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Subject: Recommendation from the Commission to the Council authorising the Commission to open negotiations with Canada on an Agreement on the processing and transfer of Advanced Passenger Information (API) and Passenger Name Record (PNR) data by air carriers to the Canada Border Services Agency (CBSA)

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

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

¹ Document declassified by the European Commission on 31 March 2023.

RESTREINT UE



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 10 January 2005

5202/05

RESTREINT UE

**CDN 1
TRANS 2**

COVER NOTE

from: Secretary-General of the European Commission,
signed by Ms Patricia BUGNOT, Director

date of receipt: 6 January 2005

to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: Recommendation from the Commission to the Council authorising the
Commission to open negotiations with Canada on an Agreement on the
processing and transfer of Advanced Passenger Information (API) and
Passenger Name Record (PNR) data by air carriers to the Canada Border
Services Agency (CBSA)

Delegations will find attached Commission document SEC(1717) final.

Encl.: SEC(1717) final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4.01.2005
SEC(2004) 1717 final

RESTREINT UE

RECOMMENDATION FROM DE COMMISSION TO THE COUNCIL

authorising the Commission to open negotiations with Canada on an Agreement on the processing and transfer of Advanced Passenger Information (API) and Passenger Name Record (PNR) data by air carriers to the Canada Border Services Agency (CBSA)

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I. EXPLANATORY MEMORANDUM

- (1) Following the tragic events of 11 September 2001 in the US, Canada introduced a series of laws aimed at enhancing domestic security against terrorist threats. Whilst committed to ensuring respect for fundamental rights and freedoms, notably the right to privacy, the European Union fully supports Canada in the fight against terrorism and serious crimes that are trans-national in nature, including organised crime.
- (2) In particular, on 25 October 2001 the Canadian Senate adopted an amendment to (section 107.1 of) the Customs Act, giving the then Canada Customs and Revenue Agency, today part of the Canada Border Services Agency (CBSA), legal authority to obtain and collect Advanced Passenger Information (API) and Passenger Name Record (PNR) information relating to all persons on board flights bound for Canada.
- (3) Similarly, Citizenship and Immigration Canada, today also part of CBSA, derives legal authority from paragraph 148 (1) (d) of the Immigration and Refugee Protection Act to request from persons operating transportation facilities any prescribed information on their passengers.
- (4) In the framework of air transport, Advanced Passenger Information (API) refers to data for passengers carried into a country from the last place of call of that aircraft abroad. It contains data relating both to the flight and to each individual passenger. The passenger data usually corresponds to data contained in machine-readable passports or other official travel documents. The "Passenger Name Record" (PNR) is a record of each passenger's travel requirements which contains all information necessary to enable reservations to be processed and controlled by the booking and participating airlines.
- (5) CBSA started collecting API data in October 2002. CBSA phased in the requirement to provide PNR data relating to all persons on board flights bound for Canada between March 2003 and September 2004. Between 1 November 2004 and 1 February 2005 a system of monetary penalties for non-compliance will also be phased in.
- (6) These measures potentially conflicted with Community and Member States' legislation on privacy and data protection, and in particular with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹.
- (7) From February 2005, airlines will potentially face sanctions for non-compliance on both sides of the Atlantic, while not being in a position to solve the legal problems at stake. A solution is thus urgently required that will avoid legal uncertainty for airlines, while ensuring the protection of citizens' personal privacy as well as their physical security. In addition, this solution should be applied homogeneously throughout the Community in order to ensure respect for the right of privacy with respect to the processing of personal data and to avoid fragmentation of the internal market and the

¹ OJ L 281, 23.11.1995, p.31. See also Regulation 2299/89 of the Council of 24 July 1989 on a Code of Conduct for Computerised Reservation Systems, OJ L 220, 29.7.1989, p.1, as amended by Council Regulation 3089/93 of 29 October 1993 (OJ L 279, 11.11.1993, p.1) and Council Regulation 323/1999, of 8 February 1999 (OJ L 40, 13. 2.1999, p.1).

disruption of competition between those airlines that (are in a position to) comply with the Canadian requirements and those that are not.

