requests are being processed in practice, especially where no direct access has been allowed.

III. Conclusion

39. The EDPS welcomes the safeguards foreseen in the proposals especially with regard to the concrete implementation of the agreement. In particular, data security aspects, supervision and enforcement provisions are developed in a satisfactory way. The EDPS emphasises that any individual has access to the Australian Data Protection Authority, as well as to the Australian judicial authorities. These are among the essential guarantees provided by the proposals.
40. However, the EDPS has also identified a significant margin for improvement, especially with regard to the scope of the agreement, the definition of terrorism and the inclusion of some exceptional purposes, as well as the retention period for PNR data. Compared to the previous Australian PNR scheme, and also to the EU-PNR Proposal, this retention period is disproportionate.
41. The legal basis for the agreement should be reconsidered. Against the background of settled case law, and apart from Article 218(6)(a), the EDPS believes that the agreement should - in any case primarily - be based on Article 16 TFEU and not on Article 82 (1)(d) and Article 87 (2)(a) TFEU. This is completely in line with Declaration 21 to the Lisbon Treaty.
42. These observations should be read in the wider context of the legitimacy of any PNR scheme, seen as the systematic collection of passenger's data for risk assessment purposes. Only if the scheme respects the fundamental requirements of necessity and proportionality under Articles 7 and 8 of the Charter of Fundamental Rights and Article 16 TFEU, could a proposal satisfy the other requirements of the data protection framework.

43. The EDPS therefore also concludes that more attention should be given to these fundamental requirements in the final evaluations that will precede the conclusion of the agreement.

Done in Brussels, 15 July 2011

(signed)

Peter HUSTINX
European Data Protection Supervisor