THE LIFE CYCLE OF PASSENGER NAME RECORDS IN EUROPEAN UNION LAW—ON THE NORMALISATION OF CRISIS

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Abstract:
The topic of passenger name records constitutes one of the thorniest areas of European Union (EU) law. EU law has given rise to a Passenger Name Records Directive which has its origins in a third country international law agreement with the United States, foisted upon the European Union by US law in the wake of 9/11. The debacle with the US resulted in several highly controversial international agreements and initially disastrous European Parliament litigation. Several decades on, the passenger name records saga shows no sign of abating. It has witnessed nearly two decades of policy shifts on data transfer with third countries, a stream of controversial decisions by the European Court of Justice (the Court) as to third country legal orders and has failed to quell concerns as to its evolution. The European Union now has a range of transfer agreements with many countries (and many under negotiation) that continue to give rise to complexity when it comes to renegotiations and to evolve in line with case-law. Internally, i.e. within the EU legal order, the Directive has been upheld in 2022 by the European Court of Justice and has been the subject of challenges by civil liberties organisations from the outset. Recent Court of Justice litigation has evinced a degree of "whitewashing" of the Directive's origins—i.e. the Court not being transparent about the Directive's provenance. Whether the European Court of Justice has actually "Charter-proofed" or even "whitewashed" the Directive (i.e. approved or even downplayed its complex origins), however, remains to be seen. Externally, the European Union has faced complex negotiations with many developed countries over the place of passenger name records in international agreements. This article explores the "normalisation" of the passenger name records into European Union law from wholesale crisis law, through its internalisation (Section I), institutionalisation (Section II) and constitutional normalisation (Section III). It thus considers the internal and external reach of the passenger name records regime and the deepening and widening of policy which it has involved.

Keywords: Area of Freedom, Security and Justice – crisis data transfer – European Court of Justice – passenger name records

OVERVIEW

The topic of passenger name records (henceforth PNR) constitutes one of the thorniest areas of EU law relating to the Area of Freedom, Security and Justice. It has resulted in several highly controversial international agreements, much litigation and a directive with extraordinary origins dating from the 9/11 era of law-making. Several decades on, the controversy over passenger name records law shows no sign of abating. Most of all there has been a failure to quell concerns regarding the manner in which it has evolved. The European Union now has a range of transfer agreements with many countries and many under negotiation that continue

both to give rise to complexities when it comes to renegotiation and to evolve in line with case-law. The Area of Freedom, Security and Justice, which Article 3(2) TEU establishes as an "area", has been gradually "regularised" over time as a legal and institutional space and has a booming legislative agenda since the entry into force of the Treaty of Lisbon, involving an estimated approximate 30% of the European Union's (EU) legislative output.[1] The Area of Freedom, Security and Justice has thus been one the European Union's most prolific law fields during recent crises and in times of rising populism.[2] Justice and Home Affairs (JHA) policies are a key plank of the Area of Freedom, Security and Justice, and are now routed into the institutional foundations, decision-making parameters and principles enshrined in the European Union Treaties. These policies appear also increasingly vulnerable to declared crises—e.g. the rule of law crisis, the refugee crisis in 2015/2016 or the Covid-19 pandemic. PNR law provides ample evidence of the breadth and depth of the evolution of Area of Freedom, Security and Justice- as well as its controversies and crises.

There are multiple meanings to "crisis" in the European Union context and a vast European Union law, politics and policy scholarship on crisis to which it is difficult to do justice. It relates to everything from the Eurozone crisis to the rise of the political far-right, to the migrant crisis and to the UK's withdrawal from the European Union.[3] There is positive and negative coverage of its meaning, highly scientific readings, other contributions that are more inductive, descriptive or reactive. For some, crisis is a constitutional normal for the European Union. It enables vast amounts of law-making to be undertaken. Its breadth and depth also reflects the view that the European Union exists and evolves through crisis. Not all "crisis" law-making in the European Union produces similar results. For instance, Nic Shuibhne has eloquently outlined well how the EU's Eurozone responses to crises shrank back to the margins of the European Union framework whereas Brexit is a striking case-study of a "persistent recourse both to the fundamentals of European Union law and to the integrity of the Union's institutional

