



LEGAL COMMITTEE – 38th SESSION

(Virtual meeting, 22 to 25 March 2022)

Agenda Item 7: Any other business

PRIVACY LAWS AND INTERNATIONAL CARRIAGE BY AIR

(Presented by the International Air Transport Association)

1. INTRODUCTION

1.1 A large number of jurisdictions have adopted privacy laws or regulations that govern the collection, use, transfer and retention of personal data. These are general in scope and apply to airline companies, passengers and scenarios of international carriage by air, as well as other areas of commercial activity.

1.2 Many such national privacy laws or regulations are not designed with the special characteristics of international civil aviation in mind and may differ substantially in their requirements. Some privacy laws apply to activities taking place outside the regulating State, where certain connecting factors exist, and two or more privacy regimes may apply to a given scenario of international carriage by air.

1.3 Given the multiplicity of such requirements, and the significant practical and cost burden associated with compliance, this may be an area that merits further study with a view to promoting uniformity or harmonisation in regulatory outcomes.

2. NATIONAL PRIVACY LAWS AND INTERNATIONAL CIVIL AVIATION

2.1 National privacy laws apply to private entities such as airline companies that offer international carriage by air to passengers, as well as industry supply chain partners such as booking, payment, distribution and settlement system providers.

2.2 While many liability and regulatory aspects of international civil aviation operations are unified or harmonised between States under international frameworks known to the Legal Committee, there is no such uniformity or harmonisation with respect to privacy laws or regulations and their interaction with international civil aviation.

2.3 Such laws and regulations were not contemplated by States when much of the practice concerning the form and content of air services agreements was developed.

2.4 It is axiomatic that a passenger, who wishes to travel internationally, intends to move between jurisdictions and also intends to carry and transmit their personal data with them for this purpose. It is not possible to travel internationally without submitting one's identity documentation and various other

categories of information or personal data to both State authorities (and usually the transport provider) for the purpose of border and immigration clearance.¹

2.5 It is also understood as accepted that the laws of the destination jurisdiction will apply to a passenger, as a general principle, when that person leaves their origin jurisdiction and travels to and enters their destination jurisdiction. This is an expectation of international transport by its nature.

3. **INTERNATIONAL CARRIAGE BY AIR UNDER NATIONAL PRIVACY LAWS**

3.1 International carriage by air is recognised in many regulatory contexts to have special characteristics that ought to be taken into account by States in developing and maintaining their national legislation.

3.2 IATA understands that some 128 countries, out of a total of 194 countries examined, have introduced some form of privacy law or regulation in recent years.² However these do not typically deal with international civil aviation or international carriage by air as a specific category for regulation with regard to its special characteristics.

3.3 Airline companies and their advisers must therefore devise compliance programmes to fit within generic and varying concepts of national law that may or may not be suited to the subject-matter characteristics of international travel by passengers.

3.4 For example, national law may treat the transmission of information specific to a passenger's movement from one jurisdiction to another as a cross-border "transfer".³

3.5 IATA understands that this concept was by and large developed with regard to the emergence of large technology companies that may transfer and store consumer information to offshore data centres as a matter of business practicality or convenience.

3.6 International carriage by air can be distinguished in this respect from such a "transfer" in that:

3.6.1 the transmission of personal data outside the borders of the origin jurisdiction is inevitable and essential for international carriage by air to occur, given the origin point will be in one jurisdiction and the destination point will be in another;

3.6.2 the passenger or individual consumer will physically travel themselves to the destination jurisdiction, or intends to, and therefore will 'accompany' the movement of their data in a conceptual sense that is not true of other non-transport related business contexts;

3.6.3 the personal data in question will often be provided in the destination jurisdiction regardless of whether a transmission occurs beforehand or not (i.e. identity information in the form of passport data is provided or scanned at the immigration desks of the destination country);

¹ This modern reality has been amplified in the context of the COVID-19 pandemic, where there has been a significant recent emphasis by States on the collection and transmission of health-related personal data.

² These figures are based on work by UNCTAD. See further: <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> (accessed 18 January 2022).

³ IATA understands that, in some scenarios, remote access to a centrally-located system is considered a cross-border transfer.

3.6.4 such transmission is most often a legal requirement of the destination jurisdiction and is often provided for by immigration and border clearance legislation. Such legislation is typically expressed to attach legal obligations to *airlines* for the transmission of such data, failing which fines may be imposed; and

3.6.5 due to the nature of international civil aviation under the Chicago Convention, an international airline is based and incorporated in a particular home jurisdiction, where it maintains its aircraft registrations and passenger reservations system, among other things, and operates as a *single legal entity* across both its home and other jurisdictions in order to provide international air carriage to or from those other jurisdictions, and in accordance with rights conferred under an air services agreement.⁴ Information accordingly needs to be sent to the home entity given this assumption of the regulatory framework.

3.7 It is to be noted that many privacy laws or regulations are designed to apply to activities that occur outside their territory, where there is some connecting factor to the regulating State's citizens, residents or companies, meaning that two or more privacy regimes could apply at the same time to a given scenario or activity.⁵

3.8 The multiplicity of national privacy laws or regulations in place also implies a significant cost of compliance and resourcing burden for the air transport industry. These costs are necessarily higher than they might be under a uniform global approach.

3.9 While there are examples of State-to-State cooperation, IATA understands these fall short of an international treaty or comparable framework that addresses in meaningful detail issues relevant to how States may choose to design, implement and apply their privacy laws or regulations or, in particular, how they may choose to do so in the specific context of international carriage by air.⁶

3.10 IATA considers that international carriage by air is one area where further study with a view to advancing practical uniformity or harmonisation outcomes may be highly beneficial.

3.11 Given the increasing number of jurisdictions adopting or revising their privacy laws or regulations, there is significant potential for both (a) a patchwork of divergent compliance requirements worldwide and (b) conflict of law problems given the different content of laws and that two or more regimes of law may apply simultaneously.

3.12 This circumstance may impede the orderly development and efficiency of international civil aviation as a general proposition.

⁴ This might be contrasted with modern business practice in other sectors where it is typical to open new company or subsidiary in foreign markets, which would take on the nationality of the place it is incorporated. Under regulatory arrangements for international civil aviation, however, traffic rights and other operational permissions are premised on an international airline having the nationality of the State that designates it.

⁵ Conflicts may arise where, for example, the laws of an origin jurisdiction attempt to restrict airlines from transmitting personal data to a destination jurisdiction, which itself imposes a requirement for airlines to collect and transmit the same personal data to officials in that jurisdiction. As new privacy laws or regulations with stricter rules and heavier penalty frameworks are adopted by many countries, if such conflicts are not thoughtfully identified and avoided, they could impede air connectivity.

⁶ IATA has been referred to the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data and the APEC Privacy Framework. In respect of regional treaty instruments, the Council of Europe's 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data is sometimes referred to. IATA notes that Annex 9 (Facilitation) was amended in 2021 to address some principles in the limited context of the compulsory transmission of Advance Passenger Information (API) and Passenger Name Record (PNR) data by carriers to States.

4. **ACTION BY THE LEGAL COMMITTEE**

4.1 The Legal Committee is invited to:

- a) note this Working Paper and the issue of the interaction of international carriage by air with privacy laws from a uniformity or harmonisation perspective; and
- b) consider whether the issue merits further study or examination by the Committee, as appropriate.

— END —