



Access Now's memo on the data transfers and PNR provisions under the EU-UK Trade Agreement

Introduction

The European Union and the United Kingdom have agreed on a Trade and Cooperation Agreement which entered into provisional application on 1 January 2021.¹

Below we analyse the provisions on Data Transfers and Passenger Name Records and provide recommendations to the European Union as discussion on these issues continues with the UK.

Data Transfers

In Article FINPROV.10A, the Agreement provides for an “interim provision” for the transfer of personal data from the EU to the UK. The provision establishes that the transfers of data to the UK “shall not be considered as transfer to a third country under Union law.” This provision will apply for a maximum of six months or until the EU and the UK agree on a so-called adequacy decision, if this decision were to happen earlier.² During this period, the UK must continue to apply and not modify its current data protection law which is modelled after the EU General Data Protection Regulation.³

This workaround is unprecedented as in practice it means that while the UK has left the EU, it is allowed to keep the same benefits as EU states for up to at least 6 months in the area of data transfers. **The legality of such a measure is unclear.** It is also unclear how data subjects should seek remedy in case of data protection violations related to the transfer of data to the UK occurring during this period.

The EU should not extend this period further in order to prevent additional harmful precedent. A third country should not be granted arbitrary beneficial access to EU data in the absence of an adequacy decision. **Such an interim measure should not be used again in the future with any country seeking an adequacy decision with the EU as it is not an existing mechanism under the GDPR.** The measure relies on non-transparent and case-by-case negotiation and thus does not meet basic requirements of foreseeability and legality. Overall it undermines the EU data protection acquis.

¹ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2020.444.01.0014.01.ENG

² See Article FINPROV.10A, Point 4

³ See Article FINPROV.10A, Point 1

As the European Commission continues discussions with the UK to find a path towards an adequacy decision, **it should be clear that there is no “requirement” to get to a deal in 6 months**, even if the interim period comes to an end at that point. For the UK to qualify for an adequacy decision, the EU must carefully review the laws and practices of the UK in the area of privacy and data protection, and also regarding surveillance and government access to data. The UK surveillance regime is extensive and several legislations adopted in the recent years have been or are being challenged as they interfere with fundamental rights to privacy and data protection. **It is inconceivable that the UK would be granted an adequacy decision without undertaking significant reforms to its surveillance laws and practices** to bring these in line with human rights standards, including those set forth under the European Convention for Human Rights. These negotiations and reforms may take time and should not happen under arbitrary deadlines.

What is more, the UK leadership has indicated on several occasions its intention to diverge from EU data protection rules after Brexit. The UK may not do so during the application of the interim provision. Even after this period has ended, **the UK should not be able modify its data protection law in a way that limits people’s rights or lower level of protection if it seeks to receive an adequacy determination from the EU**. For the EU to be able to conduct this assessment, the UK must however inform the EU of its possible legislative plan. Failure to do so would impede the Commission from conducting a proper assessment of the UK laws and practices.

Finally, in conducting these adequacy discussions, the **European Commission must ensure close cooperation with the EU data protection authorities and the LIBE Committee of the European Parliament**. These experts will be required to provide opinions on any decision, and they should be closely involved in the discussions to ensure that any outcome not only has broad support but also benefits from their expertise.

Passenger Name Records

Title III of Part III of the Agreement on Law Enforcement and Judicial Cooperation in criminal matters establishes rules for the transfer and processing of passenger name record data. These provisions largely build on the EU Passenger Name Records Directive which is currently under legal scrutiny in three legal cases at the Court of Justice for possible unjustified interference with the fundamental rights to privacy and data protection.⁴

In the Agreement, we can find important provisions to define and limit the scope and use of PNR data. We note in particular the addition of a list of the PNR that can be processed,⁵ a measure prohibiting the processing of sensitive data,⁶ and a notification obligation to data subjects when their PNR data have been kept.⁷ An additional important requirement set forth by the Court in the Opinion on the Canada PNR Agreement has also been added in the text.⁸ In fact, the PNR data of most travelers must be deleted after their stay in the UK has ended.⁹ This positive step is

⁴ See for instance, Case C-817/19, Ligue des droits humains <http://curia.europa.eu/juris/showPdf.jsf?text=pnr&docid=225831&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=22569044>

⁵ See ANNEX LAW-2: PASSENGER NAME RECORD DATA

⁶ See Article LAW.PNR.24

⁷ See Article LAW.PNR.26, point 3

⁸ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=193216&doclang=FN>

⁹ See Article LAW.PNR.28, Point 4

nevertheless undermined by the several caveats that have been added to it, effectively limiting the application of this deletion obligation. First, the UK does not have to apply this provision for at least one year, and this derogation could be extended for another year if the Partnership Council agrees to it.¹⁰ In practice, this means that this provision may only take effect in 2023. In the meantime, PNR data of travellers that are not suspected of crimes and whose information is not needed for law enforcement purposes could be kept by the UK for another two years before the deletion obligation comes into force. The application of this provision will also be reviewed which means that the UK could potentially propose to remove it altogether.¹¹

The maximum retention period for PNR data for travelers who have been identified as suspects or whose information is necessary for the investigation and/or prosecution in cases of terrorism or serious crimes is 5 years.¹² As often with retention periods set forth under EU legal acts, it is unclear how this determination was made and why this period is considered necessary and proportionate.

Finally, the Agreement includes some problematic provisions on “automated processing” of data for targeting and cross-referencing of PNR data against unspecified databases.¹³ Such targeting and profiling of travelers could lead to discrimination and should not have been included. **As a minor mitigating factor, the EU could request for a closed list of databases to be listed in annex of the Agreement to try to limit this use.**

While we note an effort to improve current PNR rules, the provisions in the Agreement suffer from most of the same flaws as all existing EU PNR acts (Agreements and Directive). **The EU must take action to bring the provisions of this Agreement and other existing PNR measures in line with the EU Charter.** To do so, the European Union should clarify if and how part of the Agreement on Law Enforcement and Judicial Cooperation may be modified without putting in question the validity of the whole Trade and Cooperation Agreement with the UK.

Conclusion

Given the political context and lengthy negotiations of the EU-UK Trade and Cooperation Agreement, the deal is likely to be adopted and enter into force in its current form. However, as suggested in this memo, **the EU still can - and must - provide additional safeguards for privacy and data protection in the provisions on the processing of PNR data.** Regarding data transfers, **as discussions for an adequacy decision continues, the Commission must involve the EDPB and the LIBE Committee in the talks and should not be tied by any arbitrary deadline as important reforms should be taking place in the UK to ensure that people’s data are protected once transferred to the UK.**

¹⁰ See Article LAW.PNR.28, Points 10,11 and 13

¹¹ See Article LAW.PNR.28, Point 12.b

¹² See Article LAW.PNR.28, Point 1

¹³ See Article LAW.PNR.27

For more information, please contact:

Estelle Massé

Senior Policy Analyst at Access Now

estelle@accessnow.org