[1] Emilio De Capitani, "Progress and Failure in the Area of Freedom, Security and Justice" in Francesca Bignami (ed), *EU Law in Populist Times* (Cambridge: Cambridge University Press, 2020), p.387; Renaud Dehousse and Olivier Rosenburg, "There Has Been a Substantial Drop in EU Legislative Output Since 2010" (3 February 2015) *LSEblog.ac.uk*, available at: *https://blogs.lse.ac.uk/europpblog/2015/02/03/there-has-been-a-substantial-drop-in-eu-legislative-output-since-2010/* [Accessed 15 August 2023]. See also Ariadna Ripoll Servent and Florian Trauner (eds), *Routledge Handbook on Justice and Home Affairs* (Abingdon-on-Thames: Routledge, 2017). Elaine Fahey, "The Evolution of Transatlantic Legal Integration: Truly, Madly, Deeply? EU–US Justice and Home Affairs" in Ripoll Servent and Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (2017), pp.336–345. Elaine Fahey, "The Rise and Fall of International Law in the Post-Lisbon AFSJ Legislation Cycles" (2021) 1 *Groningen Journal of European Law* 1.

[2] Dehousse and Rosenburg, "There Has Been a Substantial Drop in EU Legislative Output Since 2010" (2015); Claude Moraes, "The European Parliament and Transatlantic Relations: Personal Reflections" in Elaine Fahey (eds), *Institutionalisation beyond the Nation State* (Berlin: Springer, 2018); Francesca Bignami (ed), *EU Law in Populist Times* (Cambridge: Cambridge University Press, 2020).

[3] Niamh Nic Shuibhne, "Did Brexit change EU law?" (2021) 74 *Current Legal Problems* 195; Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford: Oxford University Press, 2015) and Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014); Christian Joerges and Christan Kreuder-Sonnen, "European Studies and the European Crisis: Legal and Political Science between Critique and Complacency" (2017) 23 E.L.J. 118; Adrienne Yong, "The Future of EU Citizenship Status During Crisis—Is There a Role for Fundamental Rights Protection?" (2020) City Law School Research Paper No. 2020/03.

system."[4] She argues that one needs "to look *beyond* immediate impact as well as *across* different crisis events to identify– their *cumulative* impact on European Union law".[5] Passenger name records law provides a very clear case-study of one field which is a longer-term policy of the European Union in many respects, evolving continuously after an immediate crisis. It thus differs from COVID-19 pandemic era examples. PNR law follows in the trajectory of much of post-9/11 law-making, in remaining in existence and entrenching upon civil liberties.[6] As Dermine aptly puts it, crisis law-making has the tendency to promote "interpretative stretching and legal acrobatics" which ultimately undermines the integrity of primary law, the power balance between Member States and the Union, and the EU rule of law'.[7] To a degree, European Union passenger name recognition law has given rise to some of these phenomena, perhaps not all, but it has certainly had effects inimical to the rule of law in the EU because of the variety of laws, sources and instruments deployed. Passenger name records law has arguably re-constituted itself in the context of a much longer-term state of crisis in the Area of Freedom Security and Justice.[8]

The article proceeds as follows. Section I considers the absorption of United States law into European Union external relations law. Section II reflects upon institutionalisation of the *Opinion 1/15* precedent concerning the future of passenger name records law, Section III considers the constitutional normalisation of PNR law. This is followed by conclusions.

I. INTERNALISATION

The external normalised into the internal: the absorption of United States law into European Union external relations law

After 9/11, the United States infamously introduced legislation which required all airlines flying into the US to supply passenger name records (PNR) data to the US Customs and Border Control (CBC).[9] It was a development that would change the face of data transfer law and governance globally, but in particular that of European Union law. This legislation was problematic from the outset from a European Union law perspective as Article 25 of the Data

