The President

Mr. Jacques BARROT
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A rappeler dans toute correspondance.

Monsieur le Président,

I am writing with reference 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 Service, which was concluded in June 2008.

The Art. 29 Working Party regrets that the data protection authorities in charge of supervising the implementation of the agreement were not consulted and involved in the negotiations between the European Union and Australia, and that the final text of the agreement was only received by the Working Party after it had been concluded.

Although the time has passed to give comments that could be taken into account in relation to this specific agreement, we still want to stress some points of interest given the importance of this issue in light of the ever growing number of countries that see PNR data as an important tool for border control and immigration issues and in their fight against terrorism and organised crime. In the past the EU has concluded PNR agreements with the US and Canada. We are aware of the growing list of countries that want to conclude similar agreements with the EU, such as South Korea. The Working Party considers it, therefore, necessary to analyse the data protection level of this agreement and compare it with the previously concluded ones to contribute to and shape the debate on any future arrangements.

1. We note that the purposes for the transfer of passenger data are very broad but there is at least given a definition as to the meaning of "serious crime". It is welcome that the only recipient of the data is the Australian Customs Service (Customs) and that the disclosure of these data to a limited number of other Australian entities can only take place on a case-by-case basis for the purposes stated in the agreement and that Customs has to maintain a log of all disclosures. The same has to be said regarding the transfer of EU-sourced PNR data to third countries. This aspect is a significant improvement as compared to the agreement concluded between the EU and the US.

Another positive element of the agreement is that Australia's independent Privacy Commissioner can carry out privacy audits and monitor and investigate all aspects of the use of such data, their handling as well as the access policies and procedures according to the Australian data protection law, which covers the activities of Customs and which applies to European Union citizens as well. Thus, from a data protection point of view there is a higher level of protection than the one offered by the US agreement.

Regarding the security procedures, the agreement contains certain provisions governing the data security measures which have to be put in place by Customs. These are a significant improvement on other agreements as there is a comprehensive physical and electronic security system and restricted access to the EU-sourced PNR data for the purposes of processing this type of data.

With regard to the rights of the data subjects, the agreement foresees that Australia shall provide a system that is accessible by individuals regardless of their nationality or country of residence to exercise their rights. With the view of informing passengers, the Working Party appreciates the willingness of Customs to provide the public with information notices regarding the processing of PNR data.

We also applaud Art. 9 of the agreement which explicitly foresees regular joint reviews with participation of data protection authorities. This involvement makes sure that such reviews can successfully be carried out as one of the major tasks of the data protection authorities is to monitor the application of data protection provisions.

Unlike the EU-US agreement, the arrangements foresee, in case of a dispute between the parties of this agreement, a conflict mechanism which is useful and should be adopted in any future PNR agreement the European Union intends to conclude. At the same time, the data protection authorities may exercise their existing powers to suspend data flows to protect individuals with regard to the processing of their personal data where there is a substantial likelihood that the provisions of the agreement are being infringed. This is also a favourable aspect of the agreement.

Another positive element of the agreement is the fact that Customs will implement a push system which is always preferable to a pull system. We hope that the Australian authorities will indeed move to such a real push system in the foreseen timeframe and that there won't be any delays as in the case of the US PNR agreement. This matter has to be followed up and should be raised with Customs in case of non-compliance even before the first joint review takes place.

Given these welcome aspects of the agreement, we are, however, of the view that the agreement also contains some shortcomings which could have been avoided and should be addressed in future agreements.

2. In comparison with the retention period stipulated in the US PNR agreement we note that the retention period in the Australia agreement is much reduced - 5.5 years. However, we have consistently been concerned about retention periods and the fact that this period still appears to be disproportionate in light of the purposes for which passenger data are being stored and we reiterate that there is no operational evidence that this period is really necessary (as required by Art. 8 of the European Convention of Human Rights).

Another weak point of the agreement regards the categories of data transferred to Customs. We regret that the data elements requested are the same categories of data as in the 2007 US agreement where the 34 data fields were grouped in 19 categories of data, giving the impression that the amount of transferable data had been markedly reduced, which was actually not the case. We have already stated that such a wide collection of data is disproportionate to the objective pursued and, as a consequence, must be considered not justified.

With regard to sensitive data, Customs have specifically said they do not want or need sensitive data. Customs will filter sensitive data out and delete them immediately. This stance calls into question why other jurisdictions need them and supports the repeatedly expressed standpoint of

the Art. 29 WP that there is a lack of evidence as to why sensitive data are necessary in the fight against terrorism and organised crime. It also has to be criticised that the responsibility for filtering sensitive EU-sourced data is given to the recipient of the data, meaning Customs, and not to the data controller. This is contrary to the accepted data protection standards, such as those of Convention 108 of 28 January 1981 of the Council of Europe and the Directive 95/46/EC of the European Parliament and Council.

We conclude by noting that the agreement with Australia contains some shortcomings that were already identified in previously concluded arrangements, but it also contains significant improvements compared to those agreements. The level of data protection is relatively high in particular in comparison with the US agreement. This concerns among others the rights of passengers, the technical and organisational safeguards, the provision of a push system and a dispute mechanism.

This analysis shows that there are considerable differences among the already existing agreements and, therefore, supports the Art. 29 WP's calls for uniform global standards that should be applied in any future agreements as more and more countries want to introduce such a scheme. In a globalised world it is not acceptable for passengers and air carriers that the level of data protection and the technical arrangements vary from one country to another.

This is why the Working Party repeats its call[2] for the implementation of global data protection guidelines in the field of PNR, providing adequate measures that include the necessary data protection and privacy safeguards.

The Working Party has started working on such guidelines and considers the agreement signed with Australia as an interesting precedent. In this perspective, the Working Party stresses the necessity of regular contacts and discussions with the Commission and the Council, especially on the strategy to be adopted for future PNR demands (EU, South Korea, India, and so on). Such discussions should also include an evaluation of existing schemes such as Directive 2004/82/EC, the general value of API and PNR data for immigration and law enforcement purposes, data quality and data minimisation.

The Working Party looks forward to feedback from the Commission to organise rapidly such contacts, as well as the joint meeting proposed in our letter dated july 30th.

Yours sincerely

Alex Türk

Chairman of the Article 29 WP

N.B. : Copies of this letter have sent to the Council and the LIBE Committee of the European Parliament

[2] See in particular WP145 and the Resolution of the 29th International Conference of Data Protection and Privacy Commissioners, Montreal, 28 September 2007.