

European Scrutiny Committee

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From: Sir William Cash MP

23 April 2020

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Passenger Name Record (PNR) data: updating international standards and negotiating an EU/Japan PNR Agreement (Council documents 12197/19 and 5378/20) (40822 and —)

Thank you for your letters dated 25 March 2020, the first relating to a [Council Decision](#) establishing the EU position on changes to international (ICAO—International Civil Aviation Organisation) standards on Passenger Name Record (PNR) data, the second a [Council Decision](#) authorising the European Commission to negotiate a PNR Agreement with Japan. Both Council Decisions concern opt-in decisions which were taken before the UK left the EU on 31 January 2020.

We are disappointed that it has taken so long to inform us of the Government's opt-in decisions and to publish Written Ministerial Statements. Although the Government has decided not to opt into either of the Council Decisions, they are both relevant to the goal (set out in the Government's [Command Paper](#) on *The UK's Future Relationship with the European Union*) of agreeing a framework for "reciprocal transfers of PNR data to protect the public from serious crime and terrorism".¹ This is why we are asking you to provide some additional information.

The Council Decision establishing the EU position within the ICAO Council

You explain that the UK, on the one hand, and the Council and the European Commission on the other, take a different view on the application of the UK's

¹ See the [Government's Command Paper](#) (CP211), *The Future Relationship with the European Union: The UK's Approach to Negotiations*, published in February 2020.

justice and home affairs opt-in Protocol to the Council Decision.² Recitals (11) and (16) of the text formally adopted by the Council last November state that the UK *is* bound by the Decision because it participates in the 2016 EU PNR Directive and the scope of these common EU rules “overlaps significantly with the area to be covered by the envisaged new SARPs”. We infer from this that the EU considers: (i) that it has exclusive competence to determine the position to be taken by EU Member States in the ICAO Council as changes to the ICAO’s SARPs on PNR data may affect the common rules established by the 2016 PNR Directive;³ and (ii) that the UK cannot simultaneously be bound by the PNR Directive but not by the Council Decision and so has no option but to participate in it.

By contrast, your letter informing us of the Government’s decision *not* to opt in says that this “will enable the UK to retain control over our national interests in the development of our independent policy on international transfers of PNR data”. The EU and UK positions appear difficult to reconcile. To clarify matters, please tell us:

- whether the Government accepts that the Council Decision falls within the ambit of Article 127 of the [EU/UK Withdrawal Agreement](#) and is binding on the UK until the end of the post-exit transition period;⁴ and
- what, if any, constraints there are on the position the UK takes “as a contracting party within its own right” within the ICAO Council during transition.

The Council Decision on the negotiation of a PNR Agreement with Japan

Although we understand that the EU alone has negotiated, signed and concluded previous PNR Agreements with Australia and the US and considers this to be an area of exclusive EU competence, it seems that the EU and UK both agree that the justice and home affairs opt-in Protocol does apply in this case and that it is open to the UK to decide not to participate in the proposed Council Decision.⁵ We would welcome your analysis of the reasons why the EU considers that the UK is bound to participate in the Council Decision establishing the EU position in the ICAO but not in this Council Decision, based on your understanding of the extent of the EU’s competence for the collection, processing, transfer and use of PNR data.

² Protocol No 21 to the EU Treaties.

³ Article 3(2) TFEU provides that the EU has exclusive competence if “necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”.

⁴ Article 127 states: “Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period”.

⁵ This is clear from recital (4) which states that Ireland, like the UK, has chosen *not* to opt into the Council Decision even though both are bound by the 2016 EU PNR Directive.

The Government has said that it wishes to agree a framework for reciprocal transfers of PNR data after transition and that this should be “based on, and in some respects go beyond, precedents for PNR Agreements between the EU and third countries—most recently, the mandate for the EU-Japan Agreement”.⁶ This suggests that the scope of the agreement the UK is seeking may be broader than existing EU third country precedents or more ambitious than the common rules set out in the 2016 EU PNR Directive. Do you anticipate that the UK will negotiate exclusively with the EU, on the basis that the negotiation will cover an area of exclusive EU competence, or might the agreement also cover areas of Member State competence and require Member State involvement in the negotiation and ratification of the agreement? How might that affect the time taken for the agreement to become operational? Is there any scope for the UK to negotiate bilateral agreements with individual Member States if the Government is unwilling to accept the EU’s terms?

The detailed mandate for the EU’s negotiations with Japan has not been published, but the Council has made clear that it should include all “the necessary safeguards and controls as provided by EU law”.⁷ We assume that these include the data protection requirements set out in [Opinion 1/15](#) issued by the EU Court of Justice in July 2017 which prompted the EU to renegotiate its PNR agreement with Canada. This raises two concerns. First, that any future PNR agreement between the UK and the EU which does not comply fully with the Opinion will be at risk of legal challenge. Second, that any significant departure from the EU’s PNR framework when negotiating agreements with other (non-EU) countries may well be a factor in obtaining a so-called “adequacy” decision. This is because the [mandate agreed by EU Member States](#) for negotiating a future relationship with the UK makes wider criminal justice and law enforcement cooperation conditional on the UK ensuring a level of protection of personal data which is essentially equivalent to EU standards and requirements (the “adequacy” test).⁸ Does the Government consider that there is scope to diverge from existing EU precedents on PNR without jeopardising the UK’s ability to conclude its own PNR agreement with the EU and to secure a data adequacy decision?

Finally, we ask whether the Government’s policy is to seek to continue to apply the EU’s PNR agreements with Australia and the US (and any others concluded in the coming months) after transition or to negotiate new terms. If new agreements, we would welcome some indication of how they would differ from those concluded by the EU and the timescale you envisage for concluding negotiations and the agreements taking effect.

⁶ See Part 2, para 40 of the [Government’s Command Paper](#) (CP211), *The Future Relationship with the European Union: The UK’s Approach to Negotiations*, published in February 2020.

⁷ See the [press release](#) issued by the Council on 18 February 2020.

⁸ See paragraphs 13, 118 and 119 of the [Annex to Council Decision \(EU, Euratom\) 2020/266](#).

We ask you to respond within ten working days.

I am copying this letter to the Chair (Yvette Cooper MP) and Clerk (Elizabeth Hunt) of the Home Affairs Committee; to the Chair (the Earl of Kinnoull) and Clerk (Stuart Stoner) of the Lords European Union Committee; to Mark Leslie of your Department and to Les Saunders and Donald Harris in the Cabinet Office.

CHAIR