



WORKING PAPER

LEGAL COMMITTEE – 39TH SESSION

(Montréal, 25 – 28 June 2024)

Agenda Item 2: Consideration of the General Work Programme of the Legal Committee

INTERNATIONAL CARRIAGE BY AIR AND DATA PROTECTION LAWS

(Presented by the International Air Transport Association (IATA))

EXECUTIVE SUMMARY

Air connectivity depends on data connectivity. Protecting the personal information necessary for passengers to travel between jurisdictions is critical and air carriers are committed to compliance with national data protection laws. However, many such data protection laws were not devised with the unique operational and regulatory characteristics of international civil aviation in mind, giving rise to problems of application and conflicts between State legal frameworks. In IATA's view, the interaction between international carriage by air and data protection laws raises a consistency issue that merits further study and cooperation. If unaddressed, this issue has the potential to adversely affect connectivity and the development of international civil aviation between States. Following the ICAO 41st Assembly and other recent engagements, a multidisciplinary expert group should be created to advance work.

Action: IATA invites the Legal Committee to request the approval of the ICAO Council to constitute a multidisciplinary expert group under the Legal Committee to examine the interaction of international carriage by air and data protection laws.

<i>References:</i>	ICAO Legal Committee 38 th Session (2022) – IATA Working Paper LC/39-WP/7-1 ICAO 41 st Assembly (2022) – IATA Working Paper A41-WP/73 Revision 1 ICAO Doc 10183 Executive Committee Report of the 41 st Assembly, Paragraph 13.26 (2022) ICAO 13 th Facilitation Panel (2024) – IATA Working Paper FALP/13-WP/32
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1. INTRODUCTION

1.1 Every day 12 million passengers safely take over 128,000 flights between 21,000 different city pairs. This international air connectivity depends on data connectivity.¹

1.2 To facilitate the safe and secure travel by passengers on this scale, air carriers must also safely and securely handle personal information and share it with partners in the aviation value chain, including other airlines, airports, ground handlers, travel agents and border control authorities. This must be done in strict compliance with national data protection laws.²

1.3 However, data protection laws were not devised with the unique operational and regulatory characteristics of international civil aviation in mind. Such laws differ as to their substantive requirements, often conflict with each other and may apply outside the territory of the regulating State.

1.4 Air carriers do not seek to be exempted from data protection laws nor do they challenge the sovereign policy prerogative of governments to introduce such laws. However, with over four billion passengers traveling each year and millions more making bookings up to a year in advance, the practical task of identifying which laws apply to an individual's travel itinerary and circumstances is increasingly complex. These and other related issues are highlighted in Annex A.

1.5 Air carriers also find themselves caught in legal and practical conflicts between States under data protection laws. These issues are set out in IATA Working Paper FALP/13-WP/32 to the 13th Session of the ICAO Facilitation Panel of February 2024. IATA expects to see more issues of this kind as an increasing number of States implement Passenger Name Record (PNR) programs in line with ICAO SARPs in Annex 9 – *Facilitation*.

1.6 As a policy matter, this complexity jeopardises both air connectivity and the substantive protection intended by data protection laws.

1.7 In IATA's view, the interaction between international carriage by air and data protection laws raises a consistency issue that merits further study and cooperation between States. If unaddressed, the issue has the potential to adversely affect the orderly and harmonious development of international civil aviation.

2. RECENT WORK WITH ICAO AND MEMBER STATES

2.1 IATA has sought to raise awareness with States on the interaction of international carriage by air with data protection laws on several recent occasions. For example, WP/7 was presented to the 38th session of the ICAO Legal Committee in March 2022 and WP/73, Revision 1 was presented to the 41st ICAO Assembly in October 2022. The Report to the Assembly on the Executive Committee (Doc 10183), in paragraph 13.26, notes that: "*Many delegates agreed that complex conflict of laws and legal compliance issues are broader than the provisions of Annex 9 — Facilitation and would need to be addressed. Following discussions, the*

¹ 2020 Aviation Benefits Beyond Borders Report. See: https://aviationbenefits.org/media/167517/aw-oct-final-atag_abb-2020-publication-digital.pdf

² Many jurisdictions have data protection, data security and privacy laws on the collection, use, transmission, and retention of personal information. These laws, including data protection, privacy, data security and data sovereignty laws, will be described as data protection laws for the purpose of this working paper.

Committee agreed that the actions presented in the Executive Summary of the paper should be considered and assessed by the relevant ICAO Panels and working groups”.

2.2 In February 2023, IATA presented additional information as part of an informal briefing for members of the ICAO Council. It was suggested that a dedicated event be held to examine the issue in more detail.

2.3 IATA held the Data Protection and International Carriage by Air Seminar in Montreal on 27 and 28 September 2023. The Seminar was held in cooperation with ICAO and covered a range of practical issues and problems from the perspective of passengers, governments and air carriers. A number of State representatives attended the Seminar and participated in discussions. There was general alignment in these discussions that the interaction and relationship between data protection laws merits further study at the international level.

