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Subject: Recommendation from the Commission to the Council to authorise the opening of negotiations for 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

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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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<sup>1</sup> Document declassified by the European Commission on 24/05/2019.

# RESTREINT UE



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 22 September 2010**

**13933/10**

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## **COVER NOTE**

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

date of receipt: 21 September 2010

to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European  
Union

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Subject: Recommendation from the Commission to the Council to authorise the opening  
of negotiations for 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

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Delegations will find attached Commission document SEC(2010) 1084 final.

Encl.: SEC(2010) 1084 final



EUROPEAN COMMISSION

Brussels, 21.9.2010  
SEC(2010) 1084 final

RESTREINT UE

**RECOMMENDATION FROM THE COMMISSION TO THE COUNCIL**

**to authorise the opening of negotiations for 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**

DECLASSIFIED

**RECOMMENDATION FROM THE COMMISSION TO THE COUNCIL**

**to authorise the opening of negotiations for 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**

**DECLASSIFIED**

## A. EXPLANATORY MEMORANDUM

1. Canadian legislation empowers the Canada Border Services Agency (CBSA) to require each air carrier operating passenger flights bound for Canada, to provide it with electronic access to Passenger Name Record (PNR) data prior to the passenger arrival to Canada. The requirements of the Canadian authorities are based on section 107.1 of the Customs Act and paragraph 148(d) of the Immigration and Refugee Protection Act and its implementing Regulations.
2. This legislation aims at obtaining PNR data electronically in advance of a flight's arrival and therefore significantly enhances CBSA's ability to conduct efficient and effective advance risk assessment of passengers and to facilitate bona fide travel, thereby enhancing the security of Canada. The European Union in cooperating with Canada in the fight against terrorism and other serious transnational crime views the transfer of PNR data to Canada as fostering international police and judicial cooperation which will be achieved through the transfer of analytical information flowing from PNR data by Canada to the competent Member States authorities as well as Europol and Eurojust within their respective competences.
3. PNR is a record of each passenger' travel requirements which contains all information necessary to enable reservations to be processed and controlled by air carriers. As far as the current recommendation is concerned, PNR data covers data collected and contained in the air carrier's automated reservation and departure control systems.
4. Air carriers are under an obligation to provide CBSA with access to certain PNR data to the extent it is collected and contained in the air carrier's automated reservation and departure control systems.
5. The data protection laws of the EU do not allow European and other carriers operating flights from the EU to transmit the PNR data of their passengers to third countries which do not ensure an adequate level of protection of personal data without adducing appropriate safeguards. A solution is required that will provide the legal basis for the transfer of PNR data from the EU to Canada as a recognition of the necessity and importance of the use of PNR data in the fight against terrorism and other serious transnational serious crime, whilst avoiding legal uncertainty for air carriers. In addition, this solution should be applied homogenously throughout the European Union in order to ensure a legal certainty for air carriers and respect of individuals' rights to the protection of personal data as well as their physical security.
6. 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 Canada Border Agency (CBSA) in relation to the application of its PNR programme<sup>2</sup>.
7. The agreement entered into force on 22 March 2006 and was based on a series of Commitments that CBSA gave to the EC as to the way that it would handle PNR

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<sup>2</sup> OJ L 82/15, 21.3.2006 and OJ L 91/49, 29.3.2006

data originating from the EC and an adequacy decision issued by the European Commission that considered the Commitments of CBSA to provide an adequate protection of personal data. The Commitments of CBSA and the adequacy decision expired on 22 September 2009. The Commitments of 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.

