

# **The Protection of Personal Data in International Civil Aviation: the Transatlantic Clash of Opinions**

Words: 4974

## **ABSTRACT**

When novel and complex legal problems arise, the legal mind is paralysed – caught between squeezing the problem into familiar models or creating new and distinctive legal approaches. Despite the growth of the international legal consciousness, threats of aviation terrorism have elicited predominately national regulatory responses, and as such, the innovative corpus of law produced by the US concerning Passenger Name Records (PNR) conflicts with fundamental liberties guaranteed in the EU. This paper considers this conflict of norms, ascertains how they are to be balanced in the interest of global cooperation, and discusses what, going forward, should be the driving force of policy development.

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## INTRODUCTION

The collection of passenger data is a legal obligation upon air carriers emanating from the original structure of the Chicago Convention.<sup>1</sup> Developments in information technology have increased the ease of processing, storing and transferring data ascertained in the reservation and booking process, subsequently expanding the basic categories of passenger data collected by airlines beyond those originally contemplated by the Convention.<sup>2</sup> These operational, *first order uses* of passenger data serve a functional, commercial purpose for air carriers<sup>3</sup> and have been largely uncontroversial.<sup>4</sup> ¶

In accordance with the Convention, a signatory State is to prescribe its local laws to passenger clearance.<sup>5</sup> Drafted with a high level of abstraction, this right sanctions discretion over the information required for admission into the territory of a State, and is qualified by the need to avoid unnecessary impediments in the administration of the laws relating to immigration.<sup>6</sup> These laws, by design or consequence, ensure the security of the State.<sup>7</sup>

Following the 2001 criminal interferences with aircraft,<sup>8</sup> the United States legislated<sup>9</sup> that the solution to the new security threat is to be found, in part, through submitting PNR data to national custom and border authorities.<sup>10</sup> Thus, information obtained by air carriers in the conduct of commercial operations have *second order uses*: a utility of law enforcement, used for counter-

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<sup>1</sup> *Convention on International Civil Aviation*, opened for signature 7 December 1944 (entered into force 4 April 1947), 15 ('the Convention'). Article 29 establishes the minimum passenger data to be collected by airlines:

- a. Passenger's name;
- b. Place of embarkation; and
- c. Point of disembarkation.

<sup>2</sup> Dawid Zadura, 'Importance of Personal Data Protection Law for Commercial Transport' (2017) 246 *Transactions of the Institute of Aviation* 1, 37; Armulf Gubitz, 'The US Aviation and Transportation Security Act of 2001 in Conflict with the EU Data Protection Laws' (2004) 39 *New England Law Review* 431, 468, labeling four categories: identification data, transactional data, financial data and flight information.

<sup>3</sup> Zadura, above n 2.

<sup>4</sup> International Air Transport Association, *Response by IATA to the European Commission's Communication: "A Comprehensive Approach to Personal Data Protection in the EU"* <[http://ec.europa.eu/justice/news/consulting\\_public/0006/contributions/organisations/iata\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0006/contributions/organisations/iata_en.pdf)> accessed 11 November 2017.

<sup>5</sup> Chicago Convention, above n 1, article 13.

<sup>6</sup> Ruwantissa Abeyratne, *Aviation Security Law* (Springer, 2010) 53.

<sup>7</sup> *Ibid.*

<sup>8</sup> See Alan Dobson, *A History of International Civil Aviation* (Routledge 2017) 61.

<sup>9</sup> *Aviation and Transportation Security Act*, 49 USC (2001).

<sup>10</sup> Pablo Mendes de Leon, 'The Fight Against Terrorism Through Aviation: Data Protection Versus Data Production' (2006) 31(4) *Air and Space Law* 320.

terrorism and security purposes<sup>11</sup> to ensure aviation safety.<sup>12</sup> It is precisely because the substantive legal force of PNR regulation comes from local laws that the international community has developed non-homogenous PNR regimes, exacerbating the problem of regulatory compliance for air carriers through a tapestry of PNR regulations.<sup>13</sup>

There is a further problem that compounds the possibility of standardized and harmonized PNR legislation concerning *second order uses* of PNR. Any discussion on this topic will invariably cast a wide net, for it is a conglomerate of many disparate legal principles *inter alia* privacy rights and data protection laws, and broader than legal parameters such as trade, security and international relations.<sup>14</sup> These nebulous boundaries introduce a plurality of different legal values and priorities over diverse areas of law, which makes any inter-systemic consensus on an act of international codification a difficult task,<sup>15</sup> as there is no “common trunk on which national doctrines of law are to graft themselves.”<sup>16</sup>

The legal issues brought forth by these *second order uses* form the subject of this paper. The research question is whether the conflicting norms resulting from the different political-legal ideologies and legal priorities of the US and the EU can be reconciled, so to as form a common regulatory market and harmonized mechanism of data transfers.