[4] Nic Shuibhne, "Did Brexit change EU law?" (2021) 74 *Current Legal Problems* 195; Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis* (2014); Joerges and Kreuder-Sonnen, "European Studies and the European Crisis: Legal and Political Science between Critique and Complacency" (2017) 23 E.L.J. 118; Yong, "The Future of EU Citizenship Status During Crisis—Is There a Role for Fundamental Rights Protection?" (2020) City Law School Research Paper No. 2020/03.
[5] Nic Shuibhne, "Did Brexit change EU law?" (2021) 74 *Current Legal Problems* 221.
[6] Mary Robinson, "The Fifth Annual Grotius Lecture Shaping Globalization: The Role of Human Rights" (2003) 19(1) *American University International Law Review* 1.
[7] Paul Dermine, "The EU's response to the COVID 19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture" (2020) 47(4) *Legal Issues of Economic Integration* 337.
[8] Maria Fletcher, Ester Herlin-Karnell and Claudio Matera, *The European Union as an Area of Freedom, Security and Justice* (Abingdon-on-Thames: Routledge, 2019), p.6; Christian Joerges, "Integration through Law and the Crisis Of Law in Europe's Emergency" in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge: Cambridge University Press, 2016), p.229.
[9] Aviation and Transportation Security Act 2001 s.1447.

Protection Directive, which was then in force, provided that personal information originating from within EU Member States could be transferred to a third country only if that country "ensure[d] an adequate level of protection"[10]—a level of protection which had not then formally been established between the EU and US. In 2003, the European Union launched negotiations with the United States on an agreement which would govern the transfer of passenger name records data. A draft agreement was reached in 2004. The Commission then adopted an Adequacy Decision, asserting that undertakings offered by the US Customs and Border Control provided adequate protection for the data of European Union citizens travelling to the United States. Under the threat of litigation in the European Court of Justice by the European Parliament (which had become increasingly vocal in its opposition to such data transfers, principally on civil liberties grounds), an Agreement between the European Union and United States came into force in 2004 and the European Parliament quickly sought annulment both of the Commission Adequacy Decision and of the Council Decision authorising the signature of the Agreement.[11]

The European Court of Justice handed down a decision in 2006 which concluded that ex Article 95 EC (now Article 114 TFEU), the legal basis for internal market harmonisation or approximation of laws, as the legal basis of the Council Decision read in conjunction with the Data Protection Directive, did not provide an adequate legal basis for the transfer of the data entailed and the Decision therefore had to be annulled.[12] Exceptionally, the Court preserved the effect of the Adequacy Decision until 30 September 2006 to allow time for a new Agreement to be negotiated. A provisional seven-year Agreement was then concluded in 2007 to replace the earlier Agreement. As De Witte famously outlined, the United States extracted a legal agreement significantly worse from an EU perspective, taking advantage of the renegotiation to extend data retention periods considerably.[13] A new Agreement was then agreed in 2011, enhancing data protection mechanisms and limiting the use of data,[14] but controversy surrounded its impact upon fundamental rights and privacy.[15]

[10] Directive 95/46 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 L281/31.

[11] 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 [2004] OJ L183/8. Elaine Fahey, "Of 'One Shotters' and "Repeat Hitters": A Retrospective on the Role of the European Parliament in the EU–US PNR Litigation' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017).

[12] *European Parliament v Council of the European Union* (C-317/04) and (C-318/04) EU:C:2006:346.

[13] Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries COM(2010) 492 final.

[14] European Commission, "New EU-US Agreements on PNR Improves Data Protection and Fights Crime and Terrorism" (17 November 2011), available at: *https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1368* [Accessed 15 August 2023].

[15] Decision 2004/496 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 [2004] OJ L183/83, and corrigendum at [2005] OJ L255/168.

The 2011 Agreement was endorsed by the majority of the European Parliament in 2012.[16] It was intended to represent—over a decade after 9/11—an *improved so-called second-generation* Agreement with the United States. This Agreement has been in force since 1 July 2012 and remains unchallenged before the Court. Although it makes provision regarding the purpose and duration of data retention, significant discretion is left to US authorities to determine exceptions to retention and regarding the anonymisation of data.