8. 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. CBSA has confirmed in writing that its API/PNR programme is a security programme and its scope is the fight against terrorism and serious transnational crime.
9. After the expiry of the Commitments of Canada and the Adequacy Decision, Member States assumed the responsibility for ensuring the continuation of transfers of PNR data to Canada during this interim period, while CBSA confirmed to the Member States, the Presidency and the Commission that it will 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.
10. The Union should therefore open negotiations with Canada for the purpose of signing a new bilateral agreement laying down the conditions and the framework under which air carriers will make available to CBSA the PNR data of passengers flying to and from the EU and Canada. The Union should strive to achieve the same standard of data protection as in the original agreement.
11. Such agreement should enshrine general principles such as non-discrimination and reciprocity and provide for the possibility of police and judicial cooperation and for review mechanisms of the implementation of the agreement.
12. This recommendation takes into consideration and is consistent with the general criteria laid down in the Communication from the Commission on the Global Approach to the transfer of Passenger Name Record (PNR) Data to third countries<sup>3</sup>.
13. In November 2008 the Commission carried out a joint review on the operation of the current Agreement where it found that CBSA implements its Commitments to the EC and the conditions spelt out in there to a very large extent.
14. In line with Article 218 TFEU, the Commission shall be nominated as the Union negotiator. The proposed agreement should be based on Articles 87 and 82 of the Treaty on the Functioning of the European Union.
15. The Commission therefore recommends to the Council to authorise the opening of negotiations with Canada to conclude an agreement on the use of PNR data to prevent and combat terrorism and other serious transnational crime.

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<sup>3</sup> COM(2010) 492.

## **B. RECOMMENDATION**

In the light of the foregoing considerations, the Commission recommends that the Council:

- authorises the Commission to negotiate 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;
- issues the annexed negotiating directives;
- designates a special committee, in consultation with which the negotiations must be conducted.

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## ANNEX

### NEGOTIATING GUIDELINES

The Commission shall, in the course of negotiations, aim to achieve the specific objectives which are set out in detail below:

- The Agreement shall duly reflect the necessity and importance of the use of PNR data in preventing and combating terrorism and other serious transnational crime. To this extent, the objective of the Agreement shall be to regulate the transfer and use of PNR data for the sole purposes of preventing and combating terrorism and other serious transnational crime, with full respect of the protection of personal data under the conditions to be set out in the Agreement.
- The Agreement shall also acknowledge the transfer of PNR data to Canada as fostering international police and judicial cooperation which will be achieved through the transfer of analytical information flowing from PNR data. Therefore the Agreement should ensure the transfer of analytical information flowing from PNR data by competent Canadian authorities to police and judicial authorities of the Member States, as well as to Europol and Eurojust within their respective competences.
- The Agreement shall limit the processing of PNR data exclusively for the prevention, detection, investigation or prosecution of terrorism and other serious transnational crime, as based on the approach of definitions laid down in relevant EU instruments.
- The Agreement shall ensure full respect for fundamental rights as enshrined in Article 6 of the Treaty on European Union, in particular the right to privacy with regard to the processing of personal data as stipulated in Article 16 of the Treaty on the Functioning of the European Union. It shall also ensure full respect for the principles of necessity and proportionality regarding the right for private and family life and the protection of personal data as set out in Article 8 of the European Convention on Human Rights and Article 7 and Article 8 of the Charter of fundamental Rights of the European Union.
- The Agreement shall provide for legal certainty, notably for air carriers by providing a legal basis for them to transfer PNR data contained in their automated reservation and departure control systems. Therefore the Agreement and any accompanying document shall be legally binding upon the Parties.
- The Agreement shall provide for safeguards and controls to protect the privacy of air passengers and which shall ensure an adequate level of protection of personal data. It shall reflect the standards set out in the Council of Europe Convention 108 of 1981 and its additional Protocol 181 of 2001 or other equivalent international conventions on data protection. Those safeguards shall envisage that:
  - Specifying exhaustively the categories of PNR data to be transferred which should be of minimum amount and proportionate to the stated purposes of the Agreement and the various ways in which PNR data are used;