The first chapter provides the theoretical basis of this conflict. The second chapter discusses Opinion 1/15<sup>17</sup> as an indication of the compatibility of *second order uses* with the European privacy and data protection *acquis*. Following this discussion will be an analysis of the opposing perspectives – the primacy of privacy and data protection in the EU *contra* the US deference to security – and whether the Opinion was correct in its determinations. This analysis is followed by a brief consideration of some future issues, such as the EU General Data Protection Regulation, the economic cost of compliance and the need for uniformity. This paper concludes that the special nature of aviation as a the axle-and-wheel of the globalized world may, at times, require, so long as the object or outcome of such policy design is in the interest safety, the legitimate limitation of rights and interests of others.

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<sup>11</sup> Zadura, above n 2, 38; Paul De Hert and Vagelis Papakonstantinou, ‘Repeating the Mistakes of the Past will do Little Good for Air Passengers in the EU’ (2015) 6(1) *New Journal of European Criminal Law* 160, 162.

<sup>12</sup> Mendes de Leon, above n 10, 321.

<sup>13</sup> Kerianne Wilson, ‘Gone With the Wind: The Inherent Conflict between API/PNR and Privacy Rights in an Increasingly Security-Conscious World’ (2016) 41(3) *Air and Space Law* 229.

<sup>14</sup> Mendes de Leon, above n 10.

<sup>15</sup> Edward McWhinney, *Aerial Piracy and International Terrorism* (Martinus Nijhoff Publishers, 1987) 169.

<sup>16</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1993) 20, 2.

<sup>17</sup> *Case Opinion 1/15* (2017) Opinion of the Court of Justice of the EU (Grand Chamber) of 26 July 2017 (‘Opinion’).

## 1. TRANSATLANTIC DIVERGENCE OF THOUGHT

There is a high level of consensus in academic doctrines<sup>18</sup> that the variations in legal and political history and the resulting differences in moral, social and economic values,<sup>19</sup> between the US and EU, have led to conflicting philosophies on the protection of individual liberties.<sup>20</sup> It is almost the normal function of transatlantic cooperation that any agreement on norms is to be a compromise stemming from disagreement.<sup>21</sup> This fundamental difference approach due to municipal priorities is evident in the first PNR agreement between these entities, which contrasted the American pressure to “use all possible data, for all possible purposes by all possible agencies,”<sup>22</sup> with the European perspective of privacy as a fundamental legal norm.<sup>23</sup> Moreover, the subsequent conflict of norms and the task of finding the appropriate balance between public security and human rights interests<sup>24</sup> is complicated by a parity of arguments: both sides are logically coherent, pursue legitimate aims, and are potentially correct; neither a conservative attitude nor revolutionary zeal will likely lead to satisfactory solutions.<sup>25</sup>

However, this should not dissuade policy development, for overcoming such complexities is precisely the task of the international legal consciousness,<sup>26</sup> which requires a multifaceted approach at both the national and international level, and through a plurality of means.<sup>27</sup> In this spirit of cooperation and coordination, there exists growing evidence for a tilt towards the US-centric ideology of public security as legitimising *second order uses* and sanctioning interferences with civil liberties otherwise protected by the rule of law.<sup>28</sup>

The next chapter will discuss Opinion 1/15, which considered the proposed EU-Canada PNR agreement and its relationship to fundamental rights of EU citizens. The conclusions of the Opinion

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<sup>18</sup> See generally Gubitz, above n 2; Michele Nino, ‘The Protection of Personal Data in the Fight Against Terrorism’ (2010) 6(1) *Utrecht Law Review* 62.

<sup>19</sup> Watson, above n 16, 5.

<sup>20</sup> James Whitman, ‘Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 *Yale Law Journal* 1153, 1163.

<sup>21</sup> Annegret Bendiek and Andrew Porter, ‘Counterterrorism Cooperation in the Transatlantic Security Community’ (2012) 21(4) *European Security* 497, 507.

<sup>22</sup> De Hert and Papakonstantinou, above n 11, 162

<sup>23</sup> Maria Tzanou, ‘The War Against Terror and Transatlantic Information Sharing’ (2015) 31(80) *Utrecht Journal of International and European Law* 87; see Annex 1.

<sup>24</sup> Mendes de Leon, above n 10.

<sup>25</sup> Luciano Floridi et al (ed), *Protection of Information and the Right to Privacy* (Springer International Publishing, 2014) v.

<sup>26</sup> Watson, above n 16, 2.

<sup>27</sup> McWhinney, above n 15, 172.

<sup>28</sup> See specifically Directive 2016/681/ EU on the use of PNR Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crimes [2016] OJL 119/132 (the ‘PNR Directive’).

are constructive, and although it concerns international relations with the EU and Canada, it has implications relevant to the wider discourse on PNR agreements.

