ECLI:EU:C:2016:656

OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 8 September 2016 (1)

Opinion 1/15

(Request for an opinion submitted by the European Parliament)

(Request for an opinion — Admissibility — Draft agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data — ‘Passenger Name Record (PNR)’ data — Compatibility of the draft agreement with Article 16 TFEU and Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union — Legal basis)

Table of contents

I – **Introduction**

1. In application of Article 218(11) TFEU, the European Parliament has requested the Court to deliver an opinion on the agreement envisaged between Canada and the

European Union on the transfer and processing of Passenger Name Record data ('the agreement envisaged'), in order to enable it to answer the Council of the European Union's request, of July 2014, that the Parliament should approve the proposal for a decision on the conclusion of the agreement envisaged. (2)

2. Schematically, the agreement envisaged provides that Passenger Name Record data ('PNR data'), which is collected from passengers for the purpose of reserving flights between Canada and the European Union, is to be transferred to the Canadian competent authorities and then processed and used by those authorities in order to prevent and detect terrorist offences and other serious transnational criminal offences, while providing a number of guarantees in relation to privacy and the protection of passengers' personal data.

3. The request for an opinion, which concerns both the compatibility of the agreement envisaged with primary EU law and the appropriate legal basis for the Council decision concluding the agreement envisaged, is worded as follows:

'Is the [agreement envisaged] compatible with the provisions of the Treaties (Article 16 TFEU) and the Charter of Fundamental Rights of the European Union (Articles 7, 8 and Article 52(1)) as regards the right of individuals to protection of personal data?

Do Articles 82(1)(d) and 87(2)(a) TFEU constitute the appropriate legal basis for the act of the Council concluding the [agreement envisaged] or must that act be based on Article 16 TFEU?'

4. Irrespective of its content, the Court's answer to that request will necessarily have implications for the PNR Agreements already in force between the European Union and Australia (3) and the European Union and the United States of America, (4) and also on the future Passenger Name Record system, put in place within the Union itself, which was recently approved by the Parliament, although the present proceedings were still pending. (5)

5. The present request for an opinion requires an examination of questions which are both unprecedented and delicate.

6. From the aspect of determining the appropriate legal basis for the act concluding the agreement envisaged, this request must lead the Court, in particular, to examine for the first time the scope of Article 16(2) TFEU, which was introduced following the adoption of the Treaty of Lisbon, and also the way in which that article interacts with the Treaty provisions on the area of freedom, security and justice ('the AFSJ'). In that regard, as I shall show in this Opinion, (6) the objectives pursued by and the content of the agreement envisaged are interdependent and the act concluding that agreement must therefore in my view be based on both Article 16 TFEU and Article 87(2)(a) TFEU.

7. This is also the first time that the Court will be required to rule on the compatibility of a draft international agreement with the fundamental rights enshrined in

the Charter of Fundamental Rights of the European Union ('the Charter'), and more particularly with those relating to respect for private and family life, guaranteed by Article 7, and the protection of personal data, guaranteed by Article 8. The examination of that question will thus undoubtedly benefit from the valuable guidance to be derived from the judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650). As will be more fully explained, I consider that it is indeed appropriate to follow the route outlined by those judgments and to subject the agreement envisaged to a strict review of compliance with the requirements laid down in Articles 7 and 8 and Article 52(1) of the Charter. Nonetheless, it must be borne in mind that the draft agreement referred to the Court is the outcome of international negotiations with a third country, which, in the absence of a satisfactory agreement, may well decline to conclude the agreement envisaged and prefer, as it does now, to apply its PNR system unilaterally to air carriers established in the EU which provide flights to Canada.

8. That does not mean that the Court must lower the degree of vigilance which it has shown in relation to respect for the fundamental rights protected in EU law. It is necessary that, at a time when modern technology allows the public authorities, in the name of combating terrorism and serious transnational crime, to develop extremely sophisticated methods of monitoring the private life of individuals and analysing their personal data, the Court should ensure that the proposed measures, even when they take the form of international agreements envisaged, reflect a fair balance between the legitimate desire to maintain public security and the equally fundamental right for everyone to be able to enjoy a high level of protection of his private life and his own data.

9. As my subsequent observations will illustrate, it cannot be denied that the contracting parties have attempted, sometimes insufficiently, to strike a balance between those two objectives inseparably pursued by the agreement envisaged. To my mind, that effort must be acknowledged. However, without calling in question either the object of or the need for the agreement envisaged, I consider, as this Opinion will demonstrate, that in order to be compatible with Articles 7 and 8 and Article 52(1) of the Charter, the agreement envisaged will have to be brought up to date and/or some of its present terms will have to be deleted so that it does not exceed what is strictly necessary in order to achieve its security objective.

II – **Legal framework**

10. Article 16 TFEU provides as follows:

'1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the

scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

…'

11. Article 82 TFEU, in Chapter 4, entitled 'Judicial cooperation in criminal matters', of Title V of Part Three of that Treaty, provides:

'1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 …

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

…

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

…'

12. Article 87 TFEU, which is part of Chapter 5, entitled 'Police cooperation', of Title V of Part Three of that Treaty, provides as follows:

'1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

(a) the collection, storage, processing, analysis and exchange of relevant information;

…'

13. Article 7 of the Charter states:

'Everyone has the right to respect for his or her private and family life, home and communications.'

14. Article 8 of the Charter states:

'1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.'

15. Article 52 of the Charter, entitled 'Scope and interpretation of rights and principles', provides as follows:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

…'

16. Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice provides as follows, in Articles 1, 3 and 6a:

'Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the [TFEU]. The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland, shall be necessary for decisions of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) [TFEU].

…

Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the [TFEU], that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so.

…

Article 6a

The United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 16 [TFEU] which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of that Treaty where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 16.'

17. Protocol (No 22) on the position of Denmark provides as follows, in Articles 1, 2 and 2a:

'Article 1

Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the [TFEU]. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the decisions of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the [TFEU].

Article 2

None of the provisions of Title V of Part Three of the [TFEU], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice of the European Union interpreting any such provision or measure or any measure amended or amendable pursuant to that Title shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Denmark. …

Article 2a

Article 2 of this Protocol shall also apply in respect of those rules laid down on the basis of Article 16 [TFEU] which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of that Treaty.'

III – **Background to the agreement envisaged**

18. On 18 July 2005, the Council approved the Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data ('the 2006 Agreement'). (7)

19. In accordance with the preamble thereto, the 2006 Agreement was concluded having regard to the Government of Canada requirement of air carriers carrying persons

to Canada to provide Advance Passenger Information and Passenger Name Record data ('API/PNR data') to the Canadian competent authorities, to the extent that it is collected and contained in carriers' automated reservation systems and departure control systems.

20. According to Article 1 of the 2006 Agreement, the purpose of that agreement was 'to ensure that API/PNR data of persons on eligible journeys is provided in full respect of fundamental rights and freedoms, in particular the right to privacy'. The competent authority for Canada was, in accordance with Annex I to the 2006 Agreement, 'the Canada Border Services Agency (CBSA)'.

21. In the light of that commitment, the European Commission, acting on the basis of Article 25(2) of Directive 95/46/EC, (8) adopted Decision 2006/253/EC, (9) Article 1 of which provided that the CBSA was to be considered to ensure an adequate level of protection for PNR data transferred from the European Community concerning flights bound for Canada. As Decision 2006/253 expired in September 2009 (10) and the duration of the 2006 Agreement was linked to the duration of that decision, (11) that agreement therefore also expired in September 2009.

22. On 5 May 2010, the Parliament adopted a Resolution on the launch of negotiations for Passenger Name Record (PNR) data agreements with the United States, Australia and Canada. (12) In that resolution, the Parliament called for a coherent approach on the use of PNR data for law enforcement and security purposes, establishing a single set of principles to serve as a basis for agreements with third countries. To that end, it invited the Commission to present a proposal for such a single model and a draft mandate for negotiations with third countries, while setting out the minimum requirements to be met. (13)

23. On 21 September 2010, the Commission adopted three proposals aimed at authorising the initiation of negotiations with the United States, Australia and Canada. (14) Subsequently, agreements were signed and concluded with the United States and Australia, with the approval of the Parliament. (15) Those agreements entered into force in 2012.

24. Following the close of the negotiations with Canada, the Commission, on 19 July 2013, adopted proposals for Council decisions relating to the signature and conclusion of the agreement envisaged.

25. The European Data Protection Supervisor ('the EDPS') delivered his opinion on those proposals on 30 September 2013. (16) In that opinion, the EDPS raised a number of questions concerning the necessity and proportionality of PNR schemes and of bulk transfers of PNR data to third countries, cast doubt on the choice of the substantive legal basis and made various observations and proposals concerning the various provisions of the agreement envisaged.

26. On 5 December 2013, the Council adopted a decision on the signature of the agreement envisaged, which had not been amended following the opinion of the

EDPS. The agreement envisaged was signed on 25 June 2014, subject to its conclusion at a later date.

27. By letter dated 7 July 2014, the Council sought the Parliament's approval of the draft decision relating to the conclusion, on behalf of the Union, of the agreement envisaged. That draft decisions refers, as legal bases, to Article 82(1)(d) TFEU and Article 87(2)(a) TFEU read in conjunction with Article 218(6)(a)(v) TFEU.

28. On 25 November 2014, the Parliament decided to request the Court to provide the present opinion, submitting the questions set out in paragraph 3 of this Opinion.

IV – **The procedure before the Court**

29. Following the submission of the request by the Parliament, written observations were lodged by the Bulgarian and Estonian Governments, Ireland, the Spanish, French and United Kingdom Governments and by the Council and the Commission.

30. The Court put a number of questions to be answered in writing, concerning, in particular, certain practical and factual aspects of the processing of the PNR data, the legal basis for the agreement envisaged, the scope *ratione territoriae* of that agreement and the compatibility of its terms with the provisions of the FEU Treaty and the Charter, in the light of the guidance to be derived from the case-law, especially the judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650). Furthermore, in application of the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union, the Court requested the EDPS to answer those questions. The EDPS, and also Ireland, the Spanish, French and United Kingdom Governments, the Parliament, the Council and the Commission, answered the questions put to them within the prescribed period.

31. The representatives of the Estonian Government, Ireland, the Spanish, French and United Kingdom Governments, those of the Parliament, the Council and the Commission, and the representative of the EDPS presented oral argument at the hearing on 5 April 2016.

V – **The admissibility of the request for an opinion**

32. While the Bulgarian and Estonian Governments and the Commission share the Parliament's view that the request for an opinion is admissible in its entirety, the French Government and the Council question the admissibility of the second question in the Parliament's request, which deals with the appropriate legal basis for the Council decision concluding the agreement envisaged.

33. In essence, the French Government and the Council claim that that question does not relate to either the power of the European Union to conclude the agreement envisaged or the allocation of powers between the Union and the Member States. In addition, they

maintain that the possible incorrect application of Articles 82 and 87 TFEU would have no impact on the procedure to be followed in adopting the Council act concluding the agreement envisaged, as both the application of Article 16 TFEU and the application of Articles 82 and 87 TFEU require compliance with the ordinary legislative procedure, in particular the approval of the Parliament, pursuant to Article 218(6)(a)(v) TFEU.

34. I suggest that the Court should declare the request for an opinion admissible in its entirety.

35. Generally, it should first of all be borne in mind that, in accordance with Article 218(11) TFEU and the case-law of the Court, the opinion of the Court may be sought as to whether an 'agreement envisaged' (17) is compatible with the substantive rules of the Treaties or with those which determine the extent of the powers of the European Union and its institutions, including questions relating to the allocation of powers between the EU and the Member States to conclude a specific agreement with third States, (18) as confirmed by Article 196(2) of the Rules of Procedure of the Court of Justice.

36. There can thus be no doubt — as, moreover, all the interested parties acknowledge — that in so far as the request for an opinion relates to the compatibility of the agreement envisaged with the substantive provisions of EU primary law, including the provisions of the Charter, which have the same value as the Treaties, it is admissible. (19)

37. I consider that that is also the case of the second question, relating to the determination of the appropriate legal basis for the act whereby the Council concludes the agreement envisaged.

38. Admittedly, as the French Government and the Council have claimed, none of the interested parties has any doubt that, in this instance, the European Union has the power to approve the agreement envisaged, nor is that question the subject matter of the request for an opinion.

39. However, it should be noted that, when examining previous requests for opinions, the Court has already agreed to answer the question of the appropriate legal basis for the act concluding the proposed agreements at issue. (20) That position was based, in essence, on two essential considerations, which are closely linked.

40. The choice of the appropriate legal basis for the act concluding an international agreement has 'constitutional significance' (21) since the Union has conferred powers only and must therefore be able to tie the international agreements which are deemed to come within its legal order to a Treaty provision which empowers it to approve those acts. The use of an incorrect legal basis is therefore apt to invalidate the act concluding the agreement and thus to vitiate the European Union's consent to be bound by that agreement. (22)

41. Furthermore, failure to take the opportunity to examine the choice of the appropriate legal basis for the act concluding a draft agreement in the procedure for submitting a prior request to the Court might ultimately lead to complications, both at EU level and in the international legal order, if the act concluding the agreement should subsequently be declared invalid because of the error in the legal basis. In fact, the preventive procedure laid down in Article 218(11) TFEU is specifically designed to ensure that such complications cannot arise, in the interest of the contracting parties. (23)

42. Although they do not deny the existence of that case-law, the French Government and the Council maintain, in essence, that none of the legal complications to which the Court has referred in its previous opinions could arise in the present case. Thus, according to those interested parties, in the present case, the choice of Article 16 TFEU as the substantive legal basis for the agreement envisaged, as defended by the Parliament in its request for an opinion, would not affect the allocation of powers between the Union and the Member States, nor would it lead to a 'different legislative procedure' from that followed by the Council and the Commission in the present case, within the meaning of those opinions.

43. That argument lacks conviction.

44. It should be pointed out that the situations to which the Court referred in paragraph 5 of Opinion 2/00 of 6 December 2001 (EU:C:2001:664), and paragraph 110 of Opinion 1/08 of 30 November 2009 (EU:C:2009:739), respectively, are merely examples of situations in which the use of an incorrect legal basis is liable to vitiate the European Union's consent to be bound by the agreement to which it has subscribed or to entail legal difficulties at internal level or in the Union's external relations. The two situations referred to in those paragraphs of the two opinions — namely the situation in which the EU has committed itself although the Treaty does not confer on it sufficient power to ratify an agreement in its entirety, which calls for an examination of the allocation of powers between the European Union and the Member States, and the situation in which the appropriate legal basis for the act concluding the agreement provides for a different legislative procedure from that actually followed by the institutions — were introduced by the expression 'that is so in particular where'. Other situations giving rise to legal difficulties at internal EU level or in the context of international relations cannot therefore be precluded.

45. Next, it must not be forgotten that the opinion procedure is of a non-contentious and preventive nature, (24) which to my mind justifies a certain flexibility on the part of the Court when it examines the admissibility of a question relating to the appropriate legal basis for the act concluding an agreement envisaged.

46. Thus, at the admissibility stage, I consider that the Court must simply ask whether, if it declines to answer the question referred to it, there will be a serious risk that the act concluding the agreement may subsequently be declared invalid, on the same ground as that raised in the request for an opinion, resulting in a situation giving rise to difficulties

at internal EU level or in the context of external relations that the opinion procedure could have prevented.

47. In the present case, I am convinced that such a risk cannot be precluded.

48. In fact, as I shall examine later in the present Opinion, the grounds which the Parliament puts forward in support of the argument that Article 16 TFEU constitutes the appropriate substantive legal basis for the act concluding the agreement envisaged are very serious, to such an extent that I consider them to be well founded in part.

49. Consequently, failure to answer that argument in the present procedure would be apt to lead the Parliament to challenge the validity of the act concluding the agreement or, as the case may be, to lead a national court hearing an action brought by an individual harmed by the transfer of his PNR data to the Canadian competent authority to request the Court to give a preliminary ruling on the validity of the agreement and the act concluding it.

50. Furthermore, to my mind the French Government and the Council are wrong to play down the consequences of a declaration that the act concluding the agreement envisaged is invalid if it should eventually transpire that, following an action for annulment or a request for a preliminary ruling on validity, that act ought to have been adopted, as the Parliament maintains, on the sole legal basis of Article 16 TFEU.