- (8) The Commission has been working with Canada over the last year to try to put in place a sound legal framework for the transfers of API/PNR data to CBSA, along the lines of the model outlined in the Commission's Communication¹ to the European Parliament and the Council of 16 December 2001 and already followed with the United States.
- (9) This legal framework would consist of three elements. It would be based on the Commitments made by CBSA with respect to the additional protection to be afforded to API/PNR data. These would allow the Commission to adopt a finding of adequate protection under Article 25 paragraph 6 of the Data Protection Directive (95/46/EC), subject to the completion of the procedures laid down in Article 32 of the Data Protection Directive and Council Decision 99/468/EC². That Commission Decision would have to be accompanied by a bilateral Agreement between the Community and Canada, in order to deal with such legal problems as are not addressed by the adequacy finding.
- (10) The main legal problem that needs to be addressed in the international agreement relates to the need to ensure legitimate processing of API/PNR data, i.e. that airlines have a legitimate basis for the transfer of data to Canada, fully in accordance with the requirements of Article 7 of Directive 95/46/EC. The latter establishes a list of circumstances under which, and only under which, personal data may be processed. One of the circumstances foreseen (under paragraph (c)) is that processing be necessary for compliance with a legal obligation to which the controller is subject. However, the legal obligations in question are understood to be those imposed by Community or Member States' law and not by a third country. Hence, an international agreement imposing an obligation on air carriers to process API/PNR data as required by CBSA, insofar as it is covered by an Adequacy Finding, would be an appropriate way of achieving the aim of providing a legitimate basis for air carriers to process data in accordance with Directive 95/46/EC.
- (11) The application of such an obligation would be subject to there being an Adequacy Finding covering CBSA in force. In this way, any persistent non-compliance with the Commitments by Canada, leading to the suspension of the Adequacy Decision by the Commission, would lead automatically to suspension of the application of the Agreement, thus ensuring a coherent link between the three instruments that will, together, provide an appropriate legal framework for the transmission of API/PNR data to CBSA.
- (12) Beyond these concrete legal issues, the international agreement should enshrine general principles such as non-discrimination and reciprocity, and to provide for joint review of the implementation of the Canadian Commitments.
- (13) In view of all this, the Community should now open negotiations with Canada in order to reach a formal bilateral agreement on the processing and transfer of API/PNR data

¹ COM(2003) 826 final, « Transfer of Air Passenger Name Record (PNR) Data: a Global EU Approach»

² Council Decision of 28 June 1999, laying out the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p.23

by air carriers to CBSA which ensures respect for fundamental rights and freedoms, notably the right to privacy, whilst imposing an obligation on air carriers to process API/PNR data as required by CBSA.

- (14) The Commission therefore calls on the Council to adopt the following recommendation for negotiations.

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II. RECOMMENDATION

In the light of the attached Explanatory Memorandum, the Commission recommends that the Council:

- authorise the Commission to negotiate an Agreement on the processing and transfer of Advance Passenger Information (API) and Passenger Name Record (PNR) data by air carriers to CBSA to ensure respect for fundamental rights and freedoms, notably the right to privacy, imposing an obligation on air carriers to process API/PNR data as required by CBSA;
- adopt the annexed Negotiating Guidelines.

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ANNEX

NEGOTIATING GUIDELINES

- The obligation placed on air carriers to provide data to CBSA, as requested by CBSA itself, must apply only to those transfers covered by a Commission Decision establishing that the protection granted by CBSA to API/PNR data is ‘adequate’, in accordance with Directive 95/46/EC (‘Adequacy Finding’).
- The Agreement should render legally binding those Commitments made by CBSA which are not enshrined in existing Canadian law or in new legally binding domestic Regulations issued by CBSA which are necessary to ensure an adequate level of protection.
- The way in which API/PNR data is processed by CBSA should not discriminate against EU passengers.
- A mechanism should be provided for joint review of the implementation of all matters related to the Agreement.
- The Agreement should ensure reciprocal support from Canada for any European passenger identification system that may be adopted in the future.

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