RESPONSE BY THE INTERNATIONAL AIR TRANSPORT ASSOCIATION ("IATA") TO THE EUROPEAN COMMISSION'S COMMUNICATION: "A COMPREHENSIVE APPROACH TO PERSONAL DATA PROTECTION IN THE EUROPEAN UNION"

1. SUMMARY

IATA welcomes and supports the Commission’s initiative to consider whether existing European data protection legislation can still fully and effectively meet the challenges of our modern world. Two of the challenges highlighted by the Commission, rapid technological development and globalisation, raise particular challenges for a global industry such as aviation that depends on the ability to move data internationally as part of its core service provision and yet is subject to complex demands placed on the industry by customers, other government regulators within the EU, and the requirements imposed by foreign governments.

IATA urges the Commission to be sensitive to the specific concerns of particular industries and to consider working with industry bodies, such as trade associations, to create enforceable, bespoke solutions on an industry basis to facilitate and encourage strong data protection. IATA would welcome the opportunity to work with the Commission or individual regulators to create such a framework.

2. BACKGROUND

IATA is a trade organisation representing 235 airlines operating scheduled passenger and/or cargo services. Founded in 1945, IATA’s stated objectives are to:

- promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;
- provide the means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service; and
- co-operate with the International Civil Aviation Organisation and other international organisations.

The aviation industry is a uniquely global industry and its success is closely aligned to the latest technological developments. IATA’s members process, transfer and store significant amounts of personal data, and some sensitive personal data, as an essential part of their core business operations. Airlines are particularly sensitive to regulations affecting the movement of personal data due to the global nature of members’ operations, extensive national security regulations and the complex relationships between airlines and other numerous third parties that play a role in aviation operations such as reservations services, baggage handlers, caterers, immigration and government officials. Efficient and harmonised data exchange is critical to the success of the global transportation network that aviation provides.
IATA and its member airlines have long been aware of their responsibilities to safeguard the rights of individuals while processing their data internationally in the context of providing an array of aviation services. This industry-wide awareness is reflected in the Recommended Practice 1774 - *Protection of Privacy and Transborder Data Flows of Personal Data Used in International Air Transport of Passengers and Cargo*, last amended in 2000 following detailed discussion with the Article 29 Working Party. The adoption of this Recommended Practice demonstrates the willingness of IATA member airlines to seek an industry-wide approach to addressing and complying with the challenges of the Data Protection Directive.

IATA welcomes and supports the Commission’s initiative to question whether existing European data protection legislation can still fully and effectively cope with the challenges of rapid technological development and globalisation. We look forward to working with the Commission to provide it with the information necessary to strike the proper balance between the needs of our customers, the security of the aviation system and the protection of individual privacy rights.

### 3. GENERAL COMMENTS

The aviation industry sits at the crossroads of at least three of the new challenges identified in the Commission’s Communication:

- **Addressing the impact of new technologies**: the advent of e-ticketing has been a major achievement for IATA and its member airlines. This technology has enabled the industry to move away from manual processes for collecting and using data. Electronic collection and processing of data facilitates accuracy, reliability and proportionate data collection and use, in addition to stronger access controls and data security more generally. Further, electronic processing has led to improved information management by ensuring that the right data are available to the right people at the right time. In future, as data processing technologies evolve, airlines will inevitably need to consider the additional complexities raised by cloud-based data processing.

- **Enhancing the internal market dimension of data protection**: by definition, particularly with the advent and development of airline alliances, airlines have operations and process personal data in almost all the countries in which they operate. It is not uncommon for the citizen of one country to buy a ticket in a second country from an airline based in a third country for travel to a fourth country that requires disclosure of information for aviation security purposes. Not surprisingly, airlines frequently find it difficult to determine which national data protection law governs its operations, or even the sale of individual tickets, because the passenger’s location at the time of booking is not always known. In addition, the divergence in local law requirements across Member States creates many challenges at a practical level. IATA strongly favours greater harmonisation of requirements across Member States and the improved legal certainty that would result.
Addressing globalisation and improving international data transfers: international data transfers are a necessary feature of airline operations, both in the normal conduct of transportation activities and in fulfilling security and other regulatory obligations (e.g., transfers of Passenger Name Record “PNR” data). The current framework has made it burdensome and difficult for airlines to satisfy their EU data protection obligations in situations where personal data must be transferred to countries that do not have “adequate” data protection laws.