The main criticism of early European Union passenger name records data agreements was that in prioritising the expansion of counter-terrorism cooperation with third countries, especially the United States, the EU was not particularly sensitive on data protection rules. Kaunert et al., have argued that this lack of sensitivity has been more prevalent in EU–US agreements than in European Union negotiations with third countries more generally.[17]

Moving external relations law into European Union internal law: the adoption of a passenger name records directive

As has been noted by Lowe, in 2004 the Council quickly adopted Directive 2004/82 on the obligation of carriers to communicate passenger data. This Directive concerned the transfer of advanced passenger information (API), however. Advanced passenger information differs from passenger name records data as it covers the machine-readable zone on a passport i.e. a passenger's name, date of birth, nationality and passport number. The adoption of this Directive was relatively rapid because transferring advanced passenger information is less controversial than transferring passenger name records data, which depends on the more detailed information that the passenger submits at the time of the reservation. The Commission introduced a proposal for a Framework Decision on passenger name records data with the aim of helping to prevent and combat terrorism and organised crime when only the UK, France and Denmark had primary legislation to capture passenger name records data. Despite significant controversy and a failed effort to muster adequate support for a Framework Decision to be adopted, in 2011 the Commission produced a proposal for a PNR directive which would be very similar to that in the 2007 Framework decision proposal.[18]

Several European terrorist atrocities also provided justification for the European Union to forge ahead and adopt an internal passenger name records directive in 2016. The perceived success and effectiveness of the EU–US Passenger Name Records Agreement had inspired the

[16] See EU–US Agreement on the use and transfer of PNR to the US Department of Homeland Security, European Parliament legislative resolution of 19 April 2012 on the draft Council decision 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 (17433/2011—C7-0511/2011—2011/0382(NLE)) [2012] OJ CE258/132.

[17] Christian Kaunert and Dimitrios Anagnostakis, "The Counterterrorism Agreements of Europol with Third Countries: Data Protection and Power Asymmetry" (2015) 29(6) *Terrorism and Political Violence* 1, 2.

[18] David Lowe, "The European Union's Passenger Name Record Data Directive 2016/681: Is it Fit for Purpose?" (2017) *International Criminal Law Review* 78.

European Union to engage in "replica" rule-making and develop a passenger name records directive, deploying the same terminology, concepts, system and actors.[19] The proposed Directive had been rejected by the European Parliament in 2013, although the US Attorney General had claimed in 2012 before the European Parliament that no human rights violations had *ever* resulted from transatlantic justice and home affairs cooperation.[20] The new Directive arguably posed a significant challenge to European Union free movement law, extending the targets of surveillance from third country nationals to EU citizens. The European Union in its adoption of a Directive was famously labelled a norm-taker or recipient of "spillover" law.[21]

The Directive ignited a wave of academic condemnation for its attempt to implement internally a poisonous external relations settlement.[22] Compared to the 2011 proposal, the 2016 Directive ostensibly contained greater safeguards in relation to protecting personal data. It has been argued that the PNR Directive poses the "Borders Paradox" whereby the Directive applies not only to flights into the European Union but also intra-EU flights, and this involves an internalisation of external standards. Certain Members of the European Parliament, however, had claimed that the secrecy surrounding the transmission of data under certain trans-Atlantic Agreements made it impossible to assess the merits of those agreements.[23] Furthermore, the number of Member States that have notified the Commission of their decision to apply the PNR Directive to intra-EU flights has been patchy and incomplete. Although the European Union eventually did introduce its own PNR Directive internally, it would become the subject of strategic litigation challenging its existence on the part of NGOs and civil liberties organisations.[24] As a result of its adoption, the European Union can be accused of adopting a

[19] See 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 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European terrorist finance tracking system: available options COM(2011) 429 final. Directive 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (PNR Directive) [2016] L119/132. Elaine Fahey, "Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU–US Passenger Name Records and the Terrorist Finance Tracking Program" (2013) 32(1) *Yearbook of European Law* 368, Honor Mahony, "MEPs Vote Down Air Passenger Data Scheme" (24 April 2013) *EUObserver.com*, available at: *https://euobserver.com/rule-of-law/119926* [Accessed 15 August 2023].

[20] European Parliament Committee on Civil Liberties, Justice and Home Affairs, (20 September 2011) *WN.com*, available at: *https://wn.com/european_parliament_committee_on_civil_liberties,_justice_and_home_affairs/location* [Accessed 15 August 2023].

[21] Maria Tzanou, "The War against Terror and Transatlantic Information Sharing: Spillovers of Privacy or Spillovers of Security?" (2015) 31(80) *Utrecht Journal of International and European Law* 87, 96; Mitsilegas labels this the internalisation of external norms. Valsamis Mitsilegas, "The Preventive Turn in European Security Policy: Towards a Rule of Law Crisis?" in Francesca Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge: Cambridge University Press, 2020), p.301.

