HOUSE OF LORDS

European Union Committee

11th Report of Session 2010–11

The United Kingdom opt-in to the Passenger Name Record directive

Report

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The European Union Committee

The Committee considers EU documents in advance of decisions being taken on them in Brussels, in order to influence the Government's position and to hold them to account.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

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The current staff of the Sub-Committee are Michael Collon (Clerk), Michael Torrance (Policy Analyst) and Joanna Lukens (Committee Assistant).

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Introduction

1. On 2 February 2011 the Commission submitted to the Council a 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: the PNR Directive.[1] The Directive will only apply to the United Kingdom if by 2 May 2011 the Government notify the President of the Council that they wish to take part in the adoption and application of the Directive—in other words, opt in to it.[2] In this report, prepared by the Home Affairs Sub-Committee,[3] we consider whether the Government should do so.

2. On 20 January 2011 Mr David Lidington MP, the Minister of State for Europe, made a written statement on behalf of the Coalition Government[4] in which he said: "The Government will continue to honour the arrangements that are currently in place following the undertakings of the then Government Minister, Baroness Ashton, for enhanced Parliamentary scrutiny of JHA[5] opt-in decisions".[6] Those undertakings commit the Government to taking into account of the views of this Committee on whether the United Kingdom should opt in to a proposal and, where those views take the form of a report to the House, to making time for that report to be debated.

Advance Passenger Information (API) and Passenger Name Record (PNR) data

3. The data collected by airlines for their own commercial purposes fall into two categories. Advance Passenger Information (API) data are the data contained in the machine-readable zone of a travel document, such as the name of the passenger, date of birth, nationality, gender, passport number, State and date of issue, and expiry date. Such data are screened by borders agencies. In the United Kingdom the UK Border Agency uses its electronic e-Borders scheme to screen API data against watch-lists to allow early identification of persons of known interest for security, immigration, customs or law enforcement purposes. The obligation of carriers to transmit API data to border agencies is already regulated by EU law.[7] The categories of API data are listed in Appendix 2.

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1 COM(2011)32, Document 6007/11.

2 Protocol (No 21) to the Treaties on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, article 3.

3 The members of the Sub-Committee are listed in Appendix 1.

4 HL Official report, 20 January 2011, col. WS 20-22.

5 Justice and Home Affairs, the commonly used expression for the matters now covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU).

6 The undertakings are set out in full in Appendix 1 of our report *Enhanced scrutiny of EU legislation with a United Kingdom opt-in*, 2nd Report, Session 2008-09, HL Paper 25.

7 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261/24 of 6 August 2004.

4. Passenger Name Record (PNR) data include other information held by the carrier or collected by the carrier when a passenger makes a booking. The full list of categories of PNR data is also in Appendix 2, though carriers will not necessarily hold all such data for all passengers.

5. On 16 February 2011 the Home Office submitted to us a very full explanatory memorandum on the draft Directive, for which we are most grateful. They explain in the memorandum that PNR data "is an essential supply of data for the security, intelligence and law enforcement agencies for investigations and operations, and is used for automated rules-based targeting in relation to unknowns; those potentially involved in terrorist and other criminal activity." They state that "the use of PNR data is a proven and vital tool for the prevention and detection of serious crime and terrorism".[8]

6. The collection of PNR data and their transfer to border agencies and law enforcement bodies, and the retention of such data for a number of years, all constitute a substantial invasion of privacy with major data protection implications. It is therefore justified only if the benefits in combating terrorism and serious crime are as great as is stated. When in June 2007 this Committee first considered the use of PNR data in the context of the third agreement between the EU and the United States, we were concerned not to have received evidence which would have enabled us to assess for ourselves the value of PNR data. We were nevertheless reluctantly prepared to accept assertions by the Government and by the US Secretary of Homeland Security on the value of PNR data as a weapon in the fight against terrorism and serious crime.[9] In the course of our inquiry the following year into the draft EU PNR Framework Decision, we received from the Home Office further material which persuaded us that PNR data, when used in conjunction with data from other sources, can significantly assist in the identification of terrorists.[10] **We now have no hesitation in accepting the Home Office's assessment of the value of PNR data for the prevention and detection of serious crime and terrorism.**

The case for action at EU level

7. Many countries have been collecting the PNR data of incoming passengers for a number of years; those countries include the United States, Canada and Australia. Among the Member States of the EU, the United Kingdom is the only country to have a fully functioning PNR system. France, Denmark, Belgium, Sweden and the Netherlands have either enacted legislation or are currently testing PNR, and several other Member States are considering setting up PNR systems.