In IATA’s view, a modern legal framework for data protection should:

- be based on clear objectives which are focussed on real threats to fundamental rights and the risks of other personal or social harm;
- aim for outcomes which reflect both social norms and workable business practices;
- ensure a good balance between the services and benefits that require the use of personal data and the genuine risk of harms that could result from the unnecessary retention or communication of personal data;
- promote good practice, while imposing minimum standards;
- be drafted in accessible and relevant language which will facilitate consistent results;
- recognize and accommodate competing legal and regulatory obligations;
- avoid stifling innovation by being technologically neutral and future-proof; and
- be internationally compatible, or at least inter-operable.

It is important that the reform agenda prioritises both implementation and practicalities. The current EU approach involves too many uncertainties and excessive bureaucracy and burden which can deter good practice and undermine credibility.

There have been far-reaching technological and commercial transformations since the Data Protection Directive was adopted in 1995. Data protection now impacts virtually every organisation of every size and sector. With such a range of business types and business models, and such widespread use of technology within those businesses, it is crucial to recognise that “one size cannot fit all”, and to avoid regulatory approaches which are excessively prescriptive. In particular, the legal framework should not impose a “one size fits all” opt-in solution in circumstances in which an opt-out solution sufficiently protects the individual’s privacy rights while allowing the airline to respond to the individual’s commercial needs and expectations.

In addition, the airline industry faces its own particular challenges. Care must be taken not to impose additional requirements which might work - or, at least, not be burdensome - in other contexts, but which are entirely unsuitable for the fast-moving, global aviation sector. A key objective should be to allow specific industries - like aviation - to develop their own ways of incorporating the EU Data Protection Principles into their business models and to demonstrate how they are ensuring compliance.
4. DETAILED OBSERVATIONS

We have set out below comments on the “Key Objectives of the Comprehensive Approach on Data Protection” that are of particular relevance to IATA members.

EU Charter of Fundamental Rights (sections 1 and 2.1)

IATA supports the Commission’s focus on ensuring a coherent application of data protection rules, having regard to the EU Charter of Fundamental Rights, but encourages the Commission to ensure that any such linking of data protection legislation to the Charter takes into account the need for greater harmonisation at a national level.

Transparency and the Promotion of Standard Forms (sections 2.1.2)

IATA members support the general principle of transparent processing, but airlines face particular difficulties in communicating information about data processing activities to individuals. The variety of ways in which tickets may be sold, often using intermediaries, may mean that the airline does not have direct contact with the passenger at the point of sale. In these circumstances, it may be difficult for the airline to communicate details of its data processing activities to the individual, or to convey the often complex arrangements for processing the data.

IATA is strongly against the notion of any compulsory standards, such as standard privacy policies or notices. The diversity of the market place (even within travel and aviation businesses alone) is so great that – even if they could be drafted - any standard form notices will inevitably be so comprehensive, or so simple, as to be meaningless. Rather, best practice recommendations, as are promoted in the UK, are a more sensible approach.

Breach Notification (section 2.1.2)

IATA agrees that individuals should be informed when their data are accidentally or unlawfully destroyed, lost, altered, accessed by or disclosed to unauthorised persons provided there is a real likelihood of harm or loss to individuals. IATA supports the establishment of clear criteria for triggering notification obligations, based on the likelihood of harm or loss to individuals, but can see no benefit in a requirement to notify all breaches as a matter of course.

Data Minimisation (section 2.1.3)

Airlines are concerned by the proposal to strengthen the data minimisation principle, to the extent that it may be inconsistent with requirements set by foreign governments or other third parties to collect certain data (e.g., PNR data, or data that may assist with the detection or prevention of fraud), increase the risk of processing the data (e.g., where packets of data are carved up in order to comply with this principle), or even restrict the services that passengers legitimately expect to receive.
Right to be Forgotten (section 2.1.3)

At a policy level, the Right to be Forgotten is controversial. Allowing individuals to insist on the deletion of their data on the grounds that it may be embarrassing or damaging to the individual could have dangerous cultural, political and human consequences. For example an airline may have legitimate reasons for keeping a record of passengers who have been violent on flights or abusive to staff, or for the purposes of preventing or detecting fraud. In addition, at a practical level, it may be problematic for airlines to comply with such a requirement. Data pass through so many hands, for so many purposes, that it would be very difficult to verify that it had been deleted.