## 2. OPINION 1/15

The Grand Chamber of the Court of Justice of the European Union, in Opinion 1/15, considered the interference with fundamental rights posed by PNR agreements. The justification for interference of rights enshrined in article 7 and article 8(1) of the Charter of Fundamental Rights of the European Union,<sup>29</sup> is provided by article 52(1), requiring that such limitations:

*[A]re provided for by law, that they respect the essence of those rights and that, subject to the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.*<sup>30</sup>

The absence of precise statistics indicating the contribution to security was not enough to diminish the finding that *second order uses* of PNR satisfy the objective of general interest within the meaning of article 52(1).<sup>31</sup> The pursuit of public security was “capable of justifying even serious interferences” with these fundamental rights, for it also contributed to the protection of rights and freedoms of others under article 6 of the Charter – the right to security of the person.<sup>32</sup> Further, although the data was identifiable and touched on areas of private life, it was somewhat diminutive in effect for it was generally limited to only certain aspects of private life and did not allow very precise conclusions about individuals to be drawn.<sup>33</sup>

The Grand Chamber, however, was not satisfied that all components of the agreement were proportional – that is, concerned with what was strictly necessary to achieve this legitimate objective of public security.<sup>34</sup> Although the agreement attempted synergy with EU law, as opposed to being entirely unilateral legislation emanating from Canada with extra-territorial effect, the incorporated guarantees relating to, *inter alia*, the period of retention, sensitive data,<sup>35</sup> and transparency, were not limited to what was strictly necessary.<sup>36</sup> Due to these deficiencies, the Opinion concluded that the generalized strategic monitoring sanctioned by the agreement

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<sup>29</sup> *Charter of Fundamental Rights of the EU* [2000] OJ C 346/1 ('Charter').

<sup>30</sup> *Case Opinion 1/15*, above n 17, 133-141.

<sup>31</sup> *Ibid* 55.

<sup>32</sup> *Ibid* 149.

<sup>33</sup> *Ibid* 150; see Annex 2.

<sup>34</sup> *Ibid* 154.

<sup>35</sup> Mistale Taylor 'Necessary Extraterritorial Legal Diffusion in the US-EU PNR Agreement' (2015) 18 *Spanish Yearbook of International Law* 221, 225: sensitive data is personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life.

<sup>36</sup> *Case Opinion 1/15*, above n 17, 232.



constituted large-scale interference with the fundamental rights of the Charter.

This conclusion, however, did not render PNR agreements incompatible *in perpetuum*. Rather, the communication, use, retention and transfer of PNR are only *prima facie* incompatible with fundamental rights. Provided agreements are drafted with a more precise scope of application and assimilate modern principles of data protection,<sup>37</sup> they will be compatible with those essential treaties and constitutional principles undermining the European Community. The question as to whether this amounts to a judicial redrafting of the agreement is outside the scope of this paper, however, the Opinion nonetheless indicates the standard the judicial authority of the Union will consider as acceptable for the interference with rights guaranteed under the Charter.

The next chapter will consider these countervailing interests in further detail, followed by an assessment of the Opinion and the contribution it makes to transatlantic cooperation in this area. As will be discussed, such evidence of cooperation and practical compromise is an essential preliminary step towards harmonized and standardized rules.

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<sup>37</sup> Ibid 170.

### 3. ON THE HIERARCHY OF INTERESTS

#### 3.1 Privacy and Data Protection – the Individual Interest

There is a central importance bestowed upon privacy in liberal ideology,<sup>38</sup> and the vastly expanded possibilities for amassing, linking and accessing personal data precipitated a burgeoning of privacy concerns which underpinned EU data protection laws.<sup>39</sup> Although privacy and data protection are separate, autonomous rights, they are intrinsically linked as data protection empowers one with the tools to exercise their right to privacy.<sup>40</sup> In particular, data protection rhetoric is linked to autonomy: – as dynamic, selective and relational processes contribute to forming an identity, the autonomous construction of identity requires control over personal information.<sup>41</sup> As regards privacy, the jurisprudence of the European Court of Human Rights has consistently acknowledged privacy as a dignity concern and a means of vindicating the individual's autonomy:<sup>42</sup> privacy is necessary for the free and self-determined development of the individual, particularly in regards to their personal and social life<sup>43</sup> and their relationships with other human beings.<sup>44</sup>

Therefore, protecting personal data allows an individual to determine when, how and to what extent information about them may be communicated to others,<sup>45</sup> and by controlling who has access to information,<sup>46</sup> the individual engages in self-determination.<sup>47</sup> The next section will consider how these rights subsist in passenger data and the general threat to these rights quantified by *second order uses*.

##### 3.1.1 The Digital Dossier and Surveillance

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<sup>38</sup> Lee Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (Kluwer Law International, 2002) 126.

<sup>39</sup> 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 [1995] OJ L 281/31.

<sup>40</sup> Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECHR' (2013) 3 *International Data Privacy Law* 222, 223.

<sup>41</sup> Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421, 465.