2.4 In October 2023, by letter to IATA following the Seminar, the President of the ICAO Council expressed his view that work was in a good position to advance under the ICAO framework.

2.5 Given these developments and the pressing implications for air connectivity, IATA believes that a formal consideration by the international community is appropriate and respectfully requests that a multidisciplinary group is constituted under the Legal Committee to advance the work referred to in paragraphs 2.1 and 2.4 above at the earliest opportunity.

3. TERMS OF REFERENCE FOR A MULTIDISCIPLINARY GROUP

3.1 The terms of reference for a multidisciplinary group are an important consideration. In IATA’s view, the multidisciplinary group would undertake work on the following areas:

- (a) an examination of the types of data and personal information collected, processed, retained and transferred in scenarios relating to international carriage by air;
- (b) how data protection laws apply to these scenarios relating to international carriage by air;
- (c) how other categories of State law apply in the context of international carriage by air and require data and personal information to be collected, processed, retained and transferred by air carriers and others;
- (d) how data protection laws interact with (i) these other categories of State law; (ii) the data protection laws of other States and (iii) the operational aspects of international carriage by air;
- (e) the identification and examination of areas of conflict or practical difficulty under (d), including recommendations in respect of these areas; and
- (f) the preparation of options and recommendations to advance consistency among States in their data protection laws as they apply to international carriage by air, including but not limited to consideration of guidance material for the reference of States in the adoption, review or amendment of their data protection laws.

3.2 IATA makes these observations as suggestions for the Legal Committee's further consideration.

4. **ACTION BY THE COMMITTEE**

4.1 The Committee is invited to

- a) take note of this Working Paper; and
- b) request the ICAO Council to constitute a multi-disciplinary expert group under the Legal Committee to examine the interaction of international carriage by air and data protection laws in detail and, among other things, to develop guidance material for States to refer to when they adopt or amend their data protection laws.

APPENDIX

INTERNATIONAL CARRIAGE BY AIR AND NATIONAL DATA PROTECTION LAWS – A CONSISTENCY ISSUE FOR CONSIDERATION BY STATES

137 countries or around 70% of ICAO Member States have data protection laws which govern the collection, use, transfer, and retention of personal information.

These laws represent a growing patchwork of requirements. They:

- (a) are often inconsistent with each other as to their substantive requirements;
- (b) are not adapted to, nor take account of the special characteristics of international civil aviation (i.e. in respect of the international regulatory framework by which international carriage by air is conducted or its specific operational characteristics);
- (c) may have extraterritorial application (meaning that two or more laws may apply to the *same* scenario of international carriage by air, with the possibility for different and/or conflicting legal bases for collection, use, transfer and retention of personal information); and
- (d) in some cases, do not recognize foreign law or international obligations as a justification or legal basis for the use of personal information.

As a result, the following can be observed in policy terms:

- For States, the lack of a consistent framework for data protection in the context of international civil aviation creates uncertainty for their ability to regulate data protection and privacy issues and, in practice, this diminishes the substantive protection intended by these laws.
- States who wish to modernise their operational procedures, and rely more upon data-driven processes, for example, may be unable to easily do so because of the practical impact of multiple foreign laws that apply to air carriers serving their jurisdiction.
- For passengers, equally, there is understandable confusion as to how and where data protection laws apply, including how these laws relate to other laws, including foreign law, that may require personal information in the context of international carriage by air or international travel.
- Air carriers face considerable cost and complexity in addressing domestically focused and divergent data protection laws, with this aspect multiplied by the size and diversity of their international route network.
- Air carriers also face specific challenges in managing the collection and transmission of PNR information and other personal data to governments as a key example. First, they must comply with legislation requiring the transmission of Advance Passenger Information (API) and PNR data to the destination government and, at times, to the government of the origin or overflow territories.¹ Second, air carriers must also transmit additional personal information as required by the destination government's laws, which can go beyond API and PNR data.² Third, air carriers may also need to retransmit data already sent to the government or transfer it multiple times, leading to inefficiencies and potential privacy concerns.³

Appendix

In order to highlight these and other related issues, IATA has published a White Paper entitled “*Turbulent Skies: Data Protection and International Carriage by Air.*”

¹ PNR information includes passenger booking and reservation record elements, such as travel itinerary, passenger names, contact details and payment information.

² For example, during a health crisis such as the COVID-19 pandemic, health information may be required by governments from air carriers, adding another layer of data collection and transmission. In some cases, governments have required air carriers to retain such information for a period of time.

³ As suggested in ICAO A41-WP/73, IATA encourages governments to prioritize passengers in collecting personal information and to focus on their preferences. Data protection and privacy concerns can be addressed by having authorities directly collect information from passengers through web portals or mobile apps. This allows authorities to gather necessary data, such as immigration, customs, and health information, and perform checks before the journey begins. This approach also minimizes the airline's role in information collection, ideally limiting it to verifying that passengers have the necessary authorizations from these platforms.

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