[22] See generally Elif Mendos Kuşkonmaz, "Chapter 3 Birth of PNR Data and the EU–US PNR Agreement" in *Privacy and Border Controls in the Fight against Terrorism* (Leiden: Brill Nijhoff, 2021); Lowe, "The European Union's Passenger Name Record Data Directive 2016/681: Is it Fit for Purpose?" (2017) *International Criminal Law Review* 78.

[23] Nikolaj Nielsen, "Terrorist Data Oversight Tainted by Potential Conflict of Interest" (20 December 2012) *EUObserver.com*, available at: *https://euobserver.com/rule-of-law/118593* [Accessed 15 August 2023].

[24] Directive 2016/681 (PNR Directive) [2016] L119/132; See *Ligue des droits Humains v Conseil des Ministres* (C-817/19) EU:C:2022:491.

security crisis mentality rather than evolving a solid human rights framework. It can also be said, however, that the output of the era was the incremental tightening of the protection of personal data to reflect a range of Court of Justice decisions on data rights, in part the *Schrems* litigation, discussed below in Sections II and III.

II. INSTITUTIONALISATION

The Opinion 1/15 precedent concerning the future of passenger name records law

The North American trajectory of passenger name records law has remained a constant in its life cycle—except that Canada rather than the US would prove to be a more significant third country in relation to this story. Moreover, the United Kingdom would ultimately be the most significant passenger name records partner over time—a partnership predicated upon a highly cautious implementation of the EU–Canada outcomes. Thus, the EU–UK Trade and Cooperation Agreement is the latest significant instalment in passenger name records law by 2023. An entire chapter of a trade agreement is dedicated to PNR law. This is something previously unheard of in European Union external relations law, where it has been more usual for passenger name records agreements to be agreed with third countries, often after trade agreement negotiations have been conducted and completed, with a corresponding soft law agreement on e.g., values and human rights etc. The Trade and Cooperation Agreement also came in the wake of a complex Court of Justice Opinion, *Opinion 1/15*,—in a case taken by the European Parliament concerning the EU–Canada PNR Agreement, which succeeded, resulting in that Agreement being struck down.[25] Some provisions of that Agreement were considered incompatible with Articles 7 (on privacy) and 8 (on data protection) of the Charter of Fundamental Rights of the European Union (the Charter), in conjunction with Article 52 of the Charter (regarding the principle of proportionality). *Opinion 1/15* is, despite its emphasis upon rights, a controversial decision on passenger name records, and one that has yet to be implemented, with no PNR agreement having been agreed yet with Canada to replace the one struck down.[26] Notably, the Court there found the Agreement to be legally problematic in having oversight governed by an authority lacking complete independence.[27] *Opinion 1/15* has come to be widely understood to be a troublesome precedent regarding the character of EU–US passenger name records agreements.[28] Perhaps as a consequence of passenger name records litigation, European Union law has increasingly pushed for a further and deeper degree of

[25] See *EU-Canada Passenger Name Record Agreement, Re (Opinion 1/15)* EU:C:2017:592.

[26] See Arianna Vedaschi, "The European Court of Justice on the EU-Canada Passenger Name Record Agreement" (2018) 14 *European Constitutional Law Review* 410. See also Elspeth Guild and Elif Mendos Kuşkonmaz, "EU Exclusive Jurisdiction on Surveillance Related to Terrorism and Serious Transnational Crime: Case Review on *Opinion 1/15*" (2018) 43 E.L. Rev. 583; Christopher Kuner, "International Agreements, Data Protection, and EU Fundamental Rights on the International Stage: *Opinion 1/15*, EU–Canada PNR" (2018) 55 C.M.L. Rev. 857, 858; Monika Zalnieriute, "Developing a European Standard for International Data Transfers after Snowden: *Opinion* 1/15 on the EU–Canada PNR Agreement" (2018) 81(6) M.L.R. 1046; Mario Mendez, "*Opinion 1/15*: The Court of Justice Meets PNR Data (Again!)" (2017) 2 *European Papers* 803.