<sup>42</sup> *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited* (Joined Cases C-509/09 and C-161/10) [2011] ECR 2011 I-10269, [44]-[48].

<sup>43</sup> *Beldjoudi v France* (1992) 234-A Eur Court HR (ser A).

<sup>44</sup> *Niemietz v Germany* (1992) 251-B Eur Court HR (ser A) [29].

<sup>45</sup> Daniel Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York University Press, 2004) 51.

<sup>46</sup> Mark Tunick, 'Privacy and Punishment' (2013) 39(4) *Social Theory and Practice* 643, 652.

<sup>47</sup> Bundesverfassungsgericht [German Constitutional Court] 1 BvR 209/15 December 1983: coining the term 'informationelles selbstbestimmung' (informational self-determination).

Privacy advocates have identified a range of issues with *second order uses* of PNR.<sup>48</sup> The unifying theme surrounds the “breadth of personal information collected”<sup>49</sup> and the creation of an identifiable, passenger dossier<sup>50</sup> that is retained by border services, accessible by third parties and subject to cyber-interferences.<sup>51</sup> The use of PNR by border services is thus viewed as a *priori* for creating a system of mass surveillance.<sup>52</sup> Surveillance, as a mode of observation to enforce norms, breaks the civility into smaller, manageable chunks that are easier to organize and assess “distributions, gaps, series, combinations” to render “visible, record, differentiate and compare.”<sup>53</sup> Though it could assist in detecting security threats, there is an inherent risk of abuse or error,<sup>54</sup> and the *second order uses* of PNR are predicated upon fundamental misunderstandings of the dangers of surveillance, specifically, the likelihood of inducing in the mind of an individual the threat of constant observation and thereby reducing autonomy.<sup>55</sup> These *second order uses* are considered an aggressive tool of law enforcement that “reverses the presumption of innocence against passengers”<sup>56</sup> and establishes a “global surveillance system of travel.”<sup>57</sup>

### 3.2 The Value of Security – the Public Interest

The value of safeguarding the public, even if it transcends “limitations posed by the rule of law”<sup>58</sup> is a symptomatic feature of US jurisprudence.<sup>59</sup> General safety, as a precondition to peace, order and security, is the highest law, and in order to secure social life against “forms of actions and causes of conduct, which threatens its existence,” greater weight is afforded to this interest of security.<sup>60</sup> When this scaffold of liberty is applied to aviation, an industry of latent security threats,<sup>61</sup> legislators are engaged in a constant process of assessing the efficiency of existing rules and their

<sup>48</sup> De Hert and Papakonstantinou, above n 11; Nino, above n 18.

<sup>49</sup> De Hert and Papakonstantinou, above n 11, 162.

<sup>50</sup> Mendes de Leon, above n 10, 320: PNR reveals, *inter alia*: travel habits; relationship between individuals; information of financial situation, dietary habits.

<sup>51</sup> Pablo Mendes de Leon, *Introduction to Air Law* (Kluwer International, 10<sup>th</sup> ed, 2017) 2.

<sup>52</sup> Nino, above n 18.

<sup>53</sup> Michael Foucault, *Discipline and Punishment* (Vintage Books, 1995) 210-211.

<sup>54</sup> Gubitz, above n 2, 469.

<sup>55</sup> De Hert and Papakonstantinou, above n 11, 161.

<sup>56</sup> *Ibid* 163.

<sup>57</sup> Gubitz, above n 2, 467.

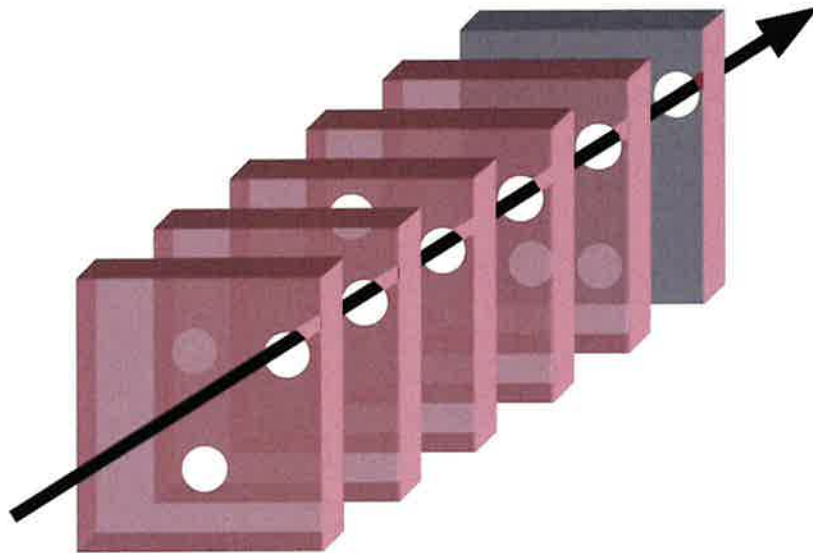
<sup>58</sup> Bendiek and Porter, above n 21, 498.