51. In fact — and I shall return to this point later —, and as suggested in certain written observations, if Article 16 TFEU were taken as the *sole* legal basis of the act concluding the agreement envisaged, that would alter the status of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, as those Member States would then be directly and automatically bound by the agreement, contrary to Article 29 of the agreement envisaged. As regards the Kingdom of Denmark, in particular, any international commitment that it might have concluded with Canada, alongside the agreement envisaged, would then be unlawful, since that Member State would no longer have the necessary power to give such a commitment.

52. It therefore seems to me that, all things considered, by analogy with the Court's observation in paragraph 47 of Opinion 1/13 of 14 October 2014 (EU:C:2014:2303), it is particularly appropriate that the Court should answer the second question in the present request for an opinion in order, in particular, to forestall the legal complications that might be caused by situations in which a Member State enters into international commitments without the requisite authorisation when, under EU law, it would no longer have the necessary power to enter into or give effect to such a commitment.

53. I therefore propose that the Court should declare that the second question raised by the Parliament in its request for an opinion is admissible.

54. Furthermore, as that question relates to the procedural validity of the act concluding the agreement and requires an analysis of the objectives and the content of the

agreement envisaged, I suggest that it should be dealt with before the question relating to the compatibility of the agreement with the provisions of the FEU Treaty and the rights enshrined in the Charter.

VI – **The appropriate legal basis for the act concluding the agreement envisaged (second question)**

A – *Analysis of the arguments of the Parliament and the other interested parties*

55. The Parliament and all the interested parties who have lodged observations are agreed that, in accordance with the case-law of the Court, the choice of the legal basis must be founded on objective criteria amenable to judicial review, and those objective criteria include the purpose and the content of the act at issue.

56. The Parliament emphasises that the agreement envisaged has two purposes, which are set out in Article 1 thereof. However, the main purpose of the agreement envisaged is to ensure the protection of personal data. In the Parliament's submission, the agreement envisaged has an effect analogous to an 'adequacy decision' and its aim is to replace Commission Decision 2006/253, adopted under Article 25(6) of Directive 95/46, in which the Commission established, in the context of the 2006 Agreement, the adequate level of protection of the PNR data transferred to the CBSA. In addition, the agreement envisaged does not seek to create an obligation for air carriers to transfer PNR data to the Canadian or European police authorities, which makes it difficult to justify the choice of Article 82(1)(d) and Article 87(2)(a) TFEU as the substantive legal bases. According to the case-law, those findings justify, in the Parliament's view, that the agreement envisaged should be founded on the legal basis corresponding to the main purpose of the agreement envisaged, namely, in this instance, Article 16 TFEU. The content of the agreement envisaged confirms that assessment. The Parliament states, last, that Article 16 TFEU permits the adoption of rules on the protection of personal data in all fields of EU law, including the 'AFSJ'.

57. In answer to a question put at the hearing before the Court, the Parliament stated that, in the event that the Court should consider that the agreement envisaged pursues inseparable purposes, it had no objection to the act concluding the agreement envisaged being based on Article 16, Article 82(1)(d) and Article 87(2)(a) TFEU.

58. With the exception of the Spanish Government and the EDPS and also, in the context of an alternative observation, the French Government, the other interested parties maintain that the purpose of the agreement envisaged is to combat terrorism and serious transnational crime, while data protection constitutes, in essence, only an instrument whereby that purpose may be achieved. In that regard, the Commission observes that, in the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346, paragraph 56), the Court held that the transfer of PNR data to the United States constituted processing operations concerning public security and the activities of the Member States in areas of criminal law. The choice of the legal basis for

the act concluding the agreement envisaged should be made in accordance with that reasoning.

59. The great majority of those interested parties further submit that, if data protection were to be considered to constitute an objective of the agreement envisaged, that objective would be merely incidental to the main purpose and would therefore have no consequence on the actual choice of the legal basis for the act concluding the agreement. In that regard, the Council and the Commission submit that acts having as their purpose the implementation of sectoral policies requiring the processing of personal data should be based on the legal basis corresponding to the policy concerned and not on Article 16 TFEU.

60. As for the possibility of combining Article 16, Article 82(1)(d) and Article 87(2)(a) TFEU as the substantive legal bases of the act concluding the agreement envisaged, the French Government maintains, in the alternative, in its written observations, that such a combination is perfectly conceivable. On the other hand, Ireland and the Council maintain the opposite. At the hearing before the Court, the Council submitted that the voting procedure within the Council, as defined in Protocols (No 21) and (No 22), would preclude such a hypothesis.

B – *Assessment*

61. According to settled case-law, the choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the purpose and the content of that measure. If examination of the EU measure reveals that it pursues a twofold purpose or that it has a twofold component, and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely, that required by the main or predominant purpose or component. (25)

62. However, the Court accepts, 'by way of exception', that an act may be founded on various legal bases corresponding to the number of the objectives or components of that act where those objectives or components are inseparably linked, without one being incidental in relation to the other. (26) In such a case, the Court further ascertains whether recourse to more than one legal basis might be precluded on the ground that the procedures laid down for the different legal bases are mutually incompatible. (27)

63. It is in the light of that case-law that it must be determined whether, having regard to the purpose and the content of the agreement envisaged, the act concluding that agreement should be based exclusively on Article 82(1)(d) and Article 87(2)(a) TFEU, as substantive legal bases, as the Council's draft decision indicates and as most of the interested parties maintain, or whether it should be based on Article 16 TFEU, whether exclusively or read in conjunction with those two articles. (28)

64. On the latter point, I would make clear that, contrary to the Council's contention in its written observations, the Court is in my view perfectly entitled, in the light of the non-contentious and preventive nature of the opinion procedure, to examine the second question submitted by the Parliament from the angle of the combination of substantive legal bases, even though the wording of that question does not envisage it. Furthermore, the interested parties had the opportunity, both during the written procedure and at the hearing, to express their views on that point.

65. That is all the more important because the examination of the purpose and the content of the agreement envisaged must in my view lead to the finding that the agreement pursues two objectives and has two components, although, overall, neither those two objectives nor those different components can be ranked and separated. To my mind, that justifies the act concluding the agreement envisaged taking as its substantive legal bases Article 16 and Article 87(2)(a) TFEU, which means that the procedures referred to in those two articles may co-exist.

1. The purpose and the content of the agreement envisaged

66. It is apparent from the second paragraph of the preamble to the agreement envisaged that the contracting parties recognise 'the importance of preventing, combating, repressing and eliminating terrorism and terrorist-related offences, as well as other serious transnational crime, while preserving fundamental rights and freedoms, in particular rights to privacy and data protection', while the fourth paragraph further states that the use of PNR data is a critically important instrument to pursue those goals.

67. The simultaneous pursuit of the objective of combating terrorism and other serious transnational crime and respecting private life and the protection of personal data is confirmed by the fifth and sixth paragraphs of the preamble, which emphasise, respectively, the contracting parties' desire to 'safeguard public security' and the recognition that they 'share common values with respect to data protection and privacy'.

68. Likewise, it is expressly stated in the 15th paragraph of the preamble that Canada has given a commitment that its competent authority will process 'PNR data for the purpose of preventing, detecting, investigating and prosecuting terrorist offences and serious transnational crime in strict compliance with safeguards on privacy and the protection of personal data, as set out in [the agreement envisaged]'.

69. The agreement envisaged is therefore intended to allow Canada to process the PNR data of passengers carried by airlines flying between the European Union and Canada, for the purpose of combating terrorism and other serious transnational crime while safeguarding the right to respect for privacy and the right to protection of personal data under the conditions laid down in the agreement envisaged itself.

70. The need to reconcile those two objectives is confirmed out by Article 1 of the agreement envisaged, which states that the contracting parties are to set out the conditions

for the transfer and use of PNR data '*to* ensure the security and safety of the public and prescribe the means by which the data is protected'.

71. It is also clear on examining the content of the agreement envisaged that the means of combating terrorism and other serious transnational crime by the transfer and processing of PNR data is authorised only if the data in question benefits from an adequate level of protection.

72. Thus, in the words of Article 3(1) of the agreement envisaged, Canada is to ensure that the Canadian competent authority processes PNR data received 'strictly for the purpose of preventing, detecting, investigating or prosecuting terrorist offences or serious transnational crime', while making clear that that processing must be carried out 'pursuant to this Agreement'. That means, in particular, that, in application of Article 5 of the agreement envisaged, 'subject to compliance with [that agreement], the Canadian Competent Authority is deemed to provide an adequate level of protection, within the meaning of relevant European Union data protection law'.

73. Likewise, in the context of the retention of PNR data and the gradual depersonalisation of that data by masking, provided for in Article 16 of the agreement envisaged, paragraph 4 of that article authorises the subsequent unmasking of that data by the Canadian authorities only where, 'on the basis of available information, it is necessary to carry out investigations under the scope of Article 3' of the agreement envisaged.

74. In addition, Articles 18(1) and 19(1) of the agreement envisaged authorise the subsequent disclosure of the PNR data to other Canadian government authorities or to government authorities in third countries only in strictly limited circumstances, including where the authorities in question perform 'functions [which] are directly related to the scope of Article 3 [of the agreement envisaged]' and where those authorities afford 'protection equivalent to the safeguards described in [the agreement envisaged]'.

75. However, although the need to reconcile the two objectives is not affected, some of the terms of the agreement envisaged are more concerned with the aim of combating terrorism and serious transnational crime while others are more concerned with the aim of safeguarding adequate protection of personal data.

76. Thus, as specifically regards the first objective, under Article 6(2) of the agreement envisaged Canada is required to share, in specific cases, and at the request of the European Police Office (Europol), the European Union Judicial Cooperation Unit (Eurojust), within the scope of their respective mandates, or the police or a judicial authority of a Member State of the European Union, PNR data or analytical information containing PNR data obtained under the agreement envisaged 'to prevent, detect, investigate, or prosecute within the European Union a terrorist offence or serious transnational crime'. Under Article 23(2) of the agreement envisaged, moreover, it is provided that the contracting parties are to cooperate to pursue the coherence of their

respective PNR data processing regimes ‘in a manner that further enhances the security of citizens of Canada, the European Union and elsewhere’.

77. As for the terms relating rather to the guarantees afforded by the agreement envisaged concerning data protection, the agreement lays down a number of rules relating to data security and integrity (Article 9 of the agreement envisaged), access, correction and annotation of data for individuals (Articles 12 and 13 of the agreement envisaged), oversight of PNR data processing and administrative and judicial redress for the persons concerned (Articles 10 and 14 of the agreement envisaged).

78. In the light of the aim and the content of the agreement envisaged, that agreement therefore pursues two objectives and has two essential components, as, in fact, most of the interested parties have acknowledged or at least conceded.

79. Contrary to what the interested parties assert in support of opposing arguments, it is indeed difficult, in my view, to determine which of those two objectives prevails over the other.

80. In fact, as the description of the aim and the content of the agreement envisaged tends to show, those two objectives must be pursued simultaneously and in fact appear to be inseparable. As I have emphasised, the transfer to and processing of PNR data by the Canadian competent authority for the purposes set out in Article 3 of the agreement envisaged are authorised only where those operations are accompanied by adequate protection of the data, within the meaning of European Union data protection law, in accordance with Article 5 of the agreement envisaged. In other words, if such protection is not ensured, the transfer of the PNR data provided for in the agreement envisaged cannot be lawfully effected. In addition, the guarantees laid down in the agreement envisaged in terms of protection of personal data are necessary only because the PNR data must be transferred to the Canadian competent authority under the Canadian legislation and the terms of the agreement envisaged. As illustrated by a number of provisions of the agreement envisaged, such as Articles 16, 18 and 19 thereof, the agreement envisaged is therefore designed to reconcile the security objective with the objective of protecting the fundamental rights of the individuals concerned, particularly the right to protection of their personal data.

81. All in all, I consider that those two objectives and those two components of the agreement envisaged are inseparably linked and that neither of them is secondary and indirect by reference to the other.

82. That assessment cannot be undermined by the Commission’s argument, based on paragraph 56 of the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346), that the Court has held that the transfer of PNR data to the United States constituted processing operations concerning public security and the activities of the Member States in areas of criminal law.

83. First of all, the present opinion procedure has as its subject matter the agreement envisaged with Canada and not the first agreement concluded with the United States in 2004 and the Commission adequacy decision adopted in that year, to which the actions for annulment brought by the Parliament related.

84. Next, and more fundamentally, the Commission is taking out of context the finding made by the Court in paragraph 56 of the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346), which, it must be recalled, was delivered well before the adoption of the Treaty of Lisbon.

85. The Court was asked by the Parliament to determine, in particular, whether the Commission was authorised to adopt an adequacy decision, based on Article 25 of Directive 95/46 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States, when Article 3(2) of that directive expressly excluded from its scope processing operations concerning, in particular, public security and the activities of the State in areas of criminal law. The Court logically replied in the negative. In fact, the processing of the PNR data in the context of the agreement with the United States could not be associated with the supply of services, but fell within a framework established by the public authorities that related to public security, which did not come within the scope of Directive 95/46. (29)

86. That finding does not mean that the Court made a definitive ruling on the object of PNR agreements, including, for the purpose of the argument, the object of the agreement envisaged or, *a fortiori*, that it definitively held that the exclusive, principal or predominant objective of those agreements is to combat terrorism or serious transnational crime, as the Commission wrongly implies.

87. Nor, clearly, does the finding of the Court in the judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346) mean that, in ruling on the scope *ratione materiae* of Directive 95/46, the Court on the same occasion defined in advance the limits of the scope *ratione materiae* of Article 16 TFEU.

88. In support of the argument that the security objective of the agreement envisaged is predominant and therefore justifies the legal basis chosen, the Commission also attempts to draw an analogy between the present case and the case giving rise to the judgment of 6 May 2014, *Commission* v *Parliament and Council* (C-43/12, EU:C:2014:298).

89. In that case, which concerned the determination of the appropriate legal basis for Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences, (30) the Court, after establishing that the predominant objective of that directive was to improve road safety (and therefore transport safety), held that the information exchange system set up by the directive provides ‘the means of pursuing [that] objective’. (31) The directive should therefore have been adopted not on the basis of

Article 87(2) TFEU (Police Cooperation) but on the basis of Article 91(1)(c) TFEU, under the title on transport policy.

90. While I am prepared to accept that there is a partial analogy between the two situations, that does not alter the conclusion that the agreement envisaged has two objectives and has two inseparable components. Thus, the fact that the transfer of PNR data to the Canadian competent authority may constitute the means whereby the contracting parties pursue the public security objective of the agreement envisaged does not alter the finding that the object of the agreement envisaged, as stated, in particular, in Article 1 of that agreement, is twofold. Moreover, the specific feature of the agreement envisaged, which distinguishes it from Directive 2011/82, relates to the fact that the maximum efficiency sought by the means consisting in the transfer of PNR data in order to achieve the aims set out in Article 3 of the agreement envisaged, must be weighed against the guarantees afforded to the protection of personal data laid down in that agreement, which form part of the second objective pursued by that agreement.

91. Also lacking in conviction are the Parliament's arguments in support of its position that the 'centre of gravity' of the agreement envisaged is predominantly situated in the guarantees which its terms afford to passengers in relation to the protection of their PNR data, which, it claims, means that the decision concluding that act should be based exclusively on Article 16 TFEU.

92. It is incorrect to claim that the agreement envisaged lays down no obligation for the airlines to transfer the PNR data to the Canadian competent authority so that the data can be processed according to the purposes listed in Article 3 of the agreement envisaged. It is true, as the Parliament remarked in its written observations, that Article 4(1) of the agreement envisaged states that the Union is to ensure only that air carriers 'are not prevented' from transferring PNR data to the Canadian competent authority. However, it follows from the interpretation of that article, entitled 'Ensuring PNR data is provided', in conjunction with that of Articles 5, (32) 20 (33) and 21 (34) of the agreement envisaged, as, moreover, the Parliament acknowledged in answer to a written question put by the Court, that air carriers are entitled and in practice required to provide the Canadian competent authority systematically with access to the PNR data for the purposes defined in Article 3 of the agreement envisaged.

93. Furthermore, the object of the agreement envisaged cannot principally be treated as equivalent to an adequacy decision, comparable to the decision which the Commission had adopted under the 2006 Agreement. (35) As already stated, both the aim and the content of the agreement envisaged show, on the contrary, that that agreement is intended to reconcile the two objectives which it pursues and that those objectives are inseparably linked.

