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Opinion 1/15 of the Grand Chamber dated 26 July 2017 about the agreement on Passenger Name Record data between the EU and Canada

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ABSTRACT

On 26 July 2017, the Grand Chamber of the European Court of Justice rendered its seminal Opinion 1/15 about the agreement on Passenger Name Record data between the EU and Canada. The Grand Chamber considered that the decision of the Council about the conclusion, on behalf of the Union, of the agreement between the EU and Canada about the transfer and processing of PNR data must be based jointly on Article 16(2) about the protection of personal data and Article 87(2)(a) about police co-operation among member states in criminal matters, but not on Article 82(1)(d) about judicial co-operation in criminal matters in the EU of the Treaty on the Functioning of the EU. The Grand Chamber also considered that the agreement is incompatible with Article 7 on the right to respect for private life, Article 8 on the right to the protection of personal data, Article 21 on non-discrimination and Article 52(1) on the principle of proportionality of the Charter of Fundamental Rights of the EU since it does not preclude the transfer, use and retention of sensitive data. In addition to the requirement to exclude such data, the Grand Chamber listed seven requirements that the agreement must include, specify, limit or guarantee to be compatible with the Charter.

The opinion of the Grand Chamber has far-reaching implications for the agreement on PNR data between the EU and Canada. It has also far-reaching implications for international agreements on PNR data between the EU and other third states. Last, it has far-reaching implications for Directive 681 of 27 April 2016 on PNR data.

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“If you think compliance is expensive, try non-compliance.”

Former US Deputy Attorney General Paul McNulty

1. Introduction

In a balanced 56 page opinion, the Grand Chamber considered that the agreement between the EU and Canada about the processing of Passenger Name Record (hereinafter “PNR”) data was partly incompatible with Article 7 on the right to

respect for private life, Article 8 on the right to the protection of personal data, Article 21 on non-discrimination and Article 52(1) on the principle of proportionality of the Charter of Fundamental Rights of the EU (hereinafter the “Charter”). For the first time, the Court of Justice gave an opinion about the appropriate provisions of the treaties as the legal bases of an international agreement and about its compatibility with the Charter.

This opinion was expected with anticipation at a time when member states of the EU – except Denmark pursuant

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to the general opt-out from the area of freedom, security and justice provided for in Protocol No. 22 appended as an annex to the EU treaties – needed to enact Directive 681 of 27 April 2016 on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime¹ (hereinafter the “directive”) by 25 May 2018, pursuant to Article 18(1) thereof. The directive was adopted after five years of long, laborious and harsh debates.² It aims at harmonising domestic provisions on obligations for air carriers, which operate flights between the territory of at least one member state and a third state to transmit PNR data to the competent authorities. Article 1 of the directive provides for the transfer by air carriers of personal data of aircraft passengers from the EU to relevant authorities of third states for the purpose of combating terrorism.

The opinion of the Grand Chamber needs to be read in light of the context of terrorist attacks, which were perpetrated in the EU over the last few years.

2. The agreement

The agreement between the EU and Canada was both negotiated and drafted by the Commission and Council in accordance with the procedure set out in Article 218(2) to (5) of the Treaty on the Functioning of the EU (hereinafter the “TFEU”) as well as by Canadian authorities. It provides a legal framework for transferring 19 categories of PNR data from the EU to Canada. Such categories include Advance Passenger Information, which are limited to the identification of travellers, i.e. names, date of birth, gender, nationality and travel documents. PNR data also include passengers’ contact details including e-mail addresses and telephone numbers, travel agent, travel itineraries, seat numbers, booking information on payment, credit cards and frequent flyer programmes, baggage as well as on-board requests relating to dietary requirements, meal preferences or health and mobility issues. PNR data are not systematically verified personal information³ provided by air passengers, routinely collected by private entities, i.e. airline companies, for their own commercial purposes of reserving flights and stored in the European air carriers’ automated reservation and departure control systems.

