

I: PNR - third countries: State of play

1. Up to now, the European Union has taken a bilateral approach concerning the transfer of Passenger Name Record (PNR) data from EU airline companies to third countries; the three current PNR-agreements with the USA, Canada and Australia oblige airline companies to transfer PNR data to authorities relating to all passengers flying to, from or through those countries. All existing PNR transfers to third countries are hence governed by a bilateral agreement and have been negotiated on a case-by-case basis.

2. More and more third countries, among others Japan, Saudi Arabia, Qatar, the Republic of Korea and New Zealand are (considering) using PNR data for law enforcement purposes, and have requested or are expected to request entering into bilateral agreements with the Union.

3. In 2010[1], the Commission adopted a strategy on the global approach to transfers of PNR data to non-EU countries[2], which in point 3.3 sets out the general principles - standards, content and criteria - that any PNR agreement with a non-EU country should observe. Apart from a number of data protection principles, these concern modalities of transmission and some overarching concepts (such as duration, review, monitoring and dispute resolution).

4. In its opinion adopted on 12 November 2010[3], the Article 29 Working Party[4] welcomed this initiative of the Commission "as a step in the right direction, since its application should in principle lead to a better level of data protection for the European citizen". However, the Working Party remained critical about the necessity of large-scale profiling for law enforcement purposes on the basis of passengers' data.

5. In November 2014, the European Parliament voted to request an opinion from the European Court of Justice (ECJ) on the compatibility with the Treaties and the Charter of Fundamental Rights of the envisaged EU-Canada PNR Agreement[5]. Any of the below options will obviously have to take into account the ECJ's opinion.

II: A global approach - previous discussions

6. Following the distribution of a questionnaire to Member States in order to discuss the course to follow regarding the growing number of third countries setting up PNR systems and requesting PNR data from EU carriers, the Commission convened a couple of meetings on this topic in 2013 and 2014. The four options below were put on the table, all limited to air travel and covering both PNR and API (Advance Passenger Information).

(1) No action at EU Level

7. This would imply that PNR agreements with third countries would be concluded at national level. This option does not appear to be supported by Member States.

(2) Continue the current practice of negotiating bilateral PNR agreements between the EU and third countries

8. So far this option has been followed. As long as there is no other option pursued, this practice will be continued. Recently, at its meeting of 23 June 2015, the Council adopted a Decision to authorise the opening of negotiations for an agreement between the EU and Mexico for the transfer and use of PNR data to prevent and combat terrorism and other serious transnational crime.

9. Negotiating bilateral agreements is a time- and resource-intensive approach. It would seem that the current capacity of the Commission services would not allow them to conduct all the potential negotiations simultaneously. Bilateral agreements also make it challenging to keep a consistent approach throughout.

(3) Multilateral Approach / International Agreement

10. This option would most probably take the form of an amendment to the Chicago Convention^[6]. As an important drawback of such option, the length of such multilateral negotiations was mentioned, as these could take many years. Whether the EU or the Member States should be the contracting parties of such a multilateral agreement should be further examined.

(4) An EU legal instrument providing a legal basis for transmission of passenger data to third countries

11. This option would take the form of an internal EU legal instrument (possibly a Regulation) allowing EU airline companies to share PNR data with the authorities of third countries if certain conditions are fulfilled, notably concerning the right to protection of personal data. Such Regulation could contain an Annex with a list of the third countries to which PNR data may be transferred. The advantage of this option is that it would avoid the long process of concluding international agreements.

12. An important drawback of such option is that an EU instrument cannot bind the third countries receiving PNR data, in particular as to the conditions they should fulfill. Discussions/negotiations with the third country would still be necessary with a view to assessing (and ensuring) that the conditions for the transfer are fulfilled. The Commission could be entrusted with making such an assessment (and holding the discussions with third countries necessary to that end), and a mechanism to establish and update the list of third countries enabled to receive PNR data should be established.

13. A significant number of the Member States have in the past expressed a preference for such a unilateral EU standard, as this appeared to be offering a higher degree of legal certainty and being less time-consuming in the long term.