94. What consequence, therefore, does that assertion have for the determination of the legal basis of the act concluding the agreement envisaged?

2. The appropriate legal basis

95. As already stated, it is common ground that the draft Council decision concluding the agreement envisaged is based on Article 82(1)(d) and Article 87(2)(a) TFEU, both of which come under Title V of Part Three of the FEU Treaty, on the 'Area of Freedom, Security and Justice' ('the AFSJ').

96. In the light of the two objectives and the two inseparable components of the agreement envisaged described above, those substantive legal bases seem to me to be relevant, at least in part, but insufficient. I consider it appropriate and possible, having regard to the case-law, to base the act concluding the agreement envisaged on the first subparagraph of Article 16(2) TFEU.

a) The relevance of Article 82(1)(d) and Article 87(2)(a) TFEU

97. As for the first point, namely the relevance of Article 82(1)(d) and Article 87(2)(a) TFEU, it must first of all be agreed that the construction of an AFSJ requires that the Union be able to exercise its external powers.

98. Except in the case of readmission agreements, provided for in Article 79(3) TFEU, relating to immigration policy and not relevant in the present case, the EU has not been explicitly granted any general external powers in relation to the AFSJ. However, Article 216(1) TFEU permits the Union to conclude international agreements, including in the area of police and/or judicial cooperation in criminal matters, in particular where the conclusion of such agreements is necessary in order to achieve one of the objectives referred to in the Treaties.

99. None of the interested parties questions that possibility. To my mind, however, the Court cannot merely rely on that fact, but should devote argument to that question in the opinion which it is called upon to deliver.

100. If it is to be accepted that the Union has external powers in the sphere of the AFSJ, the exercise of those powers in the sphere of police and judicial cooperation in criminal matters must be firmly fixed in the objectives pursued by the AFSJ.

101. Those objectives are set out in Article 3(2) TEU and Article 67 TFEU. The first of those provisions states that 'the Union shall offer its citizens an [AFSJ] without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls … and the prevention and combating of crime'. Article 67 TFEU, which opens Chapter 1 of Title V of Part Three of the FEU Treaty, provides, in paragraph 3, that the Union 'shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities …'.

102. As Advocate General Bot correctly argued in his Opinion in *Parliament* v *Council* (C-658/11, EU:C:2014:41, points 111 and 112), the external dimension of the AFSJ is functional and instrumental having regard to the objectives set out in those provisions.

Accordingly, while the construction of the AFSJ may require external action on the part of the Union, an agreement must, if it is to be able to be regarded as falling within the AFSJ, have a close link with freedom, security and justice within the union, that is to say, a direct link between the purpose of safeguarding the internal security of the Union and the police and/or judicial cooperation which is developed outside the Union. (36)

103. In a different context, but long the same lines, the Court, interpreting Article 87(2) TFEU in the light of Article 67 TFEU, stated that, in order for an act of the Union, having regard to its purpose and its content, to be able to be based on the first of those articles, it must be directly linked to the objectives set out in Article 67 TFEU. (37)

104. That, in my view, is indeed the case of the agreement envisaged.

105. In the first place, that agreement applies to the transfer, processing and use of PNR data for the purposes of public security and the activities of the State in areas of criminal law, (38) that is to say, more particularly, the prevention, detection, investigation and prosecution of terrorist offences and serious transnational crime. According to Article 1 of the agreement envisaged, that agreement is intended to 'ensure the security and safety of the public', which clearly means the security and safety of citizens of the Union, in particular those flying between Canada and the European Union. (39) Furthermore, under Article 6(2) of the agreement envisaged Canada is required, at the request of, among others, the police or a judicial authority of a Member State of the Union, to share, in specific cases, PNR data or analytical information containing PNR data obtained under the agreement envisaged in order to prevent or detect 'within the European Union' a terrorist offence or serious transnational crime.

106. In the second place, although the collection and initial transfer of the PNR data are carried out by the air carriers, the terms of the agreement envisaged constitute a legal framework established by the public authorities for criminal purposes. (40) As already stated, the agreement envisaged thus establishes rules on access to PNR data and/or analytical information containing PNR data by the Canadian competent authorities and also the subsequent sharing of such data with, among others, the competent police and judicial authorities of the Union and its Member States and also with those of third countries, in particular for the purposes set out in Article 3 of the agreement envisaged. Furthermore, as was clear from the discussion before the Court, the five-year retention period for the PNR data laid down in Article 16(1) and (5) of the agreement envisaged was set with a view to enabling and facilitating investigations, prosecutions and judicial proceedings relating, in particular, to international serious crime networks. In the light of the very open wording of Article 16(5) of the agreement envisaged, those investigations and prosecutions are perfectly capable of including those carried out by the police and judicial authorities of the Member States of the Union. Such rules fall, in principle, within the sphere covered by police and judicial cooperation in criminal matters. (41)

107. I conclude, first, that in so far as it relates to measures which the Parliament and the Council may establish in connection with 'the collection, storage, processing, analysis and exchange of relevant information' for the purposes of police cooperation 'in relation

to the prevention, detection and investigation of criminal offences' provided for in Article 87(1) TFEU, Article 87(2)(a) TFEU constitutes an appropriate legal basis for the act concluding the agreement envisaged. I would add, for all practical purposes, that that cooperation and those exchanges do not necessarily have to be between authorities who are specifically defined, in national law, as police services in the strict sense. Article 87(1) TFEU associates with police cooperation, in a particularly broad manner, '*all the Member States' competent authorities*, including police, customs and other … law enforcement services', (42) an expression which perfectly authorises, in the context of the external dimension of the AFSJ, cooperation with the CBSA in order to safeguard the internal security of the Union.

108. As regards, second, the 'judicial cooperation in criminal matters' aspect of the agreement envisaged, in spite of the matters to which attention was drawn in paragraphs 105 and 106 of this Opinion, I confess to having some hesitation in considering that the agreement envisaged may constitute a measure which contributes directly to 'facilitat[ing] cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions', within the meaning of Article 82(1)(d) TFEU. As the United Kingdom Government acknowledged in its reply to one of the written questions put by the Court, it is only in certain cases that the agreement envisaged might promote such cooperation between Member States' judicial authorities. Such cooperation depends, however, on a number of parameters, both factual and legal, which are outside the terms of the agreement envisaged. Cooperation between the judicial authorities of the Member States therefore appears to be only an indirect consequence of the framework established by the agreement envisaged. Admittedly, the fact that Article 6 of the agreement envisaged places an obligation not only on the Canadian competent authority but, more generally, on 'Canada' to share PNR data or analytical information with the judicial authorities of the Member States may be understood as also imposing such an obligation on the judicial authorities of that third State. On the assumption that that interpretation is correct and that an exchange of PNR data between the judicial authorities may be envisaged, the fact nonetheless remains that, as currently drafted, the agreement envisaged does not really seem to contribute to facilitating cooperation between the judicial or equivalent authorities of the Member States. To my mind, it is only if the Court were to adopt a more generous interpretation of Article 82(1)(d) TFEU, together, where appropriate, with Article 67(3) TFEU, which provides that the Union is to 'endeavour to ensure a high level of security … through measures for coordination and cooperation between police and judicial authorities and other competent authorities', or if the contracting parties were to amend the terms of the agreement envisaged in such a way that the judicial dimension of the agreement envisaged were taken more directly into account, that Article 82(1)(d) TFEU might genuinely constitute an additional legal basis for the act concluding that agreement.

109. I would add that the conclusion that Article 82(1)(d) TFEU cannot properly serve as a basis for the act concluding the agreement envisaged is not affected by the fact, to which certain of the interested parties refer, that the Council decisions concluding the PNR Agreements with Australia and the United States are based on that provision, read in

conjunction with Article 87(2)(a) TFEU. (43) In fact, it is settled case-law that, in a review of the legal basis for the act concluding the agreement envisaged in the present case, the legal basis used for the adoption of other Union measures that might display similar characteristics is irrelevant. (44)

110. In those circumstances, having regard to way in which the agreement envisaged is currently drafted, I am of the view that Article 87(2)(a) TFEU constitutes an appropriate legal basis for the act concluding the agreement envisaged.

111. Accordingly, that substantive legal basis, properly set out in the draft act concluding the agreement envisaged, seems to me to be insufficient to enable the Union to conclude that agreement.

b) The need to base the act concluding the agreement envisaged on the first subparagraph of Article 16(2) TFEU

112. As the Parliament correctly maintained in its request, Article 87(2)(a) TFEU and, generally, Title V of Part Three of the FEU Treaty on the AFSJ do not provide for the adoption of rules in the area of personal data protection.

113. As I have shown above, one of the two essential objectives of the agreement envisaged, as stated in Article 1, is specifically to 'prescribe the means by which the [PNR] data' of passengers flying between Canada and the European Union 'is protected'. As already pointed out, the content of the agreement envisaged supports that objective, in particular the terms in the chapter on 'Safeguards applicable to the processing of PNR data', consisting of Articles 7 to 21 of the agreement envisaged.

114. In that context, action taken by the Union must necessarily be based, in my view, on the first subparagraph of Article 16(2) TFEU, which, it will be recalled, confers on the Parliament and the Council the task of laying down the rules relating to the protection of individuals with regard to the processing of personal data by, inter alia, the Member States when carrying out activities which fall within the scope of application of EU law and the rules relating to the free movement of such data. Three main principles underlie that approach.

115. First of all, in line with the reasoning developed above in relation to the external dimension of the AFSJ, the European Union must be considered, in accordance with Article 216(1) TFEU, to be authorised to conclude an international agreement with a third country with the object of laying down rules relating to the protection of personal data where it is necessary to do so in order to achieve one of the objectives referred to in the Treaties, in this instance the objectives of Article 16 TFEU. That applies to the agreement envisaged, one of the essential purposes of which consists, in essence, in prescribing the means of safeguarding the protection of the PNR data of passengers flying between Canada and the European Union. To my mind, moreover, there is no doubt that the terms of the agreement envisaged must be characterised as 'rules' relating to the protection of

the data of natural persons, within the meaning of the first subparagraph of Article 16(2) TFEU, and intended to bind the contracting parties.

116. Next, and unlike the situation of the former Article 286 EC, the first subparagraph of Article 16(2) TFEU, which is part of Title II of Part One of that Treaty, entitled 'Provisions having general application', is intended to constitute the legal basis for all rules adopted at EU level relating to the protection of individuals with regard to the processing of their personal data, including the rules coming within the framework of the adoption of measures relating to the provisions of the FEU Treaty on police and judicial cooperation in criminal matters. As stated in paragraph 2 of that article, only the rules relating to the protection of personal data adopted in the context of the common foreign and security policy must be based on Article 39 TEU. That interpretation of the first subparagraph of Article 16(2) TFEU is confirmed by the omission of any reference to the possible adoption of provisions relating to the protection of personal data on the basis of Article 87(2)(a) TFEU. It should be borne in mind that, before the entry into force of the Treaty of Lisbon, Article 30(1)(b) TEU provided, on the contrary, that common action in the field of police cooperation could cover, inter alia, the processing, analysis and exchange of relevant information, 'subject to appropriate provisions on the protection of personal data', which, moreover, authorised the Council to adopt Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. (45) Furthermore — and I shall return to this point later — it must be emphasised that the provisions of Protocols (No 21) and (No 22) did indeed envisage the situation in which rules based on the first subparagraph of Article 16(2) TFEU might be adopted in the context of the exercise of activities which fall within the chapters of the FEU Treaty on police and judicial cooperation in criminal matters.

117. It follows, and in order to dispel any doubt as to the ambiguity of the position defended by the Commission in its written observations, that Article 16 TFEU, on the one hand, and Articles 87(2)(a) and 82(1)(d) TFEU, on the other, cannot maintain relationships of a '*lex generalis — lex specialis*' hierarchical type. As the abovementioned protocols illustrate, the High Contracting Parties envisaged the possibility that a Union act might be based on those three articles at the same time, precisely because those provisions have different and separate scopes.

118. Last, as the Parliament, the Commission and the EDPS, in particular, maintained in their replies to a written question put by the Court, the relevance of Article 16 TFEU as a legal basis for the act concluding the agreement envisaged cannot be put in doubt because the protective measures which can be adopted under that article relate to the processing of data by authorities of the Member States and not, as in this instance, to the transfer of data previously obtained by private entities (the air carriers) to a third country.

119. In fact, to paraphrase Advocate General Léger, the obligation by which an air carrier is bound under Articles 4, 5, 20 and 21 of the agreement envisaged, when read together, is not 'fundamentally different from a direct exchange of data between public authorities'. (46) Furthermore, as the Court has confirmed that the definition of 'data

processing', within the meaning of Directive 95/46, covers the transfer of personal data by a private operator from a Member State to a third country, (47) to put a strictly literal interpretation on the new legal basis constituted by the first subparagraph of Article 16(2) TFEU would be tantamount to splitting up the system for the protection of personal data. Such an interpretation would run counter to the intention of the High Contracting Parties to create, in principle, a single legal basis expressly authorising the EU to adopt rules relating to the protection of the personal data of natural persons. It would therefore represent a step backwards from the preceding scheme based on the Treaty provisions relating to the internal market, which would be difficult to explain. That strictly literal interpretation of Article 16 TFEU would thus have the consequence of depriving that provision of a large part of its practical effect.

120. Consequently, in the light of the objectives and the components of the agreement envisaged, which are inseparably linked, the act concluding that agreement must in my view be based on the first subparagraph of Article 16(2) TFEU and Article 87(2)(a) TFEU as its substantive legal bases.

121. In accordance with the case-law, when multiple legal bases are used when adopting an act of the Union the procedures referred to in the different legal bases in question must be compatible. (48)

122. In this instance, both the first subparagraph of Article 16(2) and Article 87(2)(a) TFEU provide that, when adopting the measures envisaged by those two articles, the Parliament and the Council are to act in accordance with the ordinary legislative procedure. The same applies, moreover, in the case of the measures based on Article 82(1)(d) TFEU should the Court consider that that article constituted an appropriate substantive legal basis for the act concluding the agreement envisaged.

123. Accordingly, the procedures specifically referred to in those articles are compatible, within the meaning of the case-law. They therefore do not preclude the Court accepting a plurality of legal bases for the act concluding the agreement envisaged.

124. The Council, supported by Ireland, claimed, however, that it is necessary to go further than that finding and to examine the detailed rules governing the participation of the Kingdom of Denmark, Ireland and the United Kingdom, within the Council, as provided for in the provisions of Protocols (No 21) and No 22) respectively. According to those interested parties, those detailed rules preclude the joint application, as substantive legal bases, of Article 16 TFEU and Article 87(2)(a) TFEU. More specifically, the Council explained at the hearing before the Court, not without some contradictions and inconsistencies, (49) that the provisions of those protocols distinguish the question of the non-binding nature of the rules established on the basis of Article 16 TFEU concerning the processing of personal data in the exercise of activities in connection with police and judicial cooperation in criminal matters from the question of the participation of those three Member States in the vote in the Council when the Council is called upon to adopt such rules. In the Council's submission, it follows that, while those three Member States would not participate in the adoption of measures falling within the scope of police and

judicial cooperation in criminal matters, except where Ireland and the United Kingdom have decided to exercise their right to 'opt in', they would still participate in the adoption of the rules which took Article 16 TFEU as their basis, in spite of the fact that, under those protocols, those measures would not be binding on those Member States.

125. That argument merits a certain amount of attention, even though, ultimately, I consider that it should be rejected.

126. It will be recalled that the Court has already held that the two protocols in question are not capable of having 'any effect whatsoever on the question of the correct legal basis' for the adoption of an EU measure. (50) Thus, according to that case-law, if, following the analysis of the objective and the content of the agreement envisaged, and contrary to what I have argued above, the act concluding that agreement had to be based exclusively on the first subparagraph of Article 16(2) TFEU, the two protocols in question, in spite of the wording of Article 29 of the agreement envisaged, could not 'neutralise' that situation. In other words, the three Member States in question would have to participate in the act concluding the agreement envisaged and be bound by it.

127. The application of that case-law in a situation in which there are two competing legal bases, which lay down the same adoption procedure (the ordinary legislative procedure and vote by a qualified majority within the Council), but which would affect in a different way the participation, within the Council, of the three Member States concerned in the adoption of the act in question, is more delicate.