[27] *Opinion 1/15* EU:C:2017:592 at [230] in particular.

[28] See *Opinion 1/15* EU:C:2017:592; See also Guild and Kuşkonmaz, "EU Exclusive Jurisdiction on Surveillance Related to Terrorism and Serious Transnational Crime: Case Review on *Opinion 1/15*" (2018) 43 E.L. Rev. 583.

institutionalisation through design and for autonomy of actors to be developed. The EU–UK Trade and Cooperation Agreement notably constitutes the only agreement on passenger name records reached with third countries since *Opinion 1/15*, with the EU–Japan PNR Agreement negotiations having ended in failure, with the Japanese authorities no longer interested in engaging in such controversial and complex law-making.

Title III of the EU–UK Trade and Cooperation Agreement: passenger name record provisions become part of the text of an EU trade agreement

The transfer of passenger name records is thus provided for in Pt III Title 3 of the EU–UK Trade and Cooperation Agreement. This is unusually detailed and comprehensive for a trade agreement.[29] Oversight is mentioned only once in one article: Article 554 on the logging and documentation of passenger name records data processing by the competent authority—which according to para.(d) thereof has to "ensure oversight".[30] Many actors are provided for in the EU–UK Trade and Cooperation Agreement who are to be involved: governance, supervision, communication, transfer, review, and accountability performing oversight generally. These include a competent authority, Passenger Information Units (PIU), a Specialised Committee on Law Enforcement and Judicial Cooperation (the Specialised Committee), independent reviews, judicial review and a Partnership Council, which are all variously provided for in Title III of the Trade and Cooperation Agreement. This is in addition to the broader governance structure of the Trade and Cooperation Agreement.[31] In total, it appears that there are at least five layers of oversight. The concept of "competent authority" is defined in Article 543 of the Trade and Cooperation Agreement and is pivotal to the operation of the passenger name records system. It refers to the UK authority responsible for receiving and processing passenger name records data under the Trade and Cooperation Agreement. This competent authority is the counterpart of Passenger Information Units in the Member States. Bodies under the EU–UK Trade and Cooperation Agreement and Passenger Information Units in turn must "cooperate" with one another, providing a rare instance of bilateral institutional cooperation provided for under the Trade and Cooperation Agreement. The competent authority is to be distinguished from the "independent administrative body", (as referred to in Articles 552(7), 552(11)(d), 552(12)(a) and 553 of the EU–UK Trade and Cooperation Agreement) since this body has explicitly to be independent from the UK competent authority (the UK Passenger Information Units). This independence is necessary to "assess on a yearly basis the approach applied by the [UK] competent authority as regards the need to retain PNR data pursuant to paragraph 4".[32] It is also the only entity expressly mandated to ensure "oversight" in relation to passenger name

[29] Elaine Fahey, Elspeth Guild and Elif Kuskonmaz, "The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU–UK Trade and Cooperation Agreement PNR Provisions" (2023) 8 *European Papers* 273.
[30] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10 art.554.
[31]Nicolas Levrat, "Governance: Managing Bilateral Relations" in Federico Fabbrini (eds), *The Law & Politics of Brexit. Volume 3: The Framework of New EU–UK Relations* (Oxford: Oxford University Press, 2021).
[32] EU–UK Trade and Cooperation Agreement [2021] OJ L149/10 art.552(7).

records data pursuant to Article 554.[33] It thus complies on its face with the ruling of the Court of Justice in *Opinion 1/15*.[34] The independent authority is required to supervise compliance with and enforcement of data protection. Thus, it is a key agent of change in the EU–UK Trade and Cooperation Agreement, marking a shift away from the EU–Canada PNR Agreement where such oversight was not provided for.[35]

Until the EU–UK Trade and Cooperation Agreement, passenger name records law agreements between third countries and the EU contained a variety of complex provisions on oversight. This requirement of independent oversight emerged also as a key theme in *Schrems II* as did the place of an independent Ombudsman for the EU–US Privacy Shield.[36] The multitude of actors themselves provides an example of highly institutionalised governance emerging, albeit that their effectiveness and the actual reach of all these layers remains to be seen.[37] The form of institutionalisation is broadly speaking highly "European", rather sophisticated and appears to constitute a good faith effort to implement *Opinion 1/15*. What is more curious however is the extent to which it constitutes a novelty. Will other third countries partners be as willing to commit to such a level of complex institutionalisation? Arguably the UK legal order was extremely well placed to implement any understanding of *Opinion 1/15*.