8. The explanatory memorandum states[11] that "if Member States were to act in this area unilaterally, then this could lead to differing requirements being imposed on carriers across the EU. It could also frustrate the success of such a system if there is no clear legal basis for passenger data to be transferred from a carrier in one Member State to the passenger information unit of another Member State." **We share the Government's view that the case**

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8 Explanatory Memorandum for the draft Directive, paragraphs 28, 24.

9 *The EU/US Passenger Name Record (PNR) Agreement,* 21st Report, Session 2006-07, HL Paper 108, paragraph 23.

10 *The Passenger Name Record (PNR) Framework Decision,* 15th Report, Session 2007-08, HL Paper 106, paragraph 49.

11 Paragraph 22.

for EU-wide legislation is compelling. It is essential that a single legislative measure should cover the collection of PNR data on flights into all the Member States, and the sharing of those data with the authorities of other Member States.

9. The draft Directive is the Commission's initiative, but it is not the first such initiative. As far back as March 2004 the European Council invited the Commission to bring forward proposals for a common EU approach to the use of PNR for law enforcement purposes. In November 2007 the Commission published a proposal for a Council Framework Decision on the use of PNR data for law enforcement purposes—the draft PNR Framework Decision.[12] We carried out an inquiry into this proposal and reported on it in June 2008.[13]

10. Framework Decisions were then adopted under Title VI of the Treaty on European Union,[14] and so required unanimity in the Council. The Government would not therefore have supported the Framework Decision, as they did, unless satisfied with its aims. The question of an opt-in did not at that time arise. However the negotiations on the Framework Decision were protracted, and nothing was agreed before the entry into force of the Treaty of Lisbon on 1 December 2009. The proposal therefore lapsed.

11. This proposal for a Directive is its successor. Crucially, because it is based on Title V of Part Three of the Treaty on the Functioning of the European Union, this proposal will, unlike its predecessor, apply to the United Kingdom only if the Government opt in to it; and this they are required to decide within a period of three months from the tabling of the proposal.

12. The Commission states that the text of the proposal "reflects the latest state of discussions in the Council working groups in 2009" on the Framework Decision.[15] However there are some significant differences. In addition to the inevitable change in the legal base, the definition of "serious" crime has been amended, and there is a new category of "serious transnational crime". Other amendments include changes to the purposes for which PNR data may be used, the length of time for which the data may be retained, and the applicable data protection provisions.

Intra-EU flights

13. This report is concerned only with the question whether the United Kingdom should opt in to the proposal within the time limit laid down in the Protocol to the Treaties; our scrutiny of the provisions of the Directive will follow in the usual way, and for that reason we retain it under scrutiny. There is however one additional matter of substance which we mention here. This is the question of the flights to which the Directive will apply. The Framework Decision applied only to "international flights to the Member States".[16] The Government made strenuous efforts to extend this to flights between Member States—intra-EU flights—but had not succeeded by the time the negotiations were suspended. The present draft Directive applies to

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12 Document 14922/07.

13 *The Passenger Name Record (PNR) Framework Decision*, 15th Report, Session 2007-08, HL Paper 106.

14 Prior to its amendment by the Treaty of Lisbon, Title VI of the TEU dealt with provisions on police and judicial cooperation in criminal matters – the so-called "third pillar".

15 Document 6007/11, page 6.

16 Document 14922/07, Article 1.

"international flights to and from the Member States"[17] but, again, not to intra-EU flights.

14. In the explanatory memorandum the Government point out that the volume of journeys between Member States is three times greater than between Member States and third countries. They believe that a PNR system providing cover only for travel to and from third countries "would seriously limit Member States' ability to tackle criminal activity", and that collecting PNR data on extra-EU routes but not on intra-EU routes "serves simply to displace rather than address the risk".[18] **The Government intend to continue to press for the Directive to be extended to intra-EU flights. In this we fully support them.**

15. There is a legitimate concern that the Directive should, at the very least, not prohibit the United Kingdom from collecting data on flights from other Member States, as they can now do under the e-Borders scheme. The last draft of the Framework Decision[19] was clear. Recital (7) provided that "Member States may choose to include intra-EU flights in their national PNR systems". Recital (7a) allowed Member States to continue to use PNR data "for purposes other than those specified in this Framework Decision".

16. By contrast, recital (28) of the new draft Directive reads:

> "This Directive does not affect the possibility for Member States to provide, under their domestic law, for a system of collection and handling of PNR data for purposes other than those specified in this Directive, or from transportation providers other than those specified in the Directive, regarding internal flights subject to compliance with relevant data protection provisions, provided that such domestic law respects the Union acquis. The issue of the collection of PNR data on internal flights should be the subject of specific reflection at a future date."