<sup>59</sup> See *Schenck v US*, 249 US 47 (1919); Kristoffel Grechenig and Martin Gelter, ‘The Transatlantic Divergence in Legal Thought’ (2008) 31(1) *Hastings International & Competition Law Review* 295, 316,

<sup>60</sup> Linus McManaman, ‘Social Engineering: The Legal Philosophy of Roscoe Pound’ (1958) 33(1) *St. John’s Law Review* 1, 19; Roscoe Pound, *Social Control Through Law* (Transaction Publishers, 1942) 78.

<sup>61</sup> See generally Ruwantissa Abeyratne, *Aviation Security: Legal and Regulatory Aspects* (Ashgate, 1998).

ability to match evolving threats.<sup>62</sup> Would-be perpetrators should be under reasonable apprehension that their act stands as great a chance as possible of not succeeding,<sup>63</sup> even if this involves a broad-brush infringement on individual liberties. Therefore, the *raison d'être* of *second order uses* of PNR is the object of safety,<sup>64</sup> and as such, it forms part of the 'Swiss Cheese Safety Model' [Figure 1] as an additional, protective layer safeguarding the industry.



**Figure 1: The Swiss Cheese Safety Model<sup>65</sup>**

Under this perspective of security as a safety instrument safeguarding public interests, the *second order uses* of PNR are a technological disciplinary mechanism that invariably requires the suspension of individual liberties, with the concomitant enhancement of that primary aim of humanity: the preservation of life.<sup>66</sup>

Having briefly considered the legal theory underpinning these interests and the values they propagate, the next chapter will consider which should gain prominence in the event of a conflict, and ultimately whether the Opinion made justified conclusions.

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<sup>62</sup> Benjamin Cardozo, 'Nature of Judicial Process' in Margaret Hall (ed) *Selected Writings of Benjamin Cardozo* (Fallon Publications, 1980) 153, 155.

<sup>63</sup> Abeyratne, above n 61, 121.

<sup>64</sup> Jeffery Forrest and James Simmons, 'US Aviation Safety Data' (2005) 70 *Journal of Air Law and Commerce* 83.

<sup>65</sup> Francis Schubert, 'Liability of ANS' (Lecture delivered at Leiden University, 11 October 2017).

<sup>66</sup> Abeyratne, above n 61, 72.

## **4. ON THE BALANCING OF NORMS**

### **4.1 The Non-Absolute Nature of Privacy**

The Opinion maintained fidelity to the notion that any action to attain a goal that requires restriction upon privacy must reach a high threshold of justification,<sup>67</sup> and that privacy is by no means an absolute prerogative.<sup>68</sup> When a privacy norm is enforced, it is balanced against society's countervailing interest, and the norm materializes only when that balance tilts to the individual, who suffers greater harm as a result of their privacy being eroded.<sup>69</sup> Hence, where governments pursue legitimate interests we should examine: –the purposes of the restrictive action; whether the negative consequences of limitation will outweigh the positive effects; and not merely the incidental effect upon privacy.<sup>70</sup> So long as sufficient justification is provided, there are no natural, necessary reasons why we should not proceed with regulation.<sup>71</sup>

### **4.2 Elevation of Security**

The protective imperative of governance is part of the substrata of modern society – the primary concern of policy development is safety,<sup>72</sup> a theme mirrored under the Chicago Convention and the need to meet “the needs of the peoples of the world for safe...air transport.”<sup>73</sup> This doctrine correlates to utilitarian principles regarding the prevention of harm: “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”<sup>74</sup>

### **4.3 Analysis**

It is the position of this paper, that, as concerns the fundamental rights of data protection and privacy, it is possible to effectively adjust these interests so as to secure “as much of the totality of them”<sup>75</sup> in light of the objective of public security. Policy-making is, in part, a sociological

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<sup>67</sup> See *Malone v United Kingdom* (1984) 82-A Eur Court HR (ser A), [82]–[84].

<sup>68</sup> Case Opinion 1/15, above n 17, 181.

<sup>69</sup> *Ibid* 7–8, 84–5.

<sup>70</sup> Frederick Schauer ‘Free Speech in a World of Private Power’ in Tom Campbell and Wojech Sadurski (eds), *Freedom of Communication* (Dartmouth 1994) 1, 12.

<sup>71</sup> *Ibid* 8.

<sup>72</sup> Abeyratne, above n 61.

<sup>73</sup> Chicago Convention, above n 1, article 44(e).

<sup>74</sup> John Stuart Mill, *On Liberty* (Longman, Roberts & Green, 1869) 8.