III. CONSTITUTIONAL NORMALISATION

The European Union had signed several passenger name records agreements before the Treaty of Lisbon, with Canada[38] and Australia[39] in 2005 and 2006 respectively, negotiated on what was understood to be an ad hoc case-by-case basis. The European Commission then proposed in 2010 that a European Union law "global approach" to passenger name records was required in order to change the "case by case" narrative.[40] Several third countries such as Mexico, South Korea, and the United Arab Emirates urgently sought European Union passenger name records agreements thereafter.[41] Meanwhile, the European Union's own PNR Directive was

[33] EU–UK Trade and Cooperation Agreement [2021] OJ L149/10 art.554.
[34] *Opinion 1/15* EU:C:2017:592 at [228]–[231].
[35] This follows not only from the TCA but also from art.36 of the Law Enforcement Directive (LED) as it requires the EU to monitor the compliance of the data protection conditions by third countries, including a periodic review to reassess the adequacy decision.
[36] Elaine Fahey and Fabien Terpan, "Torn between Institutionalisation and Judicialisation: The Demise of the EU-US Privacy Shield" (2021) 28 *Indiana Journal of Global Legal Studies* 205; and *Data Protection Commissioner v Facebook Ireland Ltd (Schrems II)* (C-311/18) EU:C:2020:559 at [68].
[37] See Levrat, "Governance: Managing Bilateral Relations" in Federico Fabbrini (eds), *The Law & Politics of Brexit. Volume 3: The Framework of New EU–UK Relations* (2021).
[38] In 2014, the EU and Canada signed a new agreement on the processing and transfer of Passenger Name Record (PNR) data by Air Carriers to the Canadian competent authorities to replace the existing agreement from 2006. Council Document No. 10940/14 (Brussels, 25 June 2014), available at: *https://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf* [Accessed 15 August 2023]
[39] See Decision 2012/381 of 13 December 2011 on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service [2012] OJ L186/4.
[40] Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries COM(2010) 492 final.
[41] Nikolaj Nielsen, "Mexico-EU Data Dispute Puts Airlines at Risk of Sanctions" (20 March 2015) *EUObserver.com*, available at: *https://euobserver.com/rule-of-law/128095* [Accessed 15 August 2023].

proposed.[42] In 2014, as has been seen, a resolution of the European Parliament was agreed to the effect that an Opinion of the Court should be sought concerning the validity of the EU–Canada PNR Agreement,[43] which the European Court of Justice duly struck down in 2017. [44] The decision had the effect of generating considerable complexity for the Commission, forcing it to renegotiate an agreement with a key trade partner, with these renegotiations still being ongoing in late 2023.[45] In 2020, the Council adopted a decision authorising the opening of negotiations between the European Union and Japan for an agreement on the transfer and use of passenger name records data. The EU and Japan began negotiations on a passenger name records agreement thereafter yet those negotiations ended abruptly with no agreement despite a Commission Proposal with annexed negotiations directives,[46] a Council decision authorising the negotiations,[47] and the Opinion of the Data Protection Supervisor[48] having been published, all indicating that the European Union did not anticipate such an outcome. This was despite the well-known and recorded movement of Japanese law in the direction of European Union data protection law standards. The capacity of the European Union to negotiate further agreements in accordance with *Opinion 1/15* and also the *Schrems II* decision of the European Court of Justice remains to be seen.[49]

Normalising complex standards for the European Union?