Rather than focus on the Right to be Forgotten, IATA encourages the Commission to concentrate on simplifying the existing rights of access, rectification, erasure and blocking, to make them more effective in practice.

Ensuring Informed and Free Consent (section 2.1.5)

IATA notes that the Commission intends to clarify and strengthen the rules on consent, and welcomes this. Instead of excessive reliance upon consent or opt-in consent, IATA would prefer a more general distinction to be drawn between those activities which are within the reasonable and legitimate expectations of the individual and those which go beyond those expectations. Neither consent, nor opt-in should be required for any form of data processing which falls within the reasonable and legitimate expectations of the individual. Consent is only necessary or appropriate for unusual, novel or otherwise sensitive situations. IATA accepts that there should be corresponding liability where the controller has provided false or misleading information, whether by formal disclosure or otherwise.

Protecting Sensitive Data (section 2.1.6)

Currently, sensitive data may only be processed if the individual has given his explicit consent to the processing. Airlines may process sensitive information when, at the request of their passengers, they provide special meals or make special care arrangements for passengers with reduced mobility or in need of special treatment on board the aircraft. Such information may have to be further transmitted to other airlines where the traveller’s planned trip involves more than one airline company. While such data are sensitive, the very fact that they are given by the passenger for the purpose of providing a service to that passenger should allow for some flexibility in their treatment. The approach suggested above, placing greater weight on the reasonable and legitimate expectations of the individual, would provide the common-sense flexibility needed for these situations.

Generally, and subject to the observations above, IATA welcomes the proposal to harmonise the conditions that allow for the processing of categories of sensitive data.
Allowing Civil Societies/Associations to Bring Claims Before National Courts (section 2.1.7)

IATA encourages the Commission to consider the possible ramifications of this proposal. Giving quasi-regulatory powers to bodies other than Data Protection Authorities (“DPAs”) is likely to lead to greater inconsistencies of approach, militate against harmonisation within the internal market, weaken the authority and credibility of DPAs, encourage litigation, add to costs and is unlikely to improve data protection for individuals.

Harmonisation (section 2.2.1)

IATA strongly welcomes the Commission’s commitment to reducing administrative burdens. There is considerable scope to eliminate or minimise unnecessary burdens as the Data Protection Directive is revised.

In this context, IATA supports all initiatives that seek to enhance the internal market dimension by providing a level playing field for data controllers and reducing the administrative burden of airlines, the majority of which are established in several Member States. Further, harmonisation with the growing volume of non-EU requirements is as important as and complements the internal market dimension. But - even within the EU - harmonisation should focus on the significantly differing duties, powers and approaches of DPAs. DPAs should be doing more to help companies/industries get data protection right, and target their enforcement activities on those companies that blatantly disregard their legal obligations.

While strongly supporting harmonisation, IATA encourages the Commission to avoid attempts to harmonise to the highest common denominator which would simply extend the reach of the most restrictive national requirements.

Notification (section 2.2.2)

IATA fully supports the Commission’s proposals to simplify notification procedures. Reducing unnecessary cost and eliminating unnecessary administration are key.

Current notification requirements are widely seen as ineffective and expensive, particularly for companies with operations in many jurisdictions who may need to provide and update a considerable volume of detailed information in different ways in up to 27 countries. It is doubtful that notification currently serves any useful purpose. The concept was originally designed in a different era when it may have made sense for regulators to be provided with details of relatively limited processing activities, to check on this and then give ex ante approval. This is no longer a realistic regulatory model.

IATA welcomes the suggestion of a new registration system. This should be kept at a very simple level, involving only the fact that the company processes personal data, not the details. The focus needs to be on informing data subjects adequately, as appropriate in particular situations, of data processing activities, not on giving the regulator a mass of information at the general level.
Where warranted, a DPA can demand details of processing from a data controller and inspect data processing activities in particular cases. This approach represents a sensible, measured step towards *ex post* enforcement and would bolster any new emphasis on targeted enforcement.