<sup>75</sup> McManaman, above n 60, 17.

phenomenon subject to external influences – the law cannot “be separated from the other components of the structure of modern society,”<sup>76</sup> and the *second order uses* of PNR are a reasonable response to latent and emergent threats, despite their infringement upon privacy. The argument of autonomy through informational self-determination explored in chapter 3.1 is doctrinal and decidedly weak; the nature of information is limited to only certain aspects of private life relating to air travel and to the exclusion of any other information not directly relevant to the flight.<sup>77</sup> Furthermore, as the stated policy aim to permit ‘re-active’, ‘real time’ and ‘pro-active’ investigation<sup>78</sup> involves an assessment of persons, connotations of surveillance are inevitable, and the rhetoric of privacy advocates in chapter 3.1.1 is unconvincing and similarly dogmatic. Data subsists within the genealogy of contemporary society, and where it is put towards legitimate purposes, we should not preclude genuine policy merely because it implicates privacy.

The Opinion is commendable for it did not completely subrogate the right to privacy, and mandated that a high level of procedural safeguards must be contained within PNR doctrines to ensure rights are infringed no more than necessary for the stated aims of public security.<sup>79</sup> This is to be considered the correct manner of balancing rights: “reconciled and compromised so that neither is fully satisfied nor completely sacrificed.”<sup>80</sup> There is an inferred benefit of this cooperation for the international community, for it is entirely a practical compromise of overlapping interests that ensures the peculiarities of one nation are not imposed upon the juridical order of another.<sup>81</sup> This adjustment of values is an essential preliminary step for coordinated policy development, and sets the requisite standard for protecting civil liberties in any global policy making initiative concerning passenger data, which invariably must subordinate the individual interest for the common, globalized interest of security.<sup>82</sup>

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<sup>76</sup> M. Schmitthoff, ‘The Science of Comparative Law’ (1939) 7(1) *The Cambridge Law Journal* 94.

<sup>77</sup> *Case Opinion 1/15*, above n 17, 150.

<sup>78</sup> EU PNR Directive, above n 28, 3.

<sup>79</sup> Eleana Carpanelli and Nicole Lazzerini, ‘PNR: Problems Not Resolved? The EU PNR Conundrum After Opinion 1/15 of the CJEU’ (2017) 42(5) *Air And Space Law* 377, 398.

<sup>80</sup> McManaman, above n 60, 17.

<sup>81</sup> Watson, above n 16, 6.

<sup>82</sup> Gubit, above n 2, 434.

## 5. FUTURE CONSIDERATIONS

The processing of PNR by border services as a global norm introduces many issues for future lawmakers and jurists.<sup>83</sup> The effect of the EU General Data Protection Regulation,<sup>84</sup> the economic costs of compliance, and uniformity are herein briefly introduced as topics requiring further exploration.

### 5.1 GDPR

The GDPR is an important development in harmonizing data protection across EU Member States, and significantly impacts how air carriers capture, store and disseminate data. At present, the primary issue for carriers concerns the accountability principle: that the scope of PNR data collected is not unnecessary for the purposes for which it is collected. In the view of this author, provided that PNR data is collected for the purpose of complying with the PNR Directive, there should be no conflict with the GDPR. Complications will arise, however, if the surrounding *process* of collecting data does not follow GDPR provisions.<sup>85</sup> For example, if an air carrier transfers PNR to the requisite authority, yet they have inadequate means of obtaining consent,<sup>86</sup> or have failed to appoint a Data Protection Officer to ensure all mandates are met to the requisite level,<sup>87</sup> they will be in breach of these more general requirements. On this basis, the PNR Directive acts as a carve out of the protection offered by the GDPR, yet the substantive procedural provisions concerning the capturing, storing and disseminating of that data must still be observed.

### 5.2 The economic burden: governments or air carriers?

There are two views on the matter of "who should bear the costs" for implementing PNR frameworks.<sup>88</sup> The first is the public law view: because the safety of air traffic is largely a case of political responsibility, the security costs associated with these measures are to be "borne directly by the States."<sup>89</sup> This point was elaborated at the 1987 International Conference on Aviation Security, where it was opined that the safety of persons "is the concern and responsibility of the government – a state duty – that cannot and should not be shifted on to third parties. This implies

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<sup>83</sup> De Hert and Papakonstantinou, above n 11, 164.

<sup>84</sup> *Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* (27 April 2016); ("the GDPR")

<sup>85</sup> General requirements to be observed by the air carrier are *inter alia* a limitation on storage (Article 5) notification of data rights (Article 30) and data breach notifications (Article 33–4)

<sup>86</sup> *Ibid*, Article 7

<sup>87</sup> *Ibid*, Article 37.

<sup>88</sup> Mendes de Leon, above n 10, 325

<sup>89</sup> International Conference on Aviation Security, 'How to Safeguard International Air Transport' (1987) *International Institute of Air and Space Law* 87.

that this government should also bear the associated costs.<sup>90</sup> If maintaining national law and order is a government's responsibility, it is to be expected that a fair share of the cost is borne.