- Ensuring that sensitive data shall not be used unless under exceptional circumstances where there is an imminent threat to loss of life and provided that the Canadian authorities provide appropriate safeguards, for example that such data may be used only on a case-by-case basis, under the authorisation of a high-ranking official and strictly limited to the purposes of the original transfer;
- Including provisions on data security, especially by allowing only a limited number of specially authorised individuals to have access to PNR data and providing for an obligation to notify without delay the relevant European authorities of breaches of data security leading to unauthorised access to PNR data;
- Ensuring a system of oversight by an independent public authority responsible for data protection with effective powers of investigation, intervention and enforcement to exercise oversight over those public authorities that use PNR data. The latter shall be accountable for complying with the established rules on the protection of personal data, and should have powers to hear complaints from individuals concerning the processing of PNR data.
- Ensuring oversight by including provisions for regular joint review of all aspects of the implementation of the Agreement, including the purpose limitation, the rights of passengers and onward transfers of PNR data, and comprising a proportionality assessment of the retained data based on their value for the prevention and combat of terrorism and other transnational serious crime, including organised crime;
- Laying down rules for the adequate, appropriate and transparent information to the passengers in relation to the processing of personal data, as well as the right of access, and where appropriate, rectification and deletion;
- Ensuring the rights of effective administrative and judicial redress on a non discriminatory basis regardless of nationality or place of residence for any person whose data are processed pursuant to this Agreement, in line with Article 47 of the Charter of Fundamental Rights of the European Union;
- Ensuring that decisions producing adverse actions or effects on the individual may not be based solely on the automated processing of personal data without human involvement;
- Laying down a proportionate and limited duration of the retention of the data. The period of retention may be set taking into account the various ways in which PNR data are used, while exploring possibilities of reduced access rights over the period of retention such as inactive retention periods and anonymisation of data. The Agreement should ensure that the data is deleted upon the expiry of the retention period;
- Ensuring that all types of processing, accessing, consulting of PNR data are logged and documented by the Canadian competent authority for the purposes of verification of the lawfulness of the data processing;

- PNR data should only be disclosed to other government authorities whose functions are directly related to the stated purposes of the Agreement and which undertake to afford the same protections as those afforded by the recipient agency under the agreement. PNR data should never be disclosed in bulk but only on a case-by-case basis. The potential recipient agencies of PNR data should be specified; and
- Onward transfers to competent authorities in third countries should be subject to appropriate safeguards. In particular, the receiving country should undertake to treat the data with the same level of protection as set out in the agreement and the transfer should be strictly limited to the purposes of the original transfer of the data. PNR data. Moreover, onward transfers should be logged and documented and PNR data should never be transferred in bulk but only on a case-by-case basis.
- The Agreement shall require that the data be transferred exclusively on the basis of a 'push' system.
- Agreement shall ensure that the number of transmissions of PNR data does not constitute an excessive work and financial burden for the air carriers and should be proportionate to the aim to be achieved. In exceptional circumstances Canada should have the right to request that carriers transmit the data more times in addition to the standard transmissions. Such right shall be used judiciously and proportionately and exercised by using exclusively the 'push' system.
- The Agreement should ensure that the carriers are not required to collect any more data than they already do or to mandatorily collect certain types of data. Carriers should only be required to transmit what they already collect as part of their business.
- The Agreement shall specify that additional information that can be derived from PNR data can only be acquired by way of legal channels and only for the purposes that the Agreement specifies for the use of PNR data.
- The Agreement shall be reviewed, if it would facilitate the functioning of a European PNR system, if and when such a system is adopted, so as to ensure reciprocity.
- The Agreement shall provide for a dispute settlement mechanism with respect to its interpretation, application and implementation.
- The Agreement shall be concluded for a period of 7 years and shall include a provision whereby a Party may terminate it and a provision whereby the Agreement may be renewed for a similar period unless a Party terminates it. It shall include a clause allowing for a review of the Agreement after 4 years.
- The Agreement shall include a clause addressing its territorial application.
- The Agreement shall be equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages and shall include a language clause to that effect.