17. From this it is clear that, as before, Member States may use the data they have collected for purposes going beyond those in the Directive; it is not clear to us that they may continue to collect data from flights other than those covered by the Directive. **We urge the Government to seek to have this point clarified, so that there is no possibility that the Directive will result in their no longer being allowed to collect data which are currently available to them**.

Should the Government opt in?

18. In their explanatory memorandum[20] the Home Office list four factors as being relevant to the Government's decision on whether or not to opt in to the Directive. These are:

- the likelihood of the eventual Directive covering intra-EU flights;
- whether the Directive will provide for data processing for terrorism and serious crime, and not just for serious transnational crime in certain circumstances;
- the period of retention of PNR data; and

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17 Document 6007/11, Article 1(1).

18 Explanatory memorandum, paragraphs 25-26.

19 Document 5618/09.

20 Paragraphs 30-34.

- whether the Directive will allow the use of sensitive personal data in exceptional circumstances.

19. We agree that these are important issues, but it must be uncertain if all of them can be settled before an opt-in decision has to be taken. Opting in will however enable them to be pursued vigorously in the subsequent negotiations.

20. On 2 March 2011 we heard evidence from Mr James Brokenshire MP, Parliamentary Under-Secretary of State at the Home Office, for our current inquiry into the EU Internal Security Strategy. We asked him whether the United Kingdom would be opting in to the Directive. He said that ministers had not yet reached a decision; one reason was that the Government would be respecting the eight-week period for the Committee to express its views.[21] While this is a proper line for the Government to take in the light of the Ashton undertakings, it would have been helpful to have some indication of the Minister's own views.

21. There are other issues which may give rise to concern. In particular, the European Data Protection Supervisor felt that the proportionality of the proposed Framework Decision had not been demonstrated since it involved the collection of data of innocent persons.[22] The European Parliament strongly criticised the proposal on grounds of invasion of privacy and inadequate data protection; it believed that the need for the proposed action had not been made out.[23] The Parliament was then expressing an opinion; now it is a co-legislator with the Council.

22. These are issues which we will consider more closely in the course of our scrutiny of the proposal. But in our view none of these matters outweighs the importance of PNR data as a weapon in the fight against terrorism and serious crime. **We believe that the Government should opt in to the draft Directive.** They will then be in a position to play a vigorous part in extending the Directive to intra-EU flights, and in negotiating the other amendments they seek. Being a party to the Directive will in turn allow the United Kingdom to benefit from the data collected by other Member States.

23. **We recommend this report to the House for debate.** We welcome the fact that the Government have undertaken to make time for such debates. An early debate on this report will allow the Government to be fully aware of the views, not just of this Committee, but of the House as a whole, before they have to reach a decision on whether or not to opt in.

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21 QQ 436-437.

22 OJ C 110, 1 May 2008.

23 Resolution of the European Parliament of 20 November 2008, P6_TA(2008)0561.

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
Lord Dear
Baroness Eccles of Moulton
Lord Hannay of Chiswick (Chairman)
Lord Hodgson of Astley Abbotts
Lord Judd
Lord Mackenzie of Framwellgate
Lord Mawson
Lord Richard
Lord Tomlinson
Lord Tope

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:
http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests

APPENDIX 2: API AND PNR DATA CATEGORIES

Categories of API data for the purposes of Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data

(1) Number and type of travel document used
(2) Nationality
(3) Full names
(4) Date of birth
(5) Border crossing point of entry into the territory of the Member States
(6) Code of transport
(7) Departure and arrival time of the transportation
(8) Total number of passengers carried on that transport
(9) Initial point of embarkation

Categories of PNR data for the purposes of the draft Directive

(1) PNR record locator
(2) Date of reservation/issue of ticket
(3) Date(s) of intended travel
(4) Name(s)
(5) Address and contact information (telephone number, e-mail address)
(6) All forms of payment information, including billing address
(7) Complete travel itinerary for specific PNR
(8) Frequent flyer information
(9) Travel agency /Travel agent
(10) Travel status of passenger, including confirmations, check-in status, no show or go show information
(11) Split/divided PNR information
(12) General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent)
(13) Ticketing field information, including ticket number, date of ticket issuance and one way tickets, Automated Ticket Fare Quote fields
(14) Seat number and other seat information
(15) Code share information
(16) All baggage information
(17) Number and other names of travellers on PNR
(18) Any Advance Passenger Information (API) data collected
(19) All historical changes to the PNR listed in numbers 1 to 18