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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 19 October 2017

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: 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

Delegations will find attached document COM(2017) 605 final.

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Brussels, 18.10.2017
COM(2017) 605 final

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

EXPLANATORY MEMORANDUM

1. PURPOSE

In its Opinion of 26 July 2017¹ the Court of Justice of the EU stated that the Agreement between Canada and the EU for the transfer and use of Passenger name Record (PNR) data signed on 25 June 2014 may not be concluded in its current form. The EU should therefore open new negotiations with Canada with the aim of concluding a PNR Agreement in line with the requirements laid down in the Court's Opinion.

2. CONTEXT OF THE RECOMMENDATION

Canadian legislation requires air carriers operating passenger flights bound for Canada to provide the Canada Border Services Agency (the CBSA) with electronic access to Passenger Name Record (PNR) data prior to the passenger arrival to Canada.

This legislation aims at obtaining PNR data in advance of a flight's arrival and therefore significantly enhances the CBSA's ability to conduct efficient and effective advance travel risk assessment of passengers and to facilitate bona fide travel, thereby enhancing the security of Canada. The EU cooperates with Canada in the fight against terrorism and other serious transnational crime and views the transfer of PNR data to Canada as a means to foster international law enforcement cooperation which will be achieved through the provision by Canada of analytical information stemming from PNR data to the competent Member States authorities as well as Europol and Eurojust within their respective mandates.

PNR is a record of each passenger's travel requirements which contains all information necessary to enable reservations to be processed by air carriers. As far as the present Recommendation is concerned, PNR data covers data collected from passengers and contained in the air carrier's automated reservation and departure control systems.

Air carriers are under an obligation to provide the CBSA with PNR data to the extent it is collected and contained in the air carriers' automated reservation and departure control systems.

The transfer of personal data from the EU to a third country may take place only if that country ensures a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union. A solution is required that will provide a legal basis at EU level for the transfer of PNR data from the EU to Canada as a recognition of the necessity of PNR data in the fight against terrorism and other forms of serious transnational crime.

The European Community signed an Agreement in 2005 with Canada on the transfer and processing of PNR data based on a set of commitments by the CBSA in relation to the application of its PNR programme².

The Agreement entered into force on 22 March 2006 and was based on a series of Commitments that the CBSA gave as to the way it would handle PNR data and an adequacy decision issued by the European Commission that considered the Commitments of the CBSA to provide an adequate protection of personal data.

¹ Opinion 1/15 of the Court of Justice of 26 July 2017 (EU:C:2017:592).

² OJ L 82, 21.3.2006, p. 15 and OJ 91, 29.3.2006, p. 49.

In November 2008 the Commission carried out a joint review on the implementation of the 2006 Agreement where it found that the CBSA implements its Commitments and the conditions spelt out in there to a very large extent.

The Commitments of the CBSA and the adequacy decision expired on 22 September 2009. The Commitments of the CBSA provided that one year before their expiry, the CBSA will enter into negotiations with the Commission with the goal of extending the Commitments upon mutually acceptable terms.

The government of Canada made a request to the Commission that the two parties enter into negotiations with the aim of either amending the existing framework or concluding a new Agreement.

The CBSA also confirmed to Member States, the presidency and the Commission that it would continue implementing its Commitments for such an interim period as it is necessary to negotiate and conclude a long term Agreement between the EU and Canada. As a consequence, Member States assumed the responsibility for ensuring the continuation of transfers of PNR data by air carriers to Canada during this interim period.

The EU therefore opened negotiations with Canada in 2010 for the purpose of signing a new bilateral Agreement laying down the conditions and the framework under which air carriers will make available to the CBSA the PNR data of passengers flying between the EU and Canada. The new draft Agreement with Canada was signed on 25 June 2014 and submitted by the Council to the European Parliament in July 2014 for consent. On 30 January 2015, the European Parliament requested the Opinion of the Court of Justice as to whether the envisaged PNR Agreement with Canada is compatible with the Treaties and the Charter of Fundamental Rights of the European Union.

Directive (EU) 2016/681 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (the EU PNR Directive) was adopted on 27 April 2016³, setting a legal basis for the transfer of PNR data by air carriers to Member States and the safeguards that Member States shall apply to the processing of PNR data.

On 26 July 2017, the Court of Justice delivered the above mentioned Opinion and stated that the envisaged PNR Agreement between Canada and the EU cannot be concluded in its current form because several of its provisions are incompatible with the fundamental rights recognised by the EU, in particular the right to data protection and respect for private life. The Court also held that the legal basis of such an Agreement should be the combination of Article 87(2)(a) TFEU and Article 16(2) TFEU.

Following the issuance of this Opinion, the CBSA has expressed its wish to enter again into negotiations to find mutually acceptable terms consistent with these findings of the Court.

The EU should therefore open negotiations once more with Canada with the purpose of signing a new bilateral Agreement laying down the framework and conditions under which air carriers will transfer to the CBSA the PNR data of passengers flying between the EU and Canada in a manner which is compliant with the Court's requirements.

³ OJ L 119, 4.5.2016, p. 132.

The negotiations should be limited to the aspects necessary to draw the consequences from the Opinion of the Court. All other elements of the envisaged Agreement signed on 25 June 2014 should not be affected.

3. LEGAL ELEMENTS OF THE RECOMMENDATION

The Court's Opinion on the previously envisaged EU-Canada PNR Agreement already referred to above sets out the legal requirements for such an Agreement to be compliant with the Charter of Fundamental Rights of the European Union.

This Recommendation is based on Article 218 of the Treaty of the Functioning of the European Union. As the Court in its Opinion has already clarified that the envisaged agreement should be based on Articles 16(2) and 87(2)(a) TFEU, these legal bases are also indicated as substantive legal bases. In line with Article 218 of the Treaty on the Functioning of the European Union, the Commission shall be nominated as the Union negotiator.

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 16(2) and 87(2)(a), in conjunction with Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) Negotiations should be opened with a view to concluding 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.
- (2) The Agreement should respect fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right to private and family life recognised in Article 7 of the Charter, the right to the protection of personal data recognised in Article 8 of the Charter and the right to effective remedy and fair trial recognised in Article 47 of the Charter. The Agreement should be applied in accordance with those rights and principles,
- (3) [In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to take part in the adoption and application of this Decision.]

OR

[In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application.]

OR

[In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Decision and is not bound by it or subject to its application.]

In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified (, by letter of ...) its wish to take part in the adoption and application of this Decision.]

OR

[In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom has notified (, by letter of ...) its wish to take part in the adoption and application of this Decision.

In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.]

- (4) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, an Agreement between the European Union and Canada on the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime.

Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations shall be conducted in consultation with a special committee to be appointed by the Council.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*