EXPLANATORY MEMORANDUM TO

THE PASSENGER NAME RECORD DATA AND MISCELLANEOUS AMENDMENTS REGULATIONS 2018

2018 No. 598

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 Passenger Name Records are the electronic information, collected by airlines, that countries use to strengthen national security and prevent serious crime. The UK has had an established regime for PNR since 2008, in collaboration with other countries and with industry. This instrument will transpose into national law those provisions of Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime ("the PNR Directive") which are not already provided for in existing legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument will come into force within 21 days of it being laid before Parliament. The Department apologises for this breach of convention, which is a consequence of difficulties in sequencing with other legislative measures on which the instrument is dependent against the transposition deadline for the PNR Directive (25 May 2018). This instrument replaces a planned package of measures which, taken together, were to constitute transposition of the PNR Directive. One of those measures – a revised Code of Practice governing the use and exchange of PNR data – depended upon the Data Protection Bill currently before Parliament having received Royal Assent. Due to longer than anticipated Parliamentary consideration of the Bill, it would not be possible to complete the necessary formalities to bring such a Code of Practice into force to be able to notify the European Commission of the transposition of the PNR Directive by the deadline. To ensure that the deadline is met, this instrument will serve to transpose those requirements of the PNR Directive that are specific to the processing and exchange of PNR data; it will need to come into force no later than 25 May 2018.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The PNR Directive was adopted on 27 April 2016. PNR data consists of information relating to passengers' bookings held in an air carriers' reservations and other systems. PNR data is used to counter terrorism and serious crime. The PNR Directive establishes a consistent European Union approach to the processing and protection of this data. It also provides for the exchange of information between Passenger Information Units (PIUs) in the Member States.

4.2 The UK decided in February 2011 to opt-in to the PNR Directive because of the direct contribution it would make to (i) the UK's efforts to safeguard against threats to public security (by providing a basis in EU law to process intra-EU PNR data), and (ii) to enhance EU cooperation in the fight against terrorism and serious crime (by providing a basis in EU law for Member States' PIUs to cooperate with each other).

4.3 Prior to the consideration and adoption of the PNR Directive, the UK already had the necessary legislative measures in place to acquire PNR data from air carriers. Paragraph 27B of Schedule 2 to the Immigration Act 1971 and section 32 of the Immigration, Asylum and Nationality Act 2006 enable the Secretary of State, by order, to specify the passenger and service information that, respectively, an immigration officer and a police officer may require from carriers in respect of a ship, aircraft or train arriving or departing the UK. The Immigration and Police (Passenger, Crew and Service Information) Order 2008 ("the 2008 Order")[1] specifies the passenger, crew and service information which may be required pursuant to those provisions.

4.4 This instrument amends the 2008 Order and makes other provisions relating to the processing, exchange and protection of PNR data necessary to implement the relevant requirements of the PNR Directive.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The UK has had the legal, technical and operational capabilities in place to process PNR data since 2005. This instrument is necessary to legislate for those requirements of the PNR Directive that are not already provided for in existing legislation.

7.2 The current information requirements were developed in 2008, eight years before the adoption of the PNR Directive. This instrument will amend the 2008 Order to align the information that can be required with the information specified in the PNR Directive. Whilst the PNR Directive applies only to air carriers it is operationally desirable that the requirements placed on all type of carriers are the same.

[1] SI 2008/5

7.3 This instrument will also make legislative provision for the following requirements of the PNR Directive:

- Designation of the UK Passenger Information Unit – The Home Office is designated as the authority competent for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, and as able to process PNR data for those purposes.
- Appointment of a data protection officer – The data protection officer will be responsible for monitoring the processing of PNR data by the PIU. This instrument requires that the data protection officer is able to act independently, and refer issues to the Information Commissioner where they believe that processing of PNR data has not been lawful.
- Processing of PNR data by the PIU – This instrument specifies the purposes for which the PIU may process PNR data, and prohibits the processing of PNR against pre-determined criteria which are based on a person's race or ethnic origin, political opinions, health and other specified characteristics in relation to a passenger.
- Transfers of PNR data – This instrument establishes the conditions applicable to the transfers of PNR data to competent law enforcement authorities in the UK, to the PIUs of other Member States, to Europol and to competent law enforcement authorities in third countries.
- Data retention and depersonalisation – This instrument provides that PNR data must be retained for a period of five years, following which it must be deleted. To prevent disproportionate use, those data elements that could serve to identify the individual to whom they relate must be masked out after six months and only disclosed under strict and limited conditions.
- Protection of personal data – This instrument makes specific provision relating to the protection of PNR data. These requirements enhance the protections afforded by other provisions of data protection legislation. In particular, the Regulations provide that records are to be kept in relation to all processing systems and procedures under the responsibility of the PIU and that those records are to be made available to the Information Commissioner.

7.4 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period, the Government will continue to negotiate, implement and apply EU legislation.

Consolidation

7.5 This instrument includes provisions which amend the 2008 Order. This is only the second time the 2008 Order has been amended. There was a minor amendment made to it in 2015. The Department has taken the decision to include the amendments to the 2008 Order within this instrument as they are required as part of our transposition of the PNR Directive. The Department will consider consolidation should further amendments to the 2008 Order prove necessary in the future.

8. Consultation outcome

8.1 Existing legislation already places a requirement on air carriers to provide PNR data, to the extent that they hold such data, when requested to do so. This instrument places no new obligations on air carriers. The Commission Implementing Decision (EU) 2017/759 on the common protocols and data formats to be used by air carriers transferring PNR data to Passenger Information Units provides for air carriers, if they so wish, to use a new data transport protocol, AS4. The European Commission consulted extensively with the air carrier industry and Member State governments to determine whether to include this new protocol. Following the amendments made by this instrument, the information which may be required by an immigration officer or the police, and the form and manner in which that information is to be provided, will be in line with industry standards, as reflected in the PNR Directive. In practice, there will be no changes to the existing requirements placed on carriers and therefore no consultation for this instrument is necessary.

9. Guidance

9.1 Border Force engages with air carriers and with port operators on a regular basis to discuss any changes to policy or operations. As there will be no practical change to existing carrier processes, no specific guidance on these changes is required. The Home Office will develop and make available guidance for carriers on AS4 technical requirements should they wish to use it.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies. As all air carriers are already required to provide PNR (to the extent that they collect it) there should be no change of practice for carriers as a result of this instrument.

10.2 The impact on the public sector is minimal and will be delivered from within existing resource allocations.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Home Office will closely monitor the impact of these regulations.

13. Contact

13.1 Steven Waterman at the Home Office Telephone: 020 7035 3100 or email: steven.waterman@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.