The agreement provides for further processing of such data by Canadian authorities for security purposes, i.e. to combat terrorism and serious transnational crime.⁴ It is legally based

on both Article 82(1)(d) on judicial co-operation in criminal matters in the EU and Article 87(2)(a) on police co-operation among member states in criminal matters of the TFEU.

The agreement with Canada sets out the same 19 categories of personal data as the PNR agreements signed by the EU with Australia on 24 September 2011⁵ and with the US on 14 December 2011⁶ which both entered into force in 2012⁷ and in annex I to the directive.⁸ Article 16(1) of the agreement with Canada provides that the period during which PNR data of all air passengers may be retained may last for up to five years, which starts running from the date of receipt thereof. Although the EU and Canada have both signed the agreement on 25 June 2014, it has not been ratified by the Council of the EU and has consequently not entered into force.

3. Procedural background of the opinion

The agreement between the EU and Canada of 25 June 2014 triggered reservations about its compatibility with EU primary law and in particular the treaties and the Charter even before the date when it was signed. On 30 September 2013, the European Data Protection Supervisor (hereinafter the “EDPS”) issued a critical opinion about the negotiated agreement questioning the necessity and proportionality of PNR schemes and bulk transfers of PNR data to third countries as well as the choice of legal basis.⁹

⁵ Published in *Official Journal* L 186 of 14 July 2012, pp. 4–16.

⁶ Published in *Official Journal* L 215 of 11 August 2012, pp. 5–14. See Mistale Taylor, “Flying from the EU to the US: necessary extraterritorial legal diffusion in the US-EU Passenger Name Record agreement”, *Spanish Yearbook of International Law*, 2015, volume 19, pp. 221–234.

⁷ Council decision of 13 December 2011 on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service (2012/381/EU) published in the *Official Journal* L 186 of 14 July 2012, p. 3; Council decision of 26 April 2012 on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security (2012/472/EU) published in the *Official Journal* L 215 of 11 August 2012, p. 4. See Josiane Auvret-Finck, “L’échange d’information dans les accords PNR conclus par l’Union européenne avec des États tiers”, *L’échange des données dans l’Espace de liberté, de sécurité et de justice de l’Union européenne*, Constance Chevallier-Govers (ed.), Mare & Martin, Brussels, 2017, pp. 267–283.

⁸ Passenger name record data as far as collected by air carriers, published in *Official Journal* L 119 of 4 May 2016, p. 148. Regarding the directive, see Emmanuelle Saulnier-Cassia, “La directive (UE) 2016/681 : miscellanées sur l’utilisation des données des dossiers passagers dans l’Union européenne ou le PNR européen”, *L’échange des données dans l’Espace de liberté, de sécurité et de justice de l’Union européenne*, Constance Chevallier-Govers (ed.), Mare & Martin, Brussels, 2017, pp. 207–229.

⁹ Opinion of the EDPS on the Proposals for Council Decisions on the conclusion and the signature of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, available at https://edps.europa.eu/sites/edp/files/publication/13-09-30_canada_en.pdf, p. 2, para 3 and p. 10, para 47; executive summary published in the *Official Journal* C 51 of 22 February 2014, p. 12.

¹ Published in *Official Journal* L 119 of 4 May 2016, pp. 132–149.

² Proposal for a directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32 final, 2 February 2011.

³ Council of Europe, Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-PD), Opinion on the Data protection implications of the processing of Passenger Name Records, T-PD(2016)18rev, 19 August 2016, p. 4, Section 2.

⁴ Regarding this agreement, see Arianna Vendaschi and Gabriele Marino Noberasco, “From DRD to PNR: Looking for a New Balance Between Privacy and Security”, *Surveillance, Privacy and Transatlantic Relations*, David D Cole, Federico Fabbrini and Stepen Schulhofer (eds), Hart Publishing, Oxford and Portland, 2017, pp. 67–87.

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