128. Since it is a question here of determining the appropriate legal basis for a specific act, namely the act concluding the agreement envisaged, that question does not need to be resolved so far as Ireland and the United Kingdom are concerned. In fact, it is common ground that, in accordance with Article 3 of Protocol (No 21), those two Member States have notified their intention to be bound by the agreement envisaged and will, consequently, participate in the adoption of the act concluding that agreement. No argument of a procedural nature relating to those two Member States therefore precludes the act concluding the agreement envisaged being based jointly on the first subparagraph of Article 16(2) and Article 87(2)(a) TFEU.

129. As for the Kingdom of Denmark's position, it should be borne in mind that, in accordance with Article 2a of Protocol (No 22), Article 2 of that protocol, which provides, in particular, that no measure or international agreement adopted pursuant to Title V of Part Three of the FEU Treaty is to be binding upon the Kingdom of Denmark, also applies with respect to the rules laid down on the legal basis of Article 16 TFEU which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter V of Part Three of that Treaty, namely activities which fall within the scope of police and judicial cooperation in criminal matters.

130. The Kingdom of Denmark will therefore not be bound by the terms of the agreement envisaged. However, the Council maintains that, in referring only to Article 2 of Protocol

(No 22) and not to Article 1, which states that the Kingdom of Denmark is not to take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the FEU Treaty, Article 2a of that protocol implies, conversely, that the Kingdom of Denmark would participate in the adoption of the act concluding the agreement envisaged if that act were to be based on Article 16 TFEU.

131. That line of reasoning fails to convince me or, at least, does not have the consequences which the Council ascribes to it as regards the choice of the legal basis for the act concluding the agreement envisaged.

132. In fact, I do not think that it was the intention of the High Contracting Parties to allow the Kingdom of Denmark not to be bound by an act having as its legal basis both Article 16 TFEU and one of the provisions of the FEU Treaty relating to police and judicial cooperation in criminal matters, but to participate in the adoption of that act, with the inherent risk that the Kingdom of Denmark might join a group of Member States opposed to the actual adoption of that act, and thereby prevent a qualified majority from being formed within the Council. That seems to me to be contrary to the object of Protocol (No 22), which is to seek a balance between the need to manage the Kingdom of Denmark's specific position and the need to allow the other Member States (including, where appropriate, Ireland and the United Kingdom) to pursue their cooperation within the sphere of the AFSJ.

133. The objection might be raised, admittedly, that, according to the preamble to Protocol (No 22), the High Contracting Parties note that the Kingdom of Denmark will not prevent the other Member States from further developing their cooperation with respect to measures not binding on that Member State. Thus, according to that argument, although it would be authorised to take part in the adoption of acts falling under Article 2a of that protocol which are not binding on it, the Kingdom of Denmark has undertaken never to oppose their adoption.

134. If that were the correct interpretation of the relevant provisions of Protocol (No 22), the consequence would be that the act concluding the agreement envisaged could not be based on Article 16 TFEU in conjunction with Article 87(2)(a) TFEU, on the ground of an alleged incompatibility between the procedures leading to the adoption of that act, for the simple reason that the Kingdom of Denmark would participate in a purely formal sense in the adoption of that act. Consequently, that purely formal participation by the Kingdom of Denmark in the adoption of the act concluding the agreement envisaged would 'neutralise' the objective analysis of the legal basis for that act, an analysis which, it will be recalled, is based on an examination of the purposes and the components of that agreement. That consequence would clearly run counter to the case-law according to which it is not the procedure that defines the legal basis for an act, but the legal basis for an act that determines the procedure to be followed when adopting it. (51) In my view, that case-law applies *a fortiori* where the procedure that it was claimed had to be followed would entail, within the Council, a purely formal participation by the Kingdom of Denmark in the adoption of an act in respect of which that Member State will not in any way be bound.

135. In the light of the all of the foregoing considerations, I propose that the Court should answer the second question submitted by the Parliament by stating that the act concluding the agreement envisaged, in the light of the objectives and the components of that agreement, which are inseparably linked, without some of them being incidental by comparison with the others, must be based on the first subparagraph of Article 16(2) TFEU and Article 87(2)(a) TFEU, read in conjunction with Article 218(6)(a)(v) TFEU. (52)

VII – **The compatibility of the agreement envisaged with the provisions of the FEU Treaty and the Charter (first question)**

A – *Analysis of the Parliament's request and observations and also of the observations of the other interested parties*

1. Analysis of the Parliament's request and observations

136. The Parliament maintains that, in the light, in particular, of the Court's case-law, there is legal uncertainty as to whether the agreement envisaged is compatible with Article 16 TFEU and Articles 7 and 8 and Article 52(1) of the Charter.

137. In the Parliament's submission, it is clear that the collection, transfer, analysis, retention and subsequent transfer of PNR data provided for in the agreement envisaged constitute different forms of 'processing' and different forms of interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter. In its various forms, that interference is far-reaching and particularly serious. (53)

138. The Parliament emphasises that, in accordance with Article 52(1) of the Charter, such an interference could be justified only if it is 'provided for by law' and is necessary and proportionate to an objective of general interest recognised by the Union.

139. As for the first point, the Parliament asks, in essence, whether an international agreement constitutes a 'law' within the meaning of that provision and whether it may place limitations on the exercise of the rights guaranteed by Articles 7 and 8 of the Charter. It observes that, according to the case-law of the European Court of Human Rights ('ECtHR') on the expression 'provided for by law' in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), any interference should have a basis 'in domestic law'. Because the Treaty of Lisbon profoundly changed the Union legal order by introducing the concept of 'legislative act', the expression 'provided for by law' coincides, in EU law, with the concept of 'legislative act'. In the Parliament's view, an international agreement does not meet that description.

140. As regards the second point, namely the necessity for the interference, the Parliament maintains that it is for the Council and the Commission to demonstrate, on the basis of objective factors, that the conclusion of the agreement envisaged is actually

necessary within the meaning of Article 52(1) of the Charter. In its submission, it appears that such factors are absent.

141. Last, as for the third point, concerning the proportionality of the interference provided for in the agreement envisaged, the Parliament maintains that the discretion of the EU legislature is reduced, with the consequence that it is appropriate to carry out a strict review of the requirements laid down in the Charter, including the context in which an international agreement is concluded. In that regard, the agreement envisaged comes within the category of 'generalised "strategic monitoring"', within the meaning of the case-law of the ECtHR, (54) and the reasoning followed by the Court in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238) is also applicable in the present case.

142. First, in the Parliament's view, the agreement envisaged concerns, generally, persons travelling to Canada, without there being any connection between the persons concerned, their PNR data and a threat to public security.

143. Second, the Parliament is uncertain as to whether the agreement envisaged lays down objective criteria that make it possible to restrict the Canadian authorities' access to the PNR data and the subsequent use of that data for the purposes of preventing, detecting or prosecuting criminal offences which might themselves be regarded as sufficiently serious. However, the criteria listed in the draft agreement are vague. Thus, the Parliament observes that the agreement envisaged does not define the 'Canadian competent authority' with access to the data and Article 3(2) of the agreement envisaged refers, with respect to the expression 'serious crime', to the Canadian legislation without any limits recognised by EU law and without any identification of the offences covered by that expression. Likewise, Article 3(5) of the agreement envisaged allows the PNR data to be processed by 'Canada' in areas other than criminal law and might allow the transfer of PNR data by 'the Canadian Competent Authority' to other Canadian authorities, or even to individuals. Furthermore, Article 16(2) of the agreement envisaged does not specify the number of persons with access to the PNR data, while access to that data by the Canadian authorities is not subject to any prior control by a court or by an independent administrative authority.

144. Third, the Parliament asks the Court to declare that the five-year period for the retention of the PNR data laid down in Article 16(5) of the agreement envisaged is not justified. That period is not based on objective criteria and no justification has been provided. That period, moreover, was extended by reference to the period provided for under the 2006 Agreement, and no explanation was provided.

145. Fourth, the Parliament submits that the agreement envisaged does not require that the PNR data be retained within the Union. Thus, control of compliance with the requirements of protection and security, by an independent authority, expressly required by Article 8(3) of the Charter and Article 16(2) TFEU, is not fully guaranteed. In that context, there are serious doubts as to whether the measures to be taken by the Canadian authorities satisfy the essential requirements of those articles. In particular, Article 10 of

the agreement envisaged does not guarantee control by an independent Canadian authority and does not specify to the requisite legal standard the powers, including the power to undertake a review in advance, which that authority has in order to verify whether those powers are 'adequate' within the meaning of EU law.

146. In answer to the written questions put by the Court, the Parliament stated, in particular, that the guidance to be derived from the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650) apply *mutatis mutandis* to the assessment of the compatibility of the agreement envisaged. It further states that actual compliance with the substantive and procedural conditions relating to initial access to the personal data should also apply to the subsequent transfer of that data and to access to it by other Canadian authorities or the authorities of third States. In its submission, that is not the case of the conditions laid down in Articles 18 and 19 of the agreement envisaged. Furthermore, in the Parliament's view, the wording of Article 14(2) of the agreement envisaged is ambiguous.

2. Analysis of the observations of the other interested parties

147. As regards the other interested parties, while, in essence, the EDPS, in his replies to the written questions put by the Court and his oral observations, shares the doubts and concerns expressed by the Parliament, the governments which have participated in the present proceedings and the Council and the Commission maintain that the agreement envisaged is compatible with Article 16 TFEU and Articles 7 and 8 and Article 52(1) of the Charter. Their observations relate essentially to the interference represented by the rules laid down in the agreement envisaged with the fundamental right of persons to the protection of their personal data and to compliance with the criteria laid down in Article 52(1) of the Charter (an interference 'provided for by law', with the aim of meeting an objective of general interest recognised by the Union and which is necessary and proportionate in order to meet that objective).

148. In the first place, the Estonian and French Governments expressly acknowledge that the terms of the agreement envisaged constitute an interference with the fundamental right to protection of personal data, guaranteed by Article 8 of the Charter. The French Government states, however, that the obligation placed on air carriers to transfer the PNR data does not constitute such an interference since it is provided for not by the agreement envisaged but by the Canadian legislation. The Court cannot be requested to deliver an opinion on the compatibility of the legislation of a third State with the Treaties. In addition, the French Government maintains that the interferences contained in the agreement envisaged are less far-reaching than those at the origin of the case giving rise to the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238). Thus, in the French Government's submission, less data would be transferred and fewer persons would be concerned by the agreement envisaged than by the directive at issue in that judgment. In addition, the PNR data does not allow very precise conclusions concerning the private life of passengers to be drawn. Last, the agreement envisaged imposes, in Article 11, an obligation of transparency, and it cannot therefore be concluded that the collection of the PNR data and its subsequent use is apt to

give rise in the minds of the persons concerned to the feeling that their private life is under constant surveillance.

149. In the second place, as regards the question of the legal source of such an interference, the Estonian Government, Ireland, the French and United Kingdom Governments and the Council and the Commission maintain that that interference meets the condition of being 'provided for by law' within the meaning of Article 52(1) of the Charter.

150. In the third place, as regards the objective pursued by that interference, the Bulgarian and Estonian Governments, Ireland, the Spanish and French Governments and the Council and the Commission claim that the transfer and subsequent use of the PNR data is aimed in particular at combating terrorism and thus meets an objective of general interest.

151. In the fourth place, as regards the necessity for such an interference, the French and United Kingdom Governments and the Council and the Commission maintain, first of all, that there is an increasing demand from third countries which consider that the transfer of PNR data is necessary for public security purposes. The Commission accepts that there are no precise statistics indicating the contribution which PNR data makes to the prevention and detection of crime and terrorism, and to the investigation and prosecution of offences of those types. However, the essential use of the PNR data is confirmed by information from third countries and from Member States which already use such data for law enforcement purposes. The experience acquired in those countries shows that the use of PNR data has enabled significant progress to be made in combating drug trafficking, people trafficking and terrorism and leads to a better understanding of the composition and functioning of terrorist networks and other criminal networks. The United Kingdom Government and the Commission further observe that the information supplied by the CBSA shows that the PNR data has made a decisive contribution to the ability to locate and identify persons potentially suspected of being involved in terrorist acts or serious transnational crime.

152. In the fifth place, as regards the proportionality of the interference at issue, the Estonian Government, the Council and the Commission refer, first, to the requirements arising from the case-law of the Court, in particular those referred to in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238). In particular, the Estonian Government is of the view that the guidance that can be derived from that judgment concerning the extent of the discretion of the legislature and of the judicial control of the limits of that discretion is applicable in the present case. Ireland, on the other hand, claims that it is necessary to take account of the international and negotiated nature of the act at issue, while the French Government maintains that the discretion of the EU legislature cannot be excessively restricted, having regard to the fact that the interference at issue in the present case is not particularly serious. The United Kingdom Government maintains that public security and safety by their nature raise questions in respect of which the legislature must be recognised as having a 'reasonable margin of discretion' in order to determine whether a

measure is manifestly inappropriate. The agreement envisaged cannot be characterised as a ‘general surveillance mechanism’, but relates rather to normal border control procedures.

153. Second, the Bulgarian and Estonian Governments, Ireland and the Spanish, French and United Kingdom Governments, and the Council and the Commission maintain that the agreement envisaged complies with the principle of proportionality. The United Kingdom Government claims, first of all, that in the absence of the agreement envisaged, measures taken in relation to passengers arriving from the European Union would be at risk of being less targeted and more intrusive. The PNR data allows ‘persons of interest’ travelling to particular events or places to be targeted more effectively, thus reducing security checks and delays for other passengers. Next, those governments and those institutions are, in essence, of the view that the agreement envisaged can be distinguished from the directive at the origin of the case of *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238). In particular, unlike that directive, the agreement envisaged contains strict rules on the conditions for access to and the use of the data and rules on data security and monitoring by an independent authority. In addition, the agreement envisaged makes provision for control of compliance with those rules, for the persons concerned to be informed about the transfer and processing of their data, a procedure for access to and correction of the data and also for administrative and judicial remedies in order to ensure that those rights are guaranteed.

154. As regards the Parliament’s argument that the agreement envisaged requires no connection between the PNR data and a threat to public security, the Estonian, French and United Kingdom Governments and the Commission claim, in essence, that the use of the PNR data is designed to identify persons hitherto unknown to the competent services as presenting a potential risk to security, while persons known to present such a risk can be identified on the basis of advance passenger information (API). The objective of prevention could thus not be achieved if only the PNR data of persons already suspected were transferred.

155. Third, according to those interested parties, the criticisms made by the Parliament and by the EDPS concerning the redaction and omissions from the agreement envisaged should also be rejected.

156. Thus, according to the Council and the Commission, the fact that Article 3(3) of the agreement envisaged refers to Canadian law does not permit the conclusion that it is too vague. It is difficult to include in an international agreement a definition of an act that might be characterised as ‘serious crime’, which is provided for only in EU law. Likewise, as regards Article 3(5)(b) of the agreement envisaged, the Council and the Commission observe that that provision reflects the obligation which the Canadian Constitution imposes on all Canadian public authorities to comply with a court order. In addition, the possibility of access to the PNR data would, in such a case, have been examined by the judicial authority in the light of the criteria of necessity and proportionality and the reasons would be set out in the order of the court.

157. In addition, as regards the limits concerning the authorities and individuals having access to the PNR data, the Council and the Commission maintain that the failure to identify the Canadian competent authority in the agreement envisaged is a procedural issue which has no impact on the principle of proportionality. In any event, the Canadian competent authority, within the meaning of Article 2(d) of the agreement envisaged, was notified to the Commission in June 2014. That authority is the CBSA, which alone is authorised to receive and process the PNR data. The 'limited number of officials specifically authorised' in that respect referred to in Article 16(2) of the agreement envisaged means that the officials concerned must be officials of the CBSA and that they must be authorised to process the PNR data. Additional guarantees are set out in Article 9(2)(a) and (b), (4) and (5) of the agreement envisaged.

158. Furthermore, as regards the absence of prior control of access to the PNR data, the Commission observes that the very object of the agreement envisaged is to permit the PNR data to be transferred to the CBSA for the purpose of access to that data and that such prior control would alter that object. Ireland adds that such prior control is not necessary, since the agreement envisaged provides that the number of persons authorised to access the data and use it is to be limited to what is strictly necessary and lays down a range of additional guarantees in Articles 11 to 14, 16, 18 and 20.