The antithesis of this view is that air carriers also stand to directly benefit from the minimization of security threats. Regulatory compliance therefore operates a 'security tax' to offset larger costs associated with a decrease in passengers and profits following aviation disasters. Air carriers engage in pseudo-governmental responsibilities through maintaining public order and security, and integrate public functions to deliver wider social benefits. The problem with this view, however, is that the financial and technical burdens appear at present wholly absorbed by air carriers, and as this is a new regulatory field, there are extensive 'start-up' costs involved in, for example, systems development and integration.<sup>91</sup> These costs will only increase correlative to the number of governments requesting this data.<sup>92</sup>

A comprehensive discussion falls outside the scope of this paper; however, in lieu of abandoning this problem, the following section 5.3 discusses the importance of uniformity in providing a shared regulatory space so as to limit the cost of compliance currently borne by air carriers.

### **5.3 Uniformity**

There is a lacuna in the existing international standardization through the Chicago Convention as the issue of PNR – as understood in the contemporary milieu – was outside the direct contemplation of the framers. In the “absence of mandatory requirements” from this unifying text, the international community has developed non-homogenous PNR regimes.<sup>93</sup> This bottom-up model of policy-making introduces a tapestry of disparate PNR regulations that increases complexity of compliance for air carriers.<sup>94</sup> A plurality of different values and priorities, moreover, of even those political-ideological systems with common roots, makes any inter-systemic consensus from which an act of international codification can be made a difficult task.<sup>95</sup>

Uniformity is desirable for it heralds certainty of law and introduces a stable legal regime that definitively determines the legal rights of parties concerned. Going forward, uniformity remains difficult to achieve, as uniformity in aviation law alone is not sufficient: the complex structure and hierarchy of laws that PNR agreements introduce *viz* privacy and data protection laws are

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<sup>90</sup> Ibid, 104.

<sup>91</sup> Wilson, above n 13, 258-259.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid, 229.

<sup>94</sup> Lazzerini, above n 79, 378.

<sup>95</sup> McWhinney, above n 15, 169.



themselves bodies of law subject to change at the municipal level.<sup>96</sup> As the data protection environment is a nascent form of laws susceptible to rapid and substantial changes,<sup>97</sup> the categories of data collected by the industry will likely evolve and require frequent modification of agreements.

In light of these complexities, however, this should not dissuade policy development, for overcoming such complexities is precisely the task of the international legal consciousness.<sup>98</sup> A multifaceted approach at both the national and international level, and through a plurality of means, is required. There should be an emphasis on “coordination of different state actions, and on cooperation among state official and commercial organizations, across state frontiers.”<sup>99</sup> As this paper has concluded that PNR agreements fall under the realm of safety and security, ICAO is well situated to negotiate international instruments to achieve this purpose.<sup>100</sup> ICAO already passed soft law, with PNR guidelines in Annex 9 of the Convention, and further development of this mandate with a tilt towards uniformity, would assist in alleviating the costs borne by air carriers.<sup>101</sup>

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<sup>96</sup> Zadura, above n 2, 39.

<sup>97</sup> De Hert and Papakonstantinou, above n 11, 161.

<sup>98</sup> Watson, above n 16, 2.

<sup>99</sup> McWhinney, above n 15, 172.

<sup>100</sup> Dobson, above n 8, 61.

<sup>101</sup> Although ICAO has already passed this soft law (recommended practice 3.49 in Annex 9 of the Convention) these guidelines are drafted with a high level of abstraction and are only suitable as reference material and do not form a substantive legal framework. The Opinion provides ICAO with a rubric from which to develop more robust guidelines or, most desirably, a multi-lateral convention: *see specifically* ICAO, Guidelines on PNR Data, ICAO Doc 9944 (2010).

## CONCLUSION

This paper has considered the legal implications of *second order uses* of PNR, the ideological motivations underpinning the US and EU approaches to liberties, and the balancing of these conflicting rights. The Opinion adds significant weight to the US-centric extolling of security over privacy and secures as far as possible the rights of individuals with its strict procedural safeguards. The proposed synergy of *second order uses* of passenger data with the EU privacy and data protection *acquis*, paves the way for a *second order uses* as a global norm. Therefore the Opinion stands as evidence that a practical compromise can be reached to ensure a stable framework, from which the international legal consciousness can develop policy in the interest of aviation security and safety, irrespective of substantive differences of approaches to civil liberties.