On 21 June 2022, the European Court of Justice decided that that the Passenger Name Record Directive's provisions for the processing of PNR data by competent Member State authorities were compatible with the EU Charter of Fundamental Rights in a challenge which had been taken by an NGO.[50] In proceedings brought by the Belgian civil society group, *Ligue des droits humains*, the Court upheld the validity of the Directive.[51] European Union states

[42] Directive 2016/681 (PNR Directive) [2016] L119/132.
[43] European Parliament resolution of 25 November 2014 on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data [2016] OJ C289/2.
[44] *Opinion 1/15* EU:C:2017:592.
[45] See European Commission, press release, "EU–Canada PNR agreement: Commission statement on the Opinion of the European Court of Justice" (26 July 2017), available at: *https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_2105* [Accessed 31 May 2021]; Recommendation for a Council Decision authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime COM(2017) 0605 final.
[46] Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime COM(2019) 420 final; Recommendation for a Council Decision COM(2019) 420 final Annex.
[47] Council Decision authorising the opening of negotiations with Japan for an agreement between the European Union and Japan on the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and serious transnational crime Council Document No. 5378/20 (4 February 2020).
[48] European Data Protection Supervisor, "Opinion 6/2019: EDPS Opinion on the negotiating mandate of an Agreement between the EU and Japan for the transfer and use of Passenger Name Record data" (25 October 2019).
[49] *Schrems II* (C-311/18) EU:C:2020:559; See *Ligue des droits Humains* (C-817/19) EU:C:2022:491.
[50] *Ligue des droits Humains* (C-817/19) EU:C:2022:491).
[51] *Ligue des droits Humains* (C-817/19) EU:C:2022:491; See Ligue des droits humains, available at: *https://www.liguedh.be/* [Accessed 15 August 2023].

will have to change their national laws as the Court advocated in its judgement the rewriting of the Directive significantly so as to: (i) reduce data retention requirements; (ii) clarify the purposes for which passenger name records data can be used; (iii) limit the application of the law in the context of intra-EU flights; (iv) limit the way European Union states could extend the use of PNR data to other means of transport like trains or buses; (v) limit the types of database against which PNR data are checked; and (vi) prohibit the use of self-learning systems using steps that lead to the automated profiling of passengers.

The Court stated that as long as self-learning systems are not used in order to affect the way in which screening rules are defined, the risk of discrimination can be mitigated. However, it is arguably most unsatisfactory to see the CJEU "whitewashing" the Directive of its international/US origins (i.e. not being very transparent about the Directive's controversial provenance). There is only limited acknowledgement of the origins of the PNR Directive in either the ruling of the Court of Justice or in the Advocate General's opinion—despite its origins in US law leading on to international rules—and thus of the spillover which occurred here from the external to internal. It is extremely rare for external relations to guide so clearly international law let alone internal European Union law. Moreover, the Court's analysis of the impact of external European Union rules is very limited and simplistic. Arguably, the relationship between the internal and external aspects of European Union law is not well dealt with in the decision—and the Court's treatment of this issue appears very much buried in platitudes at the end of the decision. Overall, the ruling sits oddly with the thrust of the Court's international data transfer case-law concerning North America. Unfortunately, the reasoning generally is very abstract. It could also be said that there is a danger involved in NGO/activist-led challenges, because they tend to involve slightly more artificial arguments and reasoning than do more human rights breach-based challenges with concrete consequences. Nonetheless, it is hard to avoid the obvious outcome of the decision: the spillover in an adverse manner of international law into EU law. It appeared clear to many that the Directive was vulnerable, yet the outcome of the case suggests that concerns were poorly addressed.[52]

CONCLUSIONS

European Union law can be regarded as highly esoteric insofar as it concerns passenger name records. The externalisation of European Union law here proceeded very quietly via the insertion of the rules verbatim into a trade agreement, using the same terminology as the Passenger Name Records Directive itself, thus completing the cycle of US law being transformed into international law, then into EU external relations law, and then into EU law (in the form of a directive) and then finally back into external relations trade law. Passenger name records is now a normal part of external relations law *and* the Area of Freedom, Security and Justice. Many questions still remain in this tale of normalisation, internalisation and institutionalisation as a process of constitutionalisation. Will the topic of passenger name

[52] E.g., Sara Roda "Shortcomings of the Passenger Name Record Directive in Light of Opinion 1/15 of the Court of Justice of the European Union" (2020) 6 E.D.P.R. 66.

records generate further data accountability questions? What lesson does the normalisation of crisis present? Passenger name records law both internally and externally now adopts the same lexicon and the same nomenclature for its actors. This shows the regularisation of the Area of Freedom, Security and Justice as a policy space. It is a policy space, however, marked both by a failure to adopt lessons and by the internalisation of crisis law-making.

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