III: A model agreement?

14. In its European Agenda on Security^[7], the Commission states that:

"[The EU has concluded PNR agreements with the United States, Canada and Australia. Such cooperation has real added value in identifying and apprehending foreign terrorist fighters, drug traffickers or travelling sex offenders]. The Union's future approach to the exchange of PNR data with non-EU countries will take into account the need to apply consistent standards and specific fundamental rights protections. Once the European Court

*of Justice has issued its opinion on the draft PNR Agreement with Canada, and based on the Court's conclusions, the Commission will finalise its work on legally sound and sustainable solutions to exchange PNR data with other third countries, **including by considering a model agreement on PNR setting out the requirements third countries have to meet to receive PNR data from the EU.*** [emphasis in original].

15. Obviously there would be considerable advantages for the Commission in drawing up a model agreement: less resource-demanding once fixed, offering a general framework with streamlined obligations for air carriers and robust data protection safeguards, thereby ensuring coherence in the further development of an international approach to sharing PNR data with third countries.

16. Such model agreement should therefore be considered as a modality of option 2, that is of the bilateral approach followed so far. For each third country, an agreement will need to be negotiated in accordance with the procedure laid down in Article 218 TFEU. A model agreement can facilitate the tasks of the Commission to negotiate PNR agreements with third countries, but it can obviously not do away with the prerogatives of the Council under Article 218 TFEU. The Council has to adopt, for each negotiation with a given third country, a decision authorising the opening of the negotiations with negotiating directives. A model agreement prepared by the Commission services may not bind the Council in deciding the negotiating directives in each case, and possibly to adapt them according to the third country concerned at the beginning and during the negotiations. Neither may such model agreement pre-empt the decisions the Council and Parliament to accept or not the outcome of the negotiations at the time of the decisions on signing (Council) and conclusion (Council, with European Parliament consent).

17. The model agreement can therefore be a model to be followed by the Commission that would streamline work, but it cannot be a "one-size-fits all solution". Regardless of the political prerogatives of the EU institutions to demand that the terms of an agreement be tailored to the specific (political, legal or other) situation of a third country, it is moreover doubtful that all third countries which are demanding PNR data from EU airline companies would be willing to enter into an agreement with the European Union under exactly the same terms. Thus a model agreement would have an indicative nature only. The model agreement would also have to be in line with the standards set in a future EU PNR Directive.

IV: Question

18. *In the light of the above, delegations are invited to indicate:*

– whether they support the idea of continuing the current practice of the EU negotiating bilateral PNR agreements with third countries or they would prefer any of the other options listed above;

– if they support the idea of continuing to negotiate bilateral agreements, whether they can support the idea of the Commission developing a model agreement for sharing PNR data and which remarks they would have concerning the main elements of such a model agreement.

[1] Already in January 2003 the Commission issued a Communication to the Council and the Parliament on the Transfer of Air PNR Data: A Global EU Approach aimed at setting out the elements of a global EU approach on PNR. The Communication called for a legally secure framework for PNR transfers to the US Department of Homeland Security and the adoption of an internal policy on PNR. It also called for the development of the push system of transfers of data by the air carriers and an international initiative on PNR data transfers by International Civil Aviation Organisation (ICAO).

[2] 13954/10 (COM(2010) 492 final).

[3] Opinion 7/2010 on European Commission's Communication on the global approach to transfers of PNR data to third countries.

[4] Independent advisory body on data protection and privacy, set up under Article 29 of the Data Protection Directive 95/46/EC. It is composed of representatives from the national data protection authorities of the EU Member States, the European Data Protection Supervisor and the European Commission.

[5] The agreement was signed by the EU and Canada on 25 June 2014, but needs Parliament's consent to enter into force. Parliament's final vote will be adjourned until the Court has delivered its opinion.

[6] Convention on International Civil Aviation (ICAO, also known as Chicago Convention), was signed on 7 December 1944 and entered into force on 4 April 1947. Today 190 states are parties to the Convention.

[7] 8293/15 JAI 249, p. 7, last paragraph.