159. In addition, as regards the question of the retention of the PNR data, Ireland first of all observed that, in the light of the fact that, in accordance with Article 5 of the agreement envisaged, the Canadian competent authority is to be deemed to provide an adequate level of protection of the PNR data, and that there is surveillance by an independent authority, there is no need, unlike in the situation applicable to the directive at the origin of the judgment in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), for the data to be kept within the European Union. Next, according to the Council and the Commission, the five-year retention period laid down in Article 16 of the agreement envisaged does not go beyond what is strictly necessary in the light of the public security objective pursued and cannot therefore be evaluated in the abstract. The period of three and a half years laid down in the 2006 Agreement significantly prevented the Canadian authorities from using the PNR data effectively in order to detect cases presenting a high risk of terrorism or organised crime since the relevant investigations take time. Furthermore, in the Council's submission, the period during which the PNR data is to be retained was fixed by reference to the average duration of criminal investigations, the average lifetime of serious crime networks and the fact that terrorist cells may be dormant for a number of years. The Estonian Government, Ireland and the French Government add that, given the complexity and difficulty of investigations of offences involving terrorism and serious transnational crime, the period that elapses between the time of travel and the time when the law enforcement authorities need to have access to the PNR data in order to detect, investigate and prosecute such offences may sometimes be several years. In their respective replies to the written questions put by the Court, the Spanish and French Governments also provide a number of specific examples in which the process of checking and cross-checking information has taken around five years and for which the PNR data was or might have been of great use. The Estonian Government, Ireland and

the French Government and the Council and the Commission, also maintain, in essence, that Article 16 of the agreement envisaged contains strict rules on the masking (or depersonalisation) and unmasking of the data, which are aimed at providing more protection for the personal data of airline passengers.

160. Last, as regards the control of compliance with the rules on data protection by an independent authority, required by Article 8(3) of the Charter and Article 16(2) TFEU, the Council and the Commission maintain that the fact that the agreement envisaged does not identify the Canadian competent authority does not undermine the adequacy of the measures to be taken by Canada. The identity of the competent authorities for the purposes of Articles 10 and 14 of the agreement envisaged has been communicated to the Commission. The authorities in question are the Privacy Commissioner of Canada and the CBSA Recourse Directorate. Those authorities satisfy the condition of independence enabling them to carry out their tasks without any outside influence, even though the CBSA Recourse Directorate is an 'authority created by administrative means', within the meaning of Articles 10 and 14 of the agreement envisaged. The CBSA Recourse Directorate is, in accordance with the explanations provided by the Canadian authorities, an independent authority responsible for examining complaints and administrative appeals lodged by aliens not residing in Canada. Furthermore, the Commission submits that the decisions of that authority may be challenged before the Privacy Commissioner of Canada through a person residing in Canada.

161. In the sixth place, in their replies to the written questions put by the Court and at the hearing, the United Kingdom Government, the Council and the Commission provided information about the 19 categories of PNR data in the annex to the agreement envisaged. In particular, according to the Commission, only the 17th heading, 'General remarks including Other Supplementary Information (OSI), Special Service Information (SSI) and Special Service Request (SSR) information', contains sensitive information, within the meaning of the agreement envisaged. That data is transferred only on a voluntary basis, since it is liable to be disclosed only in connection with the booking of additional services requested by the passenger and, according to the United Kingdom Government, can be consulted only in exceptional circumstances, according to the terms of the agreement envisaged. In addition, the French Government stated that the guidance to be derived from the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650) is not applicable to the examination of the compatibility of the agreement envisaged with the Treaties, while Ireland maintains that that judgment provides important guidance as to the adequacy of the level of protection which a third country must satisfy. As for the Council and the Commission, they share the opinion that only paragraphs 91 to 93 and 95 of that judgment, which concern the interpretation of the Charter, are applicable in the context of the examination of the compatibility of the agreement envisaged. On the other hand, those institutions take the view that the examination of the agreement envisaged should lead to a different conclusion from that reached by the Court in that judgment. Finally, as regards the subsequent disclosure provided for in Articles 18 and 19 of the agreement envisaged, Ireland, the Council and the Commission recall that that disclosure is subject to strict conditions and to compliance with the purposes laid down in Article 3 of the

agreement envisaged. Furthermore, the Commission emphasises that Article 19 of the agreement envisaged should be read in the light of the relevant Canadian legislation.

B – *Assessment*

1. Preliminary observations

162. Before I address the central issue of the first question in the Parliament's request for an opinion, three preliminary observations must in my view be made regarding the scope of the examination that must be carried out.

163. First of all, as is clear from their observations, the interested parties referred on a number of occasions during the proceedings to Canadian legislation and practice, in particular in order to explain, or even to supplement, certain terms of the agreement envisaged. It is clear that, in order to examine the compatibility with an agreement envisaged with primary EU law in the context of the procedure laid down in Article 218(11) TFEU, the Court cannot express a view on the legislation or the practice of a third country. The Court's examination can relate only to the terms of the agreement envisaged as they were submitted to it.

164. However understandable and logical that substantive limit on judicial review in the context of the opinion procedure may be, it nonetheless raises certain difficulties. Thus, while it is common ground that the agreement envisaged must, in particular, provide the Canadian authorities with a legal framework that allows them, on the basis of the analysis of the PNR data, to apply methods relating to the identification of passengers who have not hitherto been known to the law enforcement services, on the basis of patterns of behaviour of 'concern' or presenting an 'interest', (55) none of the terms of the agreement envisaged deals with the establishment of those methods, of the right of each 'targeted' passenger to be informed of the methods used and to be assured that such 'targeting' methods are subject to administrative and/or judicial control, as those questions all seem to be entirely within the discretion of the Canadian authorities. (56) To my mind, it is permissible to ask whether, having regard to compliance with Articles 7 and 8 of the Charter, those questions and those guarantees should not be regulated by the terms of the agreement envisaged themselves. That example shows that one of the difficulties of the present case relates to the fact that it entails ascertaining, in the light, in particular, of the right to protection of personal data, not merely what the agreement envisaged makes provision for but also, and above all, what it has failed to make provision for.

165. Next, it is important to observe that the Parliament's request for an opinion merely referred to certain terms of the agreement envisaged which in its view indicate, in some cases more clearly and more strongly than in others, that the agreement envisaged is incompatible with Article 16 TFEU and Articles 7 and 8 and Article 52(1) of the Charter. Given the preventive purpose and the non-contentious nature of the opinion procedure, the Court cannot be required to comply with such a delimitation of the request, whether deliberate or not. That position has already been perfectly illustrated by Opinion 1/00 of 18 April 2002 (EU:C:2002:231, paragraph 1), in which the Court incorporated in its

examination of the compatibility of an agreement envisaged several rules in that agreement which were not expressly stated to be the subject matter of the request for an opinion submitted by the Commission, and Opinion 1/08 of 30 November 2009 (EU:C:2009:739, paragraphs 96 to 105), in which the Court rejected the suggestion of the institution requesting the opinion that it should confine its examination to certain parts of the draft agreement at issue forming the subject matter of the request for an opinion.

166. In the present procedure, I consider it appropriate that the Court should include in its examination the compatibility of terms of the agreement envisaged, such as Articles 18 and 19, which were not specifically mentioned by the Parliament in its request for an opinion, but which deserve the Court's attention. I would add that the Parliament and the other interested parties have had the opportunity to comment on those articles, either in their replies to the written questions put by the Court or at the hearing before the Court.

167. Last, in the light of the discussions before the Court, I consider it useful to point out that, under Article 218(11) TFEU, the only provisions by reference to which the compatibility of the agreement envisaged may be examined are the provisions of EU primary law, that is to say, in this instance, the Treaties and the rights set out in the Charter, (57) to the exclusion of secondary law. In that regard, there is nothing to prevent the Court from including in its examination of the substantive validity of the agreement envisaged provisions of primary law which are not mentioned in the question submitted by the Parliament, such as Article 47 of the Charter, should it prove necessary to do so for the purposes of the opinion procedure and if the interested parties have had the opportunity to submit their comments on those provisions. That is indeed the case as regards respect for the effective judicial remedy guaranteed by Article 47 of the Charter.

168. Those observations having been made, the following developments will essentially focus on the criteria for the application of Articles 7 and 8 and Article 52(1) of the Charter. Although that is not fundamentally disputed, I shall examine whether the terms of the agreement envisaged constitute an interference with the fundamental rights to privacy and the protection of personal data and whether that interference may be justified. It is clearly the examination of the justification for the interference, and in particular its proportionality, that proves to be controversial.

2. The existence of an interference with the rights guaranteed by Articles 7 and 8 of the Charter

169. Without there being any need to examinee individually and exhaustively the 19 categories of PNR data set out in the annex to the agreement envisaged, it is common ground that they deal, inter alia, with the passenger's identity, nationality and address, all contact information (address of residence, email address, telephone number) available about the passenger who made the reservation, available payment information, including, where appropriate, the number of the credit card used to reserve the flight, information relating to luggage, passenger travel habits and habits relating to additional services requested by the passengers concerning any health problems, including mobility, or their dietary requirements during the flight, which might provide information concerning, in

particular, the health of one or more passengers, their ethnic origin or their religious beliefs.

170. That data, taken as a whole, touches on the area of the privacy, indeed intimacy, of persons and indisputably relates to one or more 'identified or identifiable individual or individuals'. (58) There can therefore be no doubt, in the light of the Court's case-law, that the systematic transfer of PNR data to the Canadian public authorities, access to that data and the use of that data and its retention for a period of five years by those public authorities and also, where relevant, its subsequent transfer to other public authorities, including those of third countries, under the terms of the agreement envisaged, are operations which fall within the scope of the fundamental right to respect for private and family life guaranteed by Article 7 of the Charter and to the 'closely connected' (59) but nonetheless distinct right to protection of personal data guaranteed by Article 8(1) of the Charter and constitute an interference with those fundamental rights.

171. In fact, the Court has already held, with regard to Article 8 of the ECHR, on which Articles 7 and 8 of the Charter are based, (60) that the communication of personal data to third parties, in that particular case a public authority, constitutes an interference within the meaning of that article (61) and that the obligation to retain that data, required by the public authorities, and subsequent access of the competent national authorities to data relating to a person's private life also constitutes in itself an interference with the rights guaranteed by Article 7 of the Charter . (62) Likewise, an EU act prescribing any form of processing of personal data constitutes an interference with the fundamental right, laid down in Article 8 of the Charter, to protection of such data. (63) That assessment applies, *mutatis mutandis*, with regard to an EU act in the form of an international agreement concluded by the Union, such as the agreement envisaged, which is designed, in particular, to enable one or more public authorities of a third country to process and retain the personal data of air passengers. The lawfulness of such an act depends on its respect for the fundamental rights protected in the EU legal order, (64) especially those guaranteed by Articles 7 and 8 of the Charter.

172. The fact, put forward by the United Kingdom Government, that the persons affected by the agreement envisaged, or at least most of them, will not suffer any inconvenience as a result of that interference is irrelevant for the purposes of establishing the existence of such an interference. (65)

173. At the same time, it is irrelevant that the information communicated, or at least most of it, may well not be sensitive. (66)

174. Moreover, I note that the contracting parties are fully aware of the interference constituted by the communication, use, retention and subsequent transfer of the PNR data provided for in the agreement envisaged, since, as expressly stated in the preamble to that agreement, it is specifically because of that interference that the agreement envisaged attempts to reconcile the requirements relating to public security and respect for the fundamental rights to protection of private life and of personal data.

175. It is true that the contracting parties' attempt to reconcile those elements is liable to reduce the intensity or the gravity of the interference which the agreement envisaged entails in the fundamental rights guaranteed by Articles 7 and 8 of the Charter.

176. The fact nonetheless remains that the interference constituted by the agreement envisaged is of a considerable size and a not insignificant gravity. It systematically affects all passengers flying between Canada and the Union, that is to say, several tens of millions of persons a year. (67) Furthermore, as most of the interested parties have confirmed, no one can fail to be aware that the transfer of voluminous quantities of personal data of air passengers, which includes sensitive data, requiring, by definition, automated processing, and the retention of that data for a period of five years, is intended to permit a comparison, which will be retroactive where appropriate, of that data with pre-established patterns of behaviour that is 'at risk' or 'of concern', in connection with terrorist activities and/or serious transnational crime, in order to identify persons not hitherto known to the police or not suspected. Those characteristics, apparently inherent in the PNR scheme put in place by the agreement envisaged, are capable of giving the unfortunate impression that all the passengers concerned are transformed into potential suspects. (68)

177. I should add, however, that, unlike the Parliament, I do not consider that that conclusion should extend to the collection of the PNR data by the air carriers.

178. In fact, the agreement envisaged does not govern the collection of such data, but is based on the presumption of law and of fact that the air carriers gather the PNR data in any event for their own commercial use. It cannot be denied, admittedly, that certain terms of the agreement envisaged refer to the collection of the PRN data. Thus, Article 4(2) states that Canada is not to require an air carrier to provide elements of PNR data which are not already collected or held by the air carrier. Likewise, Article 11 of the agreement envisaged requires Canada to ensure that the Canadian Competent Authority makes available on its website, inter alia, 'the reason for the collection of PNR data', while the contracting parties are also to work with, in particular, the air travel sector to promote transparency, by providing information to passengers, 'preferably at the time of booking' flights, about 'the reasons for PNR data collection'. While such an obligation to act in a transparent manner could in my view appropriately be reinforced if passengers were systematically informed individually about the reasons for PNR data collection at the time of booking flights, the fact nonetheless remains that the agreement envisaged does not regulate the collection operation properly so called any more than the procedures for collecting the data, which all come within the competence of the air carriers, which, in that regard, must act in compliance with the relevant national provisions and with EU law.

179. The collection of the PNR data therefore does not constitute a processing of personal data entailing an interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter *that results from the agreement envisaged itself*. In the light of the limited power of the Court in the context of the opinion procedure, that operation will therefore not form the subject matter of the following developments.

180. Independently of that observation relating to PNR data collection, the fact nonetheless remains that, for the reasons stated in paragraphs 169 to 175 of this Opinion, the agreement envisaged entails, in my view, a serious interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter. In order to be authorised, that interference must be justified.

3. The justification for the interference with the rights guaranteed by Articles 7 and 8 of the Charter

181. Neither the right to respect for private and family life nor the right to protection of personal data is an absolute prerogative.

182. Thus, Article 52(1) of the Charter accepts that limitations may be placed on the exercise of rights such as those enshrined in Article 7 and Article 8(1) of the Charter, provided that those limitations are provided for by law, that they respect the essence of those rights and that, subject to the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

183. Furthermore, Article 8(2) of the Charter permits the processing of personal data 'for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.

184. It should be noted at the outset with regard to one of the conditions set out in Article 8(2) of the Charter that the agreement envisaged does not seek to base the processing of the PNR data communicated to the Canadian competent authority on the consent of the air passengers. (69) In the light of the obligation placed on air carriers to communicate the categories of PNR data set out in the annex to the agreement envisaged, those passengers cannot object to that data being transferred if they wish to travel by air to Canada. In addition, the fact, referred to at the hearing before the Court, that certain PNR data, containing, where appropriate, sensitive information, may be communicated to the air carrier only where the passenger requires specific services does not mean that that passenger consented to that data being processed by the Canadian competent authority for the purposes of Article 3 of the agreement envisaged.

185. In addition, it has not been maintained before the Court, nor is it apparent to me, that the interference contained in the agreement envisaged is of such a kind as to harm the 'essence', within the meaning of Article 52(1) of the Charter, fundamental right enshrined in Article 7 and Article 8(1) of the Charter.

186. In fact, the nature of the PNR data forming the subject matter of the agreement envisaged does not permit any precise conclusions to be drawn as regards the essence of the private life of the persons concerned. The data in question continues to be limited to the pattern of air travel between Canada and the Union. In addition, the agreement envisaged lays down, in Articles 8, 16, 18 and 19, a series of guarantees relating to the masking and gradual depersonalisation of the PNR data which has been communicated

to, used by and retained by the Canadian authorities and, where appropriate, subsequently transferred, the essential object of which is to preserve private life.

187. Furthermore, as regards the essence of the protection of personal data, it should be observed that, under Article 9 of the agreement envisaged, Canada is required, in particular, to 'ensure compliance verification and the protection, security, confidentiality and integrity of the data', and also to implement 'regulatory, procedural or technical measures to protect PNR data against accidental, unlawful or unauthorised access, processing or loss'. In addition, any breach of data security must be amenable to effective and dissuasive corrective measures which might include sanctions.