**Clarifying the Rules on Applicable Law (section 2.2.3)**

Airlines would welcome clarification on applicable law, given the global nature of their business and the often complex network of data sharing activities (including data collection on behalf of other parties, e.g. airline alliance partners). Opinion 8/2010 of the Article 29 Working Party, adopted on 16 December 2010, contains a number of proposals to clarify the application of national law to EU data processing activities. In particular, the Opinion seeks to clarify the meaning of “an establishment”, where multiple establishments may process data in the EU, and to clarify the circumstances in which EU law will apply to non-EU controllers who use EU-based equipment to process data. IATA encourages the Commission to take into account the proposals in this Opinion, with a view to providing greater certainty and consistency.

**Enhancing Data Controllers’ Responsibility (section 2.2.4)**

The large number of parties involved in the processing of airline data, the complex data sharing arrangements and the increasingly collaborative way in which organisations function, mean that it is not always clear when a party is a data controller or a data processor. If the Commission determines that the distinction remains valid, then IATA encourages the Commission to provide additional guidance to industry.

The Commission proposes mandatory Data Protection Impact Assessments in certain circumstances. Impact Assessments may have a useful role to play in identifying risks, but it would be burdensome, and probably ineffective, to make them compulsory. Compulsory Privacy Impact Assessments may become formulaic and divert attention from the need to identify and address key data protection concerns on an ongoing basis.

In addition, the Commission proposes the mandatory appointment of independent data protection officers (DPO). DPOs can certainly play a key role in promoting awareness of and compliance with data protection principles. Making the role mandatory, however, carries the risk that the appointment of a DPO becomes routine, resulting in appointees who (although notionally independent) lack real power and influence within the organisation. An obligation to appoint a DPO with standard-form functions could easily become an intrusive burden with no real benefit to anyone.

**Self-Regulatory Initiatives (section 2.2.5)**

IATA fully supports this approach. The airline industry already regulates itself on a range of other issues, and would welcome such an approach for data protection issues. Indeed, IATA has previously attempted to have Recommended Practice 1774 accepted as a Code of Conduct.
Police and Judicial Cooperation (section 2.3)

IATA supports a harmonised approach for the processing of personal data in the area of security, police and judicial cooperation. There may also be a need for an airline-specific framework for judicial cooperation (although the industry should not become a data hub for enforcement authorities). Currently, a number of airlines are working with the World Customs Organisation, International Civil Aviation Organisation and IATA to define standard “flavours” of passenger-related data (e.g. Advance Passenger Information (“API”), Interactive API, PNR, Electronic System for Travel Authorisation (“ESTA”) and Direct Access) and the manner in which these groups of data are processed and can be shared, with a view to agreeing an appropriate framework. In future, it may be possible for a government authority or enforcement agency that required access to passenger-related data to gain access to one of these data sets, on standard, agreed terms for limited purposes, without requiring specific authorisation from a DPA.

International transfers of data (section 2.4.2)

IATA wholeheartedly welcomes the Commission’s commitment to “improve and streamline” arrangements for international transfers. This is a pressing priority for reform. Substantial resources are expended by some companies trying to transfer data legally, whilst others simply ignore the legal requirements and take the risk that they will not be found out.

The most promising way forward is to build on the Binding Corporate Rules (BCR) approach to build a new regime for international data transfers to achieve good standards of data protection on a world-wide basis. Ways must be found to avoid the delays and bureaucracy now associated with the process for gaining DPA approval for BCRs. If these delays are now occurring with the tiny number of BCR applications currently being processed for approval, this is not a sustainable way forward given the huge numbers of companies involved in international transfers. IATA doubts that there is a pressing need for BCRs to require prior approval. It would certainly not be sensible to place unrealistic demands upon over-stretched and under-resourced DPAs.

In addition, IATA considers that there is a need to improve the operation of model clauses to make it easier to sub-contract data processing activities to group companies based outside the EU/EEA.

Aside from international data flows that may be specific to a particular airline’s operations (and those of its alliance partners) the aviation industry depends on the international flow of particular subsets of data in order to facilitate its provision of services. Where there are common data elements that must be processed across the industry for standard purposes linked to the provision of services, IATA members would support the development of a harmonised mechanism, specific to processing across the industry, that would enable members easily to transfer such data internationally. A binding industry code of practice might provide such a mechanism.
Further Discussions

IATA welcomes the opportunity to respond to the Commission’s Communication on these important issues and would be happy to provide further information that may assist the Commission in considering the specific data protection challenges faced by the aviation industry.

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