Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR)

In its Resolutions of 5 May 2010 and 11 November 2010 the European Parliament raised serous concerns about the proposed EU/Australia Agreement. Many of the serious flaws identified by the Parliament still have not been eliminated by the Commission.

In its Resolution 5 May 2010, the European Parliament	**Agreement between the EU and Australia on the processing and transfer PNR**
"6. Believes that appropriate mechanisms for independent review and judicial oversight and democratic control must be provided for in any new agreement;"	Independent and judicial oversight is limited primarily to individual complaints under the Australian Privacy Act1988.
"8. Asks the Commission to request, as soon as possible, that the European Union Agency for Fundamental Rights provide a detailed opinion on the fundamental rights dimension of any new PNR agreement;"	No detailed opinion has been obtained by the Commission from the Fundamental Rights Agency.
"9. (a) PNR data may only be used on the basis of the legal definitions laid down in Council Framework Decision 2002/475/JHA."	In art. 3 paragraph 2, the definition of "terrorist offences" in the Agreement is broader than in Council Framework Decision 2002/475/JHA.
"9. (b) The use of PNR data must be in line with European data protection standards, in particular regarding limitation of the amount of data to be collected and of the length of storage periods;"	The data is retained for five and a half years. The period has not been reduced in comparison to the 2008 Agreement.
"9. (e) The onward transfer of data by the recipient country to third countries shall be in line with EU standards on data protection, to be established by a specific adequacy finding;"	The proposal allows data to be transferred to third countries without sufficient safeguards and without prior consent of the concerned Member State.
In its Resolution 11 November 2010, the European Parliament	
"6. Points out that proportionality remains a key principle in data protection policies, and that any agreement or policy measure must also stand the legal proportionality test;"	Up to date the Commission has neither provided evidence that the collection, storage and processing of personal data is proportionate nor why 5,5 years of data retention are necessary and proportionate.
"6. Reiterates its call to the Commission to provide it with factual evidence;"	No alternatives have been explored by the European Commission.
"7. Reiterates its position that PNR data shall in no circumstances be used for data mining or profiling;"	The proposal still allows data mining and profiling.

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Among the wide range of other problems that EDRi has identified in the current proposal, we would particularly like to highlight the following privacy concerns:

- Regarding the 'depersonalisation' of data, the text suggests that there is no real 'depersonalisation' of personal data since it remains accessible in identifiable form if required. Data is thus not depersonalised but merely access to it is limited after 3 years.

- Art. 3. 3 of the proposed Agreement states that “serious transnational crime shall mean any offence punishable in Australia by a custodial sentence or a detention order for a maximum period of at least four years.” Since there is no definition of ‘serious transnational crime’ in Australian law, it is assumed that it means ‘any offence’ leaving the only test being the penalty threshold of at least four years.

- Art. 7. 1 of the proposed Agreement provides that “PNR data shall be subject to the provisions of the Australian *Privacy Act 1988* (Cth) (Privacy Act)”. It should be noted, that the Australian Privacy Act has serious flaws. Even though the Australian government has proposed 295 changes in its Law Reform Report 2008, the Privacy Act has still not been updated. For this reason, the European Commission has never awarded Australia with an adequacy rating.

- Even though the European Commission has never awarded Australia with an adequacy rating, Art. 5. of the proposed Agreement states that “compliance with this Agreement by the Australian Customs and Border Protection Service shall constitute an adequate level of protection for PNR”.

- Leading independent experts on international and Australian privacy law and practice, such as Privacy International and the Australian Privacy Foundation, highlighted that privacy protection for PNR data transferred to Australia does not meet EU standards of adequacy, and that there has been insufficient transparency of Australian practices in processing PNR data to provide a valid basis for an adequacy finding.