188. It is therefore necessary to ascertain whether the other conditions of justification provided for in Article 8(2) of the Charter and those laid down in Article 52(1) thereof, which, moreover, overlap in part, are satisfied.

189. I shall not dwell unnecessarily on two of those conditions, namely the condition that the interference must (a) be 'provided for by law' and (b) meet objectives of general interest (or have a 'legitimate basis', according to the expression used in Article 8(2) of the Charter), which to my mind are manifestly satisfied. On the other hand, I shall examine more fully (c) the question of the proportionality of the interference.

a) An interference 'provided for by law', within the meaning of Article 52(1) of the Charter

190. As for the first point, the essentially formal doubts expressed by the Parliament as to the 'lawful' origin of the interference can clearly be dispelled. According to the case-law of the ECtHR, the expression 'provided for by law' in Article 8(2) of the ECHR means, in particular, that the measure in question has a basis in domestic law (70) and must be understood in its substantive and not its formal sense. (71) The ECtHR thus accepts that unwritten rules satisfy that condition. (72) In addition, the ECtHR has already held that an international treaty, incorporated into national domestic law, also satisfies that requirement. (73)

191. Like the ECtHR, the Court confirms the substantive and not the formal meaning of the expression 'provided for by law' in Article 52(1) of the Charter. Thus, the Court has considered that that condition was satisfied in the case of limitations placed on the rights guaranteed by Articles 7 and 8 of the Charter by provisions of EU regulations, adopted by the Commission (74) and by the Council, (75) respectively, and therefore without the Parliament having been involved as 'co-legislature' in the adoption of those measures.

192. In this instance, it is common ground that the act concluding the agreement envisaged can be adopted by the Council only if, pursuant to Article 218(6)(a)(v) TFEU, the agreement envisaged is first approved by the Parliament, since it covers fields, namely those of police cooperation and the retention of personal data, to which the ordinary legislative procedure applies. When those procedures have been completed, pursuant to Article 216(2) TFEU the agreement will be an integral part of the EU legal

order and will prevail over acts of secondary law. (76) It follows, in my view that the interference resulting from the agreement envisaged is indeed 'provided for by law', within the meaning of Article 52(1) of the Charter.

193. Still on that point, I would add, although it has not been discussed between the interested parties in the present proceedings, that, generally, the agreement envisaged also seems to me to satisfy the second aspect covered by the expression 'provided for by law' within the meaning of Article 8 of the ECHR, as interpreted by the ECtHR, namely that of the 'quality of the law'. According to the case-law of the ECtHR, that expression requires, in essence, that the measure in question be accessible and sufficiently foreseeable, or, in other words, that its terms be sufficiently clear to give an adequate indication as to the circumstances in which and the conditions on which it allows the authorities to resort to measures affecting their rights under the ECHR. (77) In fact, once it has been concluded, the agreement envisaged will be published in full in the *Official Journal of the European Union*, which clearly satisfies the 'accessibility' criterion. As for the 'foreseeability' criterion, apart from what are admittedly the rather numerous specific considerations relating to the scope and the degree of precision and clarity of a number of terms of the agreement envisaged, which will be set out below, (78) I also consider that, overall, the agreement envisaged is drafted in sufficiently clear terms to enable all those concerned to understand, to the requisite standard, the circumstances in which and the conditions on which the PNR data are transferred to the Canadian authorities, processed, retained and possibly subsequently disclosed by those authorities, and to regulate their conduct accordingly. Furthermore, Article 11 of the agreement envisaged lays down a number of additional measures to be adopted by the contracting parties in order to provide the public with information concerning, in particular, the reasons for collecting the PNR data and the use and disclosure of those data.

b) An interference meeting an objective of general interest

194. To my mind, the interference resulting from the agreement envisaged undoubtedly meets an objective of general interest, within the meaning of Article 52(1) of the Charter, namely the objective of combating terrorism and serious (transnational) crime, to ensure public security, as is made clear, in particular, in the preamble to and Articles 1 and 3 of the agreement envisaged. None of the interested parties has questioned the legitimacy of the pursuit of such an objective by the agreement envisaged. In a slightly different form, the 'general interest' nature of that objective for the purposes of the application of Article 52(1) of the Charter has already been recognised by the Court in its case-law. (79)

195. It is therefore necessary at this stage to ascertain whether the interference with the rights guaranteed by Article 7 and Article 8(1) of the Charter is proportionate to the legitimate objective pursued.

c) The proportionality of the interference constituted by the agreement envisaged

i) General considerations

196. It has consistently been held that the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives. (80)

197. In that regard, the interested parties first of all discussed the extent to which compliance with those conditions is amenable to judicial review. While the Parliament, the Estonian Government and the EDPS support the need for a strict review of compliance with those conditions, as the Court acknowledged in the judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), Ireland and the French and United Kingdom Governments defend, in essence, the view that the Court should limit the scope of its review and allow a broader discretion to the institutions when they adopt an act forming part of the context of international relations and having regard to the limited nature of the interference which that act entails.

198. I find the argument put forward by those parties unconvincing.

199. Admittedly, I am prepared to accept that the scope of the institutions' discretion may differ according to whether what is envisaged is the adoption of an act of secondary Union law or the conclusion of an international agreement entailing, by definition, negotiations with one or more third countries. It is clear that, in the particular context of the PNR data communicated to third countries for processing, it is undoubtedly more appropriate to conclude an international agreement that affords air passengers, citizens of the Union, sufficient protection of their private life and personal data, corresponding as much as possible to the requirements of Union law, rather than to leave each of those third countries entirely free to apply its own national legislation unilaterally as it sees fit.

200. Although those considerations are worth bearing in mind, the Court cannot decline to carry out a strict review of compliance with the requirements resulting from the principle of proportionality and more particularly from the adequacy of the level of protection of the fundamental rights guaranteed in the Union when Canada processes and uses the PNR data pursuant to the agreement envisaged.

201. In fact, the need to ensure a strict review of that type is supported by the important role which the protection of personal data plays in the light of the fundamental right to respect for private life and, moreover, by the extent and seriousness of the interference with that right, (81) which may include the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country. (82) As I have already stated, the interference constituted by the agreement envisaged with the rights guaranteed by Articles 7 and 8 of the Charter seems to be of a considerable size and a not insignificant seriousness.

202. By the same token, it follows from the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraphs 72 and 78), that the institutions' discretion as to the adequacy of the level of protection ensured by a third country to which personal data

is transferred is reduced, which entails a strict review of whether the high level of the protection of personal data provided for in EU law continues to be applied.

203. Although, as I have already indicated, the agreement envisaged cannot be reduced to a decision finding that the Canadian competent authority guarantees an adequate level of protection, Article 5 of the agreement envisaged does indeed provide that, subject to compliance with the terms of that agreement, the Canadian Competent Authority is to be deemed to provide an adequate level of protection, within the meaning of relevant Union data protection law, for the processing and use of PNR data. The contracting parties' intention is indeed to ensure that the high level of personal data protection achieved in the Union may be guaranteed when the PNR data is transferred to Canada. In the light of that intention, I see no reason why the Court should not carry out a strict review of compliance with the principle of proportionality.

204. Indeed, as the Court acknowledged in paragraph 74 of the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), I concede that the means to which Canada may have recourse for the purpose of ensuring an adequate level of protection may differ from those employed within the Union. The fact nonetheless remains that, as the Court also made clear in the same paragraph of that judgment, those means must nevertheless prove, in practice, effective in order to ensure protection 'essentially equivalent' to that guaranteed within the Union. In that regard, the Court's review of whether the level of protection resulting from the terms of the agreement envisaged is 'essentially equivalent' to that guaranteed by Union law cannot be limited.

ii) The ability of the interference to achieve the 'public security' objective pursued by the agreement envisaged

205. That point having been clarified, I do not believe that there are any real obstacles to recognising that the interference constituted by the agreement envisaged is capable of attaining the objective of public security, in particular the objective of combating terrorism and serious transnational crime, pursued by that agreement. As the United Kingdom Government and the Commission, in particular, have claimed, the transfer of PNR data for analysis and retention provides the Canadian authorities with additional opportunities to identify passengers, hitherto not known and not suspected, who might have connections with other persons and/or passengers involved in a terrorist network or participating in serious transnational criminal activities. As illustrated by the statistics communicated by the United Kingdom Government and the Commission concerning the Canadian authorities' past practice, that data constitutes a valuable tool for criminal investigations, (83) which is also of such a kind as to favour, notably in the light of the police cooperation established by the agreement envisaged, the prevention and detection of a terrorist offence or a serious transnational criminal act within the Union.

206. Although the Kingdom of Denmark's non-participation is liable to reduce the ability of the measures laid down in the agreement envisaged to help to strengthen security within the Union, it does not in itself appear to be capable of rendering the interference inappropriate for attaining the public security objective pursued by that agreement. In

fact, all air carriers providing flights to Canada are required to communicate to the Canadian competent authority the PNR data which they collect (84) and, moreover, the Canadian competent authority is authorised, under Article 19 of the agreement envisaged, and subject to compliance with strict conditions, to disclose the PNR data outside Canada, on a case-by-case basis, to public authorities whose functions are directly related to the purpose stated in Article 3 of that agreement. (85)

iii) The strict necessity for the interference

207. As to the strict necessity for the interference consisting in the agreement envisaged, its assessment must in my view entail ascertaining whether the contracting parties have struck a 'fair balance' between the objective of combating terrorism and serious transnational crime and the objective of protecting personal data and respecting the private life of the persons concerned. (86)

208. Such a fair balance must, in my view, be capable of being reflected in the terms of the agreement envisaged. Those terms must thus establish clear and precise rules governing the scope and the application of a measure providing for an interference with the rights guaranteed by Articles 7 and 8 of the Charter and impose a minimum of requirements, so that the persons concerned have sufficient guarantees that their data will be afforded effective protection against the risks of abuse and also against any unlawful access to and any unlawful use of that data. (87) The terms of the agreement envisaged must also consist of the measures least harmful to the rights recognised by Articles 7 and 8 of the Charter, while making an effective contribution to the public security objective pursued by the agreement envisaged. (88) That means that it is not sufficient to imagine, in the abstract, the existence of alternative measures that would be less intrusive in the fundamental rights at issue. Those alternative measures must also be sufficiently effective, (89) that is to say, their effectiveness must, in my view, be comparable with those provided for in the agreement envisaged, in order to attain the public security objective pursued by that agreement.

209. In that regard, the interested parties have discussed both the strict necessity for PNR agreements in general and for certain terms of the agreement envisaged. As those two aspects are in my view intrinsically linked, I consider that they should be addressed when I examine the different parts of the agreement envisaged.

210. I shall therefore concentrate on the following eight points, which were specifically raised in the request for an opinion or which were discussed between the interested parties during the proceedings before the Court, namely the categories of PNR data covered by the agreement envisaged, the sufficiently precise nature of the purpose for which the processing of PNR data is authorised, the identification of the competent authority responsible for the processing of PNR data, the automated processing of PNR data, access to the PNR data, the retention of the PNR data, the subsequent transfer of the PNR data, and, last, measures of surveillance and judicial review provided for in the agreement envisaged.

– The categories of PNR data covered by the agreement envisaged

211. As already stated, the agreement envisaged provides for the transfer to the Canadian competent authority of 19 categories of PNR data collected by air carriers for flight reservation purposes and listed in the annex to that agreement.

212. Before the Court, the interested parties submitted observations on both the significance of some of those categories, on the fact that they may be duplicated with the data gathered by the Canadian authorities for border control purposes or, since 15 March 2016, in order to issue an electronic travel authorisation ('eTA'), and on the identification of PNR data apt to contain sensitive data. In that regard, during the proceedings before the Court, the Commission asserted that only heading 17 in the annex to the agreement envisaged, entitled 'General remarks including Other Supplementary Information (OSI), Special Service Information (SSI) and Special Service Request (SSR) information', is apt to contain sensitive data, within the meaning of the agreement envisaged. In addition, it emerged from the discussion before the Court that the information in heading 17 was transferred only when the person reserving a flight requested certain on-board services, such as assistance, possibly connected to health or mobility problems or special dietary requirements, which may provide information about the health or reveal the ethnic origin and religious beliefs of that person or passengers travelling with him.

213. It is common ground that the 19 categories of PNR data the transfer of which to the Canadian competent authority is provided for in the agreement envisaged correspond to the categories which appear in the airlines' reservation systems. Those categories also correspond to the PNR data elements listed in Appendix 1 to the Guidelines on Passenger Name Record Data adopted by the International Civil Aviation Organisation (ICAO) and published in 2010. (90) The elements in those categories are therefore perfectly known to operators active in the air sector. Those elements concern, in fact, all the information necessary to book a flight, whether they relate to the booking methods or payment methods used, the itinerary chosen or any on-board services requested.

214. Furthermore, as Ireland, the United Kingdom Government and the Commission emphasised, the PNR data, taken as a whole, contains additional information by comparison with the data gathered for border control purposes by the Canadian immigration authorities. The advance passenger information (API), of a biographical nature and relating to the flight taken, which is gathered by the air carriers, is mainly intended to facilitate and speed up passenger identity checks at the border by making it possible, where appropriate, to prevent persons prohibited from residence from boarding or subjecting certain passengers already identified to enhanced checks at the border. (91) Likewise, in Canada the new eVA requirement is intended to preserve Canada's immigration programme since each person wishing to visit Canada by air who is not required to have a visa is required to obtain, on the basis of biographical information and information relating to admission to and stay in Canada, by electronic means, prior travel authorisation valid for a maximum of five years. (92) However, data of that type does not reveal information about the booking methods, payment methods used and travel habits, the cross-checking of which can be useful for the purposes of combating terrorism and

other serious transnational criminal activities. Independently of the methods used to process that data, the API and the data required for the issue of an eVA are therefore not sufficient to attain with comparable effectiveness the public security objective pursued by the agreement envisaged.

215. It is the case that those categories of PNR data are transferred to the Canadian authorities for all travellers flying between Canada and the Union even though there is no indication that their conduct may have a connection with terrorism or serious transnational crime.

216. However, as the interested parties have explained, the actual interest of PNR schemes, whether they are adopted unilaterally or form the subject matter of an international agreement, is specifically to guarantee the bulk transfer of data that will allow the competent authorities to identify, with the assistance of automated processing and scenario tools or predetermined assessment criteria, individuals not known to the law enforcement services who may nonetheless present an 'interest' or a risk to public security and who are therefore liable to be subjected subsequently to more thorough individual checks.

217. Accordingly, I have serious doubts as to whether the wording of certain categories of PNR data in the annex to the agreement envisaged is sufficiently clear and precise. Some of those categories are formulated in a very, indeed excessively, open manner, without a reasonably informed person being able to determine either the nature or the scope of the personal data which those categories might contain. I am thinking, in that regard, especially, of heading 5, on 'Available frequent flyer and benefit information (free tickets, upgrades, etc.)'; heading 7, entitled 'all available contact information (including originator information)'; and heading 17, which has already been mentioned, on 'General remarks'. The explanations provided by the Commission in its responses to the written questions put by the Court did not enable those doubts to be dispelled. In particular, as regards heading 7, the Commission acknowledged that that heading referred, in a non-exhaustive manner, to 'all details connected with the booking, including, in particular, the postal or email address and telephone number of the traveller, the person or agency that booked the flight'. Likewise, as regards heading 17, the Commission stated that it covers all 'supplementary information apart from that listed elsewhere in the annex to the agreement envisaged'.

218. The agreement does indeed lay down certain guarantees with the aim of ensuring that the data transmitted does not go beyond the list of elements set out in the annex to the agreement envisaged in the possession of the air carriers. It is apparent from Article 4(3) of the agreement envisaged that no other data must be communicated to the Canadian competent authority, since Canada is required to delete upon receipt any data transferred to it if it is not listed in the annex to the agreement envisaged. Thus, although, in accordance with what is stated under heading 8 of that annex, available payment/billing information must be transferred to the Canadian competent authority, it cannot include information relating to the payment methods for other services not directly connected with the flight, such as vehicle rental on arrival.