## ANNEXES

### Annex 1. Summary of Developments in EU PNR Regime

Year	Legal Development
2004	Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection - <b>EU-US 2004 PNR Agreement</b>
2005	Council Decision 2006/230/EC of 18 July 2005 on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of API/PNR data Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data, OJ 2006 L 82/14) – <b>EU-Canada 2005 PNR Agreement</b>
2006	CJEU Joined cases C-317/04 and C-318/04 - <b>annuls EU-US 2004 PNR Agreement.</b>
2007	EU PNR Directive Proposed 2007/551/CFSP/JHA: Council Decision of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) – <b>EU-US 2007 PNR Agreement</b>
2008	Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service Official Journal L 213, 08/08/2008 P. 0049 - 0057 - <b>EU-Australia 2008 PNR Agreement</b>
2009	<b>Expiration of EU-Canada 2005 PNR Agreement</b>
2010	<b>Commission negotiations on new EU-Canada PNR Agreement</b>
2011	Council Decision 2012/381/EU of 13 Dec. 2011 on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record data by air carriers to the Australian Customs and Border Protection Service, OJ 2012 L 186/3 - <b>EU-Australia 2011 PNR Agreement, replacing 2008 Agreement.</b>  European Commission, Proposal for a directive of the European Parliament

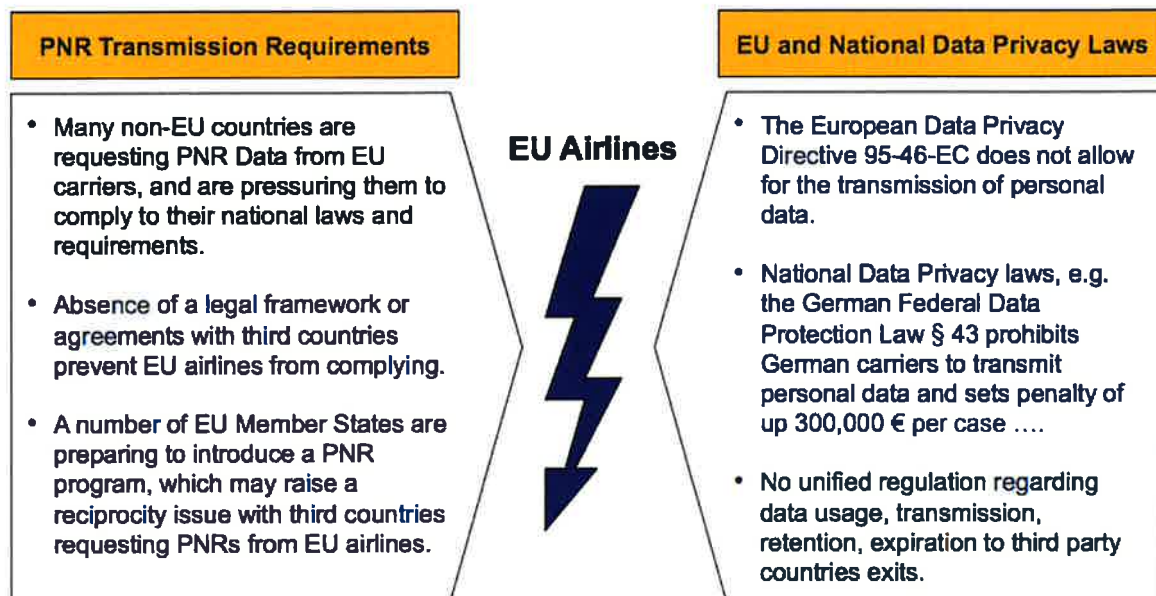
	and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM (2011) 32 – <b>2007 EU PNR Directive Rejected by European Parliament, Committee on Civil Liberties, Justice and Home Affairs</b>
2012	Council Decision 2012/472/EU of 26 Apr. 2012 on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security, OJ 2012 L 215/4 - <b>EU-US 2012 PNR Agreement, replacing EU-US 2007 Agreement</b>
2014	<b>Proposed EU-Canada Agreement referred to the CJEU per Article 218(11) TFEU</b>
2015	European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report 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, 2011/0023(COD) - <b>re-drafting of EU PNR Directive</b>
2016	Directive 2016/681/ EU on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes OJ 2016 L 119/132 - <b>EU PNR Directive</b>
2017	<b>Case Opinion 1/15 (2017) Opinion of the Court of Justice of the European Union (Grand Chamber) of 26 July 2017</b>

## **Annex 2. European PNR Directive: Passenger Name Record Data Collected by Air Carriers**

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, age, 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 the PNR
18. Any advance passenger information (API) data collected (including the type, number, country of issuance and expiry date of any identity document, nationality, family name, given name, gender, date of birth, airline, flight number, departure date, arrival date, departure port, arrival port, departure time and arrival time)
19. All historical changes to the PNR listed in numbers 1 to 18.

**Source:** Directive 2016/681/ EU on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes OJ 2016 L 119/132, Annex 1.

## European Airlines in a Conflicting Situation



**A legal solution is needed urgently!**

**Source:** Kerianne Wilson, 'Gone With the Wind: The Inherent Conflict between API/PNR and Privacy Rights in an Increasingly Security-Conscious World' (2016) 41(3) *Air and Space Law* 26-

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*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* [1995] OJ L 281/31

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