219. However, in the light of the very, indeed excessively, open nature of certain headings, it is particularly difficult to understand what data is to be regarded as not having to be transferred to Canada and therefore as having to be deleted by Canada, in application of Article 4(3) of the agreement envisaged. Furthermore, it is likely that an air carrier will choose, on the ground that it will be easier and less expensive to do so, to transfer all the data which it has previously collected, whether or not it is among the headings listed in the annex to the agreement envisaged.

220. I therefore consider that, in order to ensure the legal security of persons whose personal data is transferred and processed under the agreement envisaged and the need to establish clear and precise rules governing the scope *ratione materiae* of that agreement, the categories of data in the annex to the agreement envisaged should be drafted in a more concise and more precise manner, without any discretion being left to either the air carriers or the Canadian competent authorities as regards the actual scope of those categories.

221. Last, I consider that the agreement envisaged goes beyond what is strictly necessary by including in its scope the transfer of PNR data that is apt to contain sensitive data, which in material terms allows information about the health or ethnic origin or religious beliefs of the passenger concerned and and/or of those travelling with him to be disclosed.

222. In that regard, it is apparent from the material submitted to the Court that the PNR data apt to contain such sensitive data will be communicated only on an optional basis, that is to say, only where a passenger requests an additional on-board service. However, it seems obvious to me that a person who has not yet been ‘identified’ but is collaborating or participating in an international terrorist or serious crime network will as a matter of prudence avoid requesting such services which are apt in particular to provide information about his ethnic background or his religious beliefs. The modern investigative methods employed by the Canadian competent authorities, consisting, according to the explanations provided to the Court, in cross-checking the PNR data with scenarios or profile types of persons at risk and which might be based on such sensitive data, since the agreement envisaged does not prohibit it, will in fact allow only the sensitive data of persons who have legitimately requested one of those on-board assistance services, and on whom no suspicion lies or in all likelihood will lie, to be processed. The risk of stigmatising a large number of individuals who are not suspected of any offence which the use of such sensitive data entails strikes me as particularly worrying and prompts me to propose that the Court should exclude data of that type from the scope of the agreement envisaged. In addition, I must observe that Article 8 of the PNR Agreement concluded with Australia precludes any processing of sensitive PNR data. That suggests, in the absence of a fuller explanation in the agreement envisaged of why the processing of sensitive data is strictly necessary, that the objective of combating terrorism and serious international crime could be attained just as effectively without such data even being transferred to Canada.

223. I would add that the guarantees offered by Article 8 of the agreement envisaged, on the 'Use of sensitive data', seem to me to be insufficient to justify taking a different approach from that consisting in proposing that sensitive data be excluded from the scope of the agreement envisaged.

224. In fact, in spite of the measures laid down in Article 8(1) to (4) of the agreement envisaged, Article 8(5) *in fine* authorises 'Canada' (and not just the Canadian competent authority) to retain the sensitive data in accordance with Article 16(5) of the agreement envisaged. It follows from that provision that the data may be retained for up to five years where it is 'required for any specific action, review, investigation, enforcement action, judicial proceeding, prosecution, or enforcement of penalties, until concluded'. Article 16(5) of the agreement envisaged, moreover, makes no reference to the purposes stated in Article 3 of that agreement, unlike the point immediately preceding it. It follows that sensitive data of a Union citizen who has taken a flight to Canada is liable to be retained for five years (and, where appropriate, unmasked and analysed during that period) by any Canadian public authority, for any 'action' or 'investigation' or 'judicial proceeding', without being in any way connected to the objective pursued by the agreement envisaged, for example, as the Parliament has pointed out, in the event of proceedings related to contract law or family law. The possibility that such a situation will arise prompts the conclusion that on this point the contracting parties have not struck a fair balance between the objectives pursued by the agreement envisaged.

225. In the light of those considerations, I consider that the categories of PNR data listed in the annex to the agreement envisaged should be worded more clearly and more precisely and that, in any event, sensitive data should be excluded from the scope of the agreement envisaged. It follows that the use of sensitive data provided for in Article 8 of the agreement envisaged is in my view incompatible with Articles 7 and 8 and Article 52(1) of the Charter.

– The sufficiently precise nature of the purpose for which PNR data processing is authorised

226. As already stated, Article 3(1) of the agreement envisaged provides that the Canadian competent authority is to process PNR data received pursuant to that agreement strictly for the purpose of preventing, detecting, investigating or prosecuting terrorist offences or serious transnational crime.

227. Article 3(2)(a) of the agreement envisaged provides a precise definition of 'terrorist offence', while Article 3(3) defines 'serious transnational crime' as meaning 'any offence punishable in Canada by a maximum deprivation of liberty of at least four years or a more serious penalty and as they are defined by the Canadian law, if the crime is transnational in nature'. The conditions on which a crime is to be regarded as transnational in nature are also set out in Article 3(3)(a) to (e) of the agreement envisaged.

228. Article 3(5) of the agreement envisaged confers on Canada the right to process PNR data, on a case-by-case basis, in order to ensure the oversight or accountability of the public administration (Article 3(5)(a)) or to comply with the subpoena or warrant issued, or an order made, by a court (Article 3(5)(b)).

229. In its request, the Parliament accepts that Article 3 of the agreement envisaged offers certain objective criteria, but considers that the reference in paragraph 3 to the legislation of a third country and the possibility of further treatment afforded by paragraph 5 give rise to uncertainty as to whether the agreement is limited to what is strictly necessary.

230. I am able to subscribe to that argument only in part.

231. First of all, I consider that, unlike the position concerning the measure at issue in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), Article 3 of the agreement envisaged lays down objective criteria in relation to the nature and degree of seriousness of the offences in respect of which the Canadian authorities would be entitled to process the PNR data. Thus, a terrorist offence is directly defined in Article 3(2) of the agreement envisaged and the definition also covers the activities defined as constituting such an offence in applicable international conventions and protocols relating to terrorism. The nature and seriousness of an offence constituting 'serious transnational crime' are also clear from Article 3(3) of the agreement envisaged, since such an offence involves more than one country and is punishable in Canada by a maximum deprivation of liberty of at least four years. The definition clearly does not cover minor offences or those the seriousness of which might vary, as was the case in the act at the origin of the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), according to the domestic law of a number of States, which therefore meant that it was impossible to consider that the interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter was limited to what was strictly necessary.

232. However, I accept that the reference to Canadian domestic law does not allow the specific offences that may be covered by Article 3(3) of the agreement envisaged, if, in addition, they are transnational in nature, to be identified.

233. In that regard, the Commission communicated to the Court a document sent by the Canadian authorities setting out a non-exhaustive list of offences coming within the definition laid down in Article 3(3) of the agreement envisaged which, according to those authorities, represent the great majority of offences that may come within that definition.

234. That list clearly shows the gravity of the infringements concerned, which relate to trafficking of weapons, ammunition, explosives and humans, the distribution or possession of child pornography, the laundering of the proceeds of crime, counterfeiting, forgery, murder, kidnapping, sabotage, hostage-taking or aircraft-hijacking.

235. Nonetheless, in order to limit to what is strictly necessary the offences that may entitle the relevant authorities to process PNR data and ensure the legal security of

passengers whose data is transferred to the Canadian authorities, I consider that the offences coming within the definition in Article 3(3) of the agreement envisaged should be listed exhaustively, for example, in an annex to the agreement envisaged itself.

236. In addition, I share the Parliament's concerns about the wording of Article 3(5)(b) of the agreement envisaged, which extends the purposes for which the processing of the PNR data is authorised. According to that article, the processing of PNR data is 'also' permitted, on a case-by-case basis, in order to comply with the subpoena or warrant issued, or an order made, by a court, although it is not stated that that court must be acting in the context of the purposes of the agreement envisaged. That article therefore appears to allow the processing of PNR data for purposes unconnected with those pursued by the agreement envisaged and/or possibly in connection with conduct or offences not coming within the scope of that agreement.

237. In the light of those considerations, I consider that, in order to be limited to what is strictly necessary and to ensure the legal security of passengers, in particular citizens of the Union, the agreement envisaged must be accompanied by an exhaustive list of the offences coming within the definition of 'serious transnational crime', provided for in Article 3(3) of that agreement. Furthermore, in its current form, Article 3(5) of the agreement envisaged is incompatible with Articles 7 and 8 and Article 52(1) of the Charter, in that it allows the possibilities of processing PNR data to be extended beyond what is strictly necessary, independently of the stated purposes of the agreement envisaged.

– The scope *ratione personae* of the agreement envisaged

238. It is common ground that the PNR data transferred under the agreement envisaged concerns all travellers flying between Canada and the Union, even where there is no suggestion that the conduct of those travellers might be connected with terrorism or serious transnational crime. The transfer of that data to the Canadian competent authority, its automated processing and then its retention therefore apply without any distinction based on the possible risk that certain categories of travellers might present.

239. In the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), it was quite specifically the undifferentiated and general nature of the retention of the data of any person using electronic communications in the Union, irrespective of the objective pursued by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, (93) of combating serious offences that was held by the Court to go beyond what was strictly necessary.

240. Although the interference constituted by the agreement envisaged is less extensive than that provided for in Directive 2006/24, and is also less intrusive into the daily life of everyone, its undifferentiated and generalised nature raises questions.

241. However, as I have already observed in paragraph 216 of this Opinion, the actual interest of PNR *schemes* is specifically to guarantee the bulk transfer of data that will allow the competent authorities to identify, with the assistance of automated processing and scenario tools or predetermined assessment criteria, individuals hitherto unknown to the law enforcement services who may nonetheless present an 'interest' or a risk to public security and who are therefore liable to be subjected subsequently to more thorough individual checks. Those checks must also be capable of being carried out over a certain period after the passengers in question have travelled.

242. In addition, unlike the persons whose data was subject to the processing provided for in Directive 2006/24, all those coming under the agreement envisaged voluntarily take a means of international transport to or from a third country, a means of transport which is itself, repeatedly, unfortunately, an vehicle or a victim of terrorism or serious transnational crime, which requires the adoption of measures ensuring a high level of security for all passengers.

243. It is indeed possible to imagine a PNR data transfer and processing scheme that distinguished passengers according to, for example, geographic areas of origin (when they stop over in the Union) or according to passengers' age, minors, for example, prima facie representing a lesser risk for public security. However, in so far as they were considered not to involve prohibited discrimination, such measures, once they became known, might well entail the circumvention of the terms of the agreement envisaged, which would in any event be prejudicial to the effective attainment of one of its objectives.

244. As already indicated, however, it is not sufficient to imagine in the abstract alternative measures that would be less restrictive of individuals' fundamental rights. To my mind, those measures must also present guarantees of effectiveness comparable with those the implementation of which is envisaged with the aim of combating terrorism and serious transnational crime. No other measure which, while limiting the number of persons whose PNR data is automatically processed by the Canadian competent authority, would be capable of attaining with comparable effectiveness the public security aim pursued by the contracting parties has been brought to the Court's attention in the context of the present proceedings.

245. On balance, it therefore seems to me that, generally, the scope *ratione personae* of the agreement envisaged cannot be limited further without harming the very object of the PNR regimes.

– Identification of the competent authority responsible for processing the PNR data

246. According to Article 5 of the agreement envisaged, only 'the Canadian Competent Authority' is to be deemed to provide an adequate level of protection for the processing and use of PNR data, subject to compliance with the agreement envisaged.

247. As the Parliament has observed, the identity of that authority is not mentioned in the agreement envisaged. There can be no doubt, however, in the light of the 2006 Agreement, as confirmed in the letter from the Mission of Canada to the European Union dated 25 June 2014, notified to the Commission pursuant to Article 30(2)(a) of the agreement envisaged and communicated to the Court in the context of the present proceedings, that the authority in question is the CBSA.

248. More than the identity of that authority, it is what is frequently the lack of precision of the terms of the agreement envisaged that, from the aspect of compliance with the principle of proportionality, raises doubts as to the authorities liable to process the PNR data.

249. Several terms of the agreement envisaged refer generically to 'Canada' and not to 'the Canadian Competent Authority', which, nonetheless, is the only authority deemed to provide an adequate level of protection for the processing and use of PNR data, in application of the agreement envisaged. That applies to Article 3(5) of the agreement envisaged, which, moreover, as I have examined above, (94) extends the purposes for which the PNR data may be processed, Article 8 of the agreement envisaged, Article 12(3) of the agreement envisaged, on disclosure to any person, and Article 16 of the agreement envisaged, on the retention of the PNR data. (95)

250. Contrary to the Commission's submissions at the hearing, the replacement of the expression 'the Canadian Competent Authority' by the generic term 'Canada' casts doubt on the number of authorities authorised to process the data, *a fortiori* when Article 18 of the agreement envisaged authorises the Canadian competent authority, provided that the conditions set out in that article are met, to disclose the PNR data to other government authorities in Canada. (96)

251. The terms of the agreement envisaged therefore do not seem to me to be sufficiently clear and precise as regards the identification of the authority responsible for processing the PNR data in such a way as to ensure the protection and security of the data.

– The automated processing of the PNR data

252. It is apparent from the observations submitted to the Court that the main added value of the processing of the PNR data is the comparison of the data received with scenarios or predetermined risk assessment criteria or databases which, with the assistance of automated processing, makes it possible to identify 'targets' who can subsequently be subjected to more thorough checks. In practice, according to the data communicated by the CBSA to the Commission and the United Kingdom Government and communicated to the Court by those interested parties, the application of those techniques allowed around 9 500 'targets' to be identified by the automated processing of PNR data out of the 28 million passengers who flew between Canada and the Union between April 2014 and March 2015.

253. However, none of the terms of the agreement envisaged relates specifically to either those databases or those scenarios or assessment criteria, which would therefore continue to be determined and used at the entire discretion of the Canadian authorities.

254. Admittedly, the agreement envisaged specifies that Canada is to ensure that the safeguards applicable to the processing of PNR data apply to all passengers on an equal basis without unlawful discrimination (Article 7 of the agreement envisaged) and that it is not to take any decisions significantly adversely affecting a passenger solely on the basis of automated processing of PNR data (Article 15 of the agreement envisaged).

255. I am nonetheless convinced that, in the light of the fair balance between the two objectives pursued by the agreement envisaged and the considerable practical importance of that aspect, a comparison of the PNR data with those scenarios or those predetermined assessment criteria is liable to lead, as certain of the interested parties have acknowledged, to false positive 'targets' being identified, the agreement envisaged should contain a number of principles and explicit rules concerning both the scenarios or the predetermined assessment criteria and the databases with which the PNR data is compared.

256. The precise framing and determination of the scenarios and the predetermined assessment criteria must to a large extent make it possible to arrive at results targeting individuals who might be under a 'reasonable suspicion' of participating in terrorism or serious transnational crime. (97)

257. It is not strictly necessary for the Court to indicate the principles that should govern the determination of those scenarios and assessment criteria or the databases with which the PNR data is compared.

258. For my part, I consider that the agreement envisaged should at least expressly state that neither the scenarios or the predetermined assessment criteria nor the databases used can be based on an individual's racial or ethnic origin, his political opinions, his religion or philosophical beliefs, his membership of a trade union, his health or his sexual orientation. Furthermore, the criteria, scenarios and databases should be expressly confined to the purposes and offences defined in Article 3 of the agreement envisaged.

259. Furthermore, the agreement envisaged should in my view state more clearly than Article 15 of the agreement envisaged does at present that, where the comparison of PNR data with the predetermined criteria and scenarios leads to a positive result, that result must be examined by non-automated means. That guarantee could reduce the number of persons who might subsequently be subjected to a more thorough physical check.

260. In addition, in order to be limited to what is strictly necessary, those relevant criteria, scenarios and databases, and their reconsideration, should in my view be the subject of a check by the independent public authority referred to in the agreement envisaged, namely the Privacy Commissioner of Canada, (98) and be the subject of a report on their implementation, communicated to the competent institutions and bodies of the Union,

pursuant to Article 26 of the agreement envisaged, which governs the joint review and evaluation of the implementation of that agreement.

261. Consequently, I consider that, in failing to establish explicit principles and rules relating to the establishment and use of the predetermined scenarios and criteria and also the databases with which the PNR data is compared by automated processing, the contracting parties have not struck a fair balance between the two objectives pursued by the agreement envisaged.

– Access to the PNR data

262. When the passengers whose PNR data has been subject to automated processing and who present a profile corresponding to predetermined scenarios or criteria are identified, it is apparent from the explanations provided to the Court that CBSA officials access those passengers' data in order to determine whether they should be subjected to a more thorough check. In practice, according to the information submitted by the United Kingdom Government and the Commission, among the 9 500 'targets' identified between April 2014 and March 2015, 1 765 persons were subjected to thorough checks for reasons connected with national public security or for reasons connected with a serious transnational criminal offence. Of those persons, 178 were arrested for a serious transnational criminal offence, connected in particular with drug trafficking.

263. In the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraphs 62 and 66), the Court observed that Directive 2006/24 did not lay down any objective criterion by which to determine the limits of the number of persons authorised to access the personal data in question and did not make access to that data dependent on a prior review carried out by a court or an independent administrative body. Furthermore, the directive did not lay down any rules against the risk of abuse and against any unlawful access to or use of that data.

264. Conversely, it should be observed that the terms of the agreement envisaged satisfy those requirements in part.

265. As already observed, under Article 9(1) and (2) of the agreement envisaged Canada is required to implement regulatory, procedural or technical measures to protect PNR data against accidental, unlawful or unauthorised access, processing or loss and to ensure, in particular, the protection, security, confidentiality and integrity of the data, by applying in particular encryption procedures and holding PNR data in a secure physical environment that is protected with access controls.

266. Furthermore, both Article 9(2)(b) and Article 16(2) of the agreement envisaged provide that Canada is to restrict access to PNR data to a limited number of officials specifically authorised by Canada. As regards the retention of the PNR data, Article 16(4) of the agreement envisaged also states that data depersonalised by masking can be unmasked only if it is necessary to carry out investigations under the scope of Article 3 of the agreement envisaged and, depending on the length of time during which the PNR data

concerned is retained, either by a limited number of specifically authorised officials or only with prior permission by the Head of the Canadian Competent Authority or a senior official specifically mandated by the Head.

267. However, like Directive 2006/24, the agreement envisaged does not specify the objective criteria on the basis of which the officials with access to the PNR data are to be determined and whether those officials are all in the service of the CBSA. That information seems to be all the more important because the group of officials having access to that data in the context of Article 9(2) of the agreement envisaged is, it would appear, wider than the group, described as 'limited', who may have access to data retained for more than 30 days in the context of the application of Article 16(2) of that agreement. The criteria on which the two groups of officials authorised to access the PNR data may be distinguished is not, however, apparent from the terms of the agreement envisaged and are therefore left to Canada's entire discretion. That freedom does not in my view satisfy the requirement laid down in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), referred to in paragraph 263 of this Opinion.

268. Likewise, it should be observed that the agreement envisaged does not provide that access to the PNR data is to be subject to prior control by an independent authority, such as the Privacy Commissioner of Canada, (99) or by a court whose decision might limit access to or use of the data and which would deal with the matter following a reasoned request from the CBSA.

269. However, the appropriate balance that must be struck between the effective pursuit of the fight against terrorism and serious transnational crime and respect for a high level of protection of the personal data of the passengers concerned does not necessarily require that a prior control of access to the PNR data must be envisaged.

270. In fact, without its even being necessary to ascertain whether such a prior control would in practice be conceivable and sufficiently effective, given in particular the quantity of data to be examined and the resources available to the independent control authorities, I observe that, in the context of respect for Article 8 of the ECHR by the public authorities who have put in place measures for the interception and surveillance of private communications, the ECtHR has accepted that, save in exceptional circumstances relating in particular to the confidentiality of journalists' sources of information or communications between lawyers and their clients, an *ex ante* control of those measures by an independent body or a judge is not an absolute requirement, provided that extensive *post factum* judicial oversight of those measures is guaranteed. (100)

271. In that regard, independently of the doubts prompted by the allocation of the CBSA's surveillance and oversight powers between the 'independent public authority' and the 'authority created by administrative means that exercises its functions in an impartial manner and that has a proven record of autonomy', to which I shall return later, (101) it must be pointed out that Article 14(2) of the agreement envisaged provides that Canada is to ensure that any individual who is of the view that their rights have been infringed by a

decision or action in relation to their PNR data may seek effective judicial redress in accordance with Canadian law by way, inter alia, of judicial review. There can be no doubt, having regard to the wording of Article 14(1) of the agreement envisaged and the explanations provided by the interested parties, that that remedy is available against any decision relating to access to the PNR data of the persons concerned, irrespective of their nationality, their domicile or their presence in Canada. In the context of the present procedure of preventive examination of the compatibility of the terms of the agreement envisaged with Articles 7 and 8 of the Charter, the guarantee of such a remedy, the effectiveness of which has not been called in question by any of the interested parties, seems to me to satisfy the condition required by those provisions, read in the light of the interpretation of Article 8 of the ECHR by the ECtHR.

272. Consequently, I consider that the fact that the agreement envisaged has failed to provide that access by the authorised officials of the CBSA to the PNR data is subject to prior control by an independent administrative authority or by a court is not incompatible with Articles 7 and 8 and Article 52(1) of the Charter, in so far as — as is the case — the agreement envisaged requires that Canada guarantee that every person concerned will be entitled to an effective *post factum* judicial review of the decisions or actions relating to access to his PNR data.

273. On the other hand, I consider that, in order to be limited to what is strictly necessary, the agreement envisaged must make quite clear that only officials of the CBSA are to be authorised to have access to the PNR data and must lay down objective criteria enabling the number of such officials to be known, having regard to the different situations provided for in Articles 9 and 16 of the agreement envisaged.

– The retention of the PNR data

274. Before the Court, the interested parties discussed at length the consequences that flow from the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), as regards the strict necessity for the system of PNR data retention provided for in Article 16 of the agreement envisaged.

275. In that judgment, the Court took issue with the EU legislature for not having required that the data in question be retained within the Union, with the consequence that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security of the data was not fully ensured. (102)

276. Furthermore, as regards the data retention period of a maximum of two years laid down in Directive 2006/24, the Court took issue with the fact that the directive did not distinguish between the categories of data on the basis of their usefulness for the purposes of the objective pursued or according to the persons concerned and that the retention period was not determined on the basis of objective criteria. (103)

277. As regards the first point, it is clear that the PNR data coming within the terms of the agreement envisaged will not be kept within the Union. That in itself is not sufficient, however, to render invalid the retention system provided for in Article 16 of the agreement envisaged, unless the agreement does not fully ensure a review of the requirements of protection and security by an independent authority. However, as I shall examine below, while the contracting parties' intention is indeed to observe in full the requirement laid down in Article 8(3) of the Charter, Article 10(1) of the agreement envisaged is couched in terms that are too ambiguous to ensure, in all circumstances, the existence of such a review. (104)

278. As for the duration of the PNR data retention period, it is apparent from Article 16(1) of the agreement envisaged that the maximum duration of that period is five years from the date that the PNR data is received, (105) and that at the end of that period Canada is required, pursuant to Article 16(6) of the agreement envisaged, to destroy the PNR data.

279. It is common ground that the retention period has been extended by one and a half years by comparison with the period provided for in the 2006 Agreement. Furthermore, apart from the explanations and examples provided by certain interested parties during the proceedings before the Court, which are essentially linked to the average lifetime of international serious crime networks and to the duration and complexity of investigations of those networks, the agreement envisaged does not indicate the objective reasons that led the contracting parties to increase the PNR data retention period to a maximum of five years.

280. To my mind those objective reasons must be stated in the agreement envisaged, thus ensuring at the outset that that period is necessary for the objectives pursued by the agreement envisaged. To be quite clear on this point, that consideration also applies with respect to Article 16(5) of the agreement envisaged, the scope of which, as I have already observed in connection with the sensitive data that must be excluded from the scope of that agreement, should, as regards the retention of the other PNR data for a maximum period of five years, be confined to the purpose described in Article 3 of the agreement envisaged. (106)

281. It must therefore be stated that the contracting parties have not shown that it is necessary to retain all the PNR data for a maximum period of five years.

282. The Court might, in the context of these proceedings, confine itself to that assessment, and would therefore not be required to ascertain whether the five-year retention period for all PNR data for all air passengers travelling between Canada and the Union exceeds what is strictly necessary to attain the security purpose of the agreement envisaged.

283. In case the Court should nonetheless consider it appropriate to devote some argument to that point, I shall permit myself to make the following comments.

284. First of all, as regards the amount of PNR data retained, it is permissible in my view to ask whether, after several years, there is justification for retaining certain categories of PNR data, since the Canadian competent authority has or may have at its disposal, by means of unmasking, in accordance with the conditions laid down in Article 16(3) of the agreement envisaged, the PNR data revealing the essential information relating to the identity of the passenger or passengers on PNR, the date of travel, the payment methods used, all available information, the travel itinerary, details of the travel agency or travel agent and baggage information. In particular, I wonder whether frequent flyer and benefit information (heading 5 in the annex to the agreement envisaged), information about the check-in status of the passenger (heading 13 in the annex), ticketing or ticket price information (heading 14 in the annex) and code sharing information (heading 11 in the annex) which, according to the Commission, provide information only about the actual carrier prove, after being retained for some years, to be information having genuine added value by comparison with the other PNR data which is also retained and which may be unmasked, with the aim of combating terrorism and serious transnational crime.

285. Next, in addition to the doubts that may be raised about the strict necessity of the retention period of all the PNR data provided for in the agreement envisaged, the guarantees afforded by Article 16(3) of that agreement, concerning 'depersonalisation' by masking, seem to me to be insufficient in any event to ensure the protection and security of the personal details of the passengers concerned.

286. Admittedly, that article does indeed provide that the names of all passengers are to be masked 30 days after they are received. It also states that the PNR data in categories 6, 7, 17 and 18, listed in the annex to the agreement envisaged, (107) is to be masked two years after it is received if, in the case of the last two categories, it is capable of identifying a natural person.

287. It is precisely the exhaustive nature of that list that seems worrying. In fact, other headings in the annex to the agreement envisaged are also capable of directly identifying a natural person but do not appear on the list in Article 16(3) of the agreement envisaged. I am thinking mainly of the available frequent flyer and benefit information (heading 5 in the annex) and all available payment/billing information (heading 8), which includes, in particular, details of the payment method or methods used.

288. I therefore consider that, by omitting to ensure the 'depersonalisation' by masking of all the PNR data on the basis of which a passenger may be directly identified, the contracting parties have not struck a fair balance between the objectives pursued by the agreement envisaged.

289. Last, as regards the rules and procedures applicable to the unmasking of the PNR data, it should be borne in mind that Article 16(4) of the agreement envisaged states that such an operation can be carried out only if on the basis of available information it is necessary to carry out investigations under the scope of Article 3 of the agreement envisaged either, up to two years from initial receipt of the PNR data, by a limited number of specifically authorised officials or, between two years and five years after

receipt, only with prior permission by the Head of the Canadian Competent Authority or a senior official specifically mandated by the Head.

290. Subject to the observations made above in relation to the objective criteria on which the officials authorised to access the data may be determined (108) and to those made below in relation to the oversight of the Canadian competent authority by an independent public authority, (109) I consider that Article 16(4) of the agreement envisaged does not in itself go beyond what is strictly necessary.

– The disclosure and subsequent transfer of the PNR data

291. Articles 12, 18 and 19 of the agreement envisaged relate directly to the disclosure of the PNR data.

292. Article 12 of the agreement envisaged, entitled 'Access for individuals', appears at first sight not to call for criticism, since it seeks to ensure that everyone has access to his own PNR data.

293. Paragraph 3 of that article seems to me, however, to extend the possibilities of access to the PNR data and information extracted from it to anyone, without any specific guarantees being laid down. Article 12(3) of the agreement envisaged authorises Canada to 'make any disclosure of information subject to reasonable legal requirements and limitations …, with due regard for the legitimate interests of the individual concerned'. However, neither the recipients of that 'information' nor the use to which it is put is defined in the agreement envisaged. It is therefore quite possible that that information may be communicated to any natural or legal person, such as a bank, for example, provided that Canada considers that the disclosure of such information does not exceed 'reasonable' legal requirements, which, moreover, are not defined in the agreement envisaged.

294. Having regard in particular to the particularly vague nature of its wording and to the particularly broad terms in which it is couched, Article 12(3) of the agreement envisaged therefore seems to me to go beyond what is strictly necessary to attain the public security objective pursued by the agreement envisaged.

295. As for Articles 18 and 19 of the agreement envisaged, they relate respectively to disclosure of PNR data by the Canadian competent authority to other government authorities in Canada and to other government authorities of countries other than Member States of the Union.

296. Like the Parliament, I consider that, in so far as the 'adequate level of protection', deemed to satisfy the level guaranteed in EU law, concerns only compliance by the Canadian competent authority with the terms of the agreement envisaged, the contracting parties must ensure that that level of protection cannot be circumvented by personal data being transferred to other Canadian government authorities or to third countries. (110)

297. It cannot be denied that Articles 18 and 19 of the agreement envisaged make the subsequent transfer of PNR data or the analytical information containing PNR data subject to strict cumulative conditions, four of which are identical. Thus, that data and that information are communicated only if the government authorities in question have functions directly related to the scope of Article 3 of the agreement envisaged, on a case-by-case basis and on condition that the circumstances of the particular case render disclosure necessary for the purposes stated in Article 3. In addition, it is made clear that only the minimum PNR data or analytical information necessary is to be disclosed. (111)

298. However, the guarantees afforded by those two terms of the agreement envisaged differ from the other conditions.

299. First of all, while, according to Article 18 of the agreement envisaged, the other Canadian government authorities to whom the PNR data is disclosed must afford 'protection equivalent to the safeguards described in [the agreement envisaged]', Article 19(1)(e) states that the Canadian Competent Authority must be 'satisfied' that the foreign authority receiving the PNR data applies either standards to protect the PNR data that are equivalent to those set out in the agreement envisaged, in accordance with agreements and arrangements that incorporate those standards, or the standards to protect the PNR data that it has agreed with the Union.

300. In both situations, it is common ground that it is solely for the Canadian competent authority, namely the CBSA, to ascertain the adequacy of the protection afforded by the public authority receiving the data. Neither the CBSA's examination nor any decision on disclosure of the PNR data is subject to *ex ante* control by an independent authority or a judge. Nor does the agreement envisaged provide that the intention to transfer the PNR data of a national of a Member State of the Union is at least to be notified to the competent authorities of the Member State in question and/or to the Commission before disclosure actually takes place. Article 18 of the agreement envisaged is silent as to the latter possibility, while Article 19(2) thereof provides only that the competent authorities of the Member State in question are to be informed 'at the earliest appropriate opportunity'.

301. In fact, the additional guarantees referred to in the preceding paragraph should in my view be afforded.

302. A mere *post factum* review of the disclosure of the data will not make it possible either to counterbalance an incorrect assessment of the level of protection afforded by a recipient public authority or to restore the privacy and confidentiality of the data when it has been transferred to and used by the recipient public authority. (112) That is particularly true in the case of the disclosure of data to a third country, where its subsequent use will even be outside the *post factum* competence and review of the Canadian authorities and courts.

303. Furthermore, if the Commission and the competent authorities of the Member State of which the individual whose PNR data is to be transferred is a national are given prior

notification, it will be possible to ensure that the examination of the ‘equivalent level of protection’ has indeed been carried out. In addition, from a different aspect, such prior information, in so far as the transfer of PNR data in application of Articles 18 and 19 of the agreement envisaged will be able to be effected only in duly reasoned cases and specific circumstances and therefore in situations in which it may be supposed that significant suspicion attaches to the person concerned, is in particular apt to contribute to reinforcing cooperation between the competent authorities of Canada, the Union and its Member States, in keeping with the objective of preventing and detecting terrorism and serious transnational crime pursued by the agreement envisaged.

304. Next, it should be observed that under Article 18(1)(f) of the agreement envisaged the receiving Canadian government authority is prohibited from subsequently disclosing the PNR data to another entity unless the disclosure is authorised by the CBSA respecting the conditions laid down in that paragraph. Conversely, Article 19 of the agreement envisaged does not require the CBSA to be satisfied, before the PNR data is transferred, that the receiving public authority of a third country cannot itself subsequently disclose that data to another entity, as the case may be, of another third country.

305. As the risk that such a situation, which would have the effect of circumventing the level of protection of personal data afforded by EU law, may arise has not been excluded, it must be stated that Article 19 of the agreement envisaged authorises unwarranted interferences with the fundamental rights guaranteed by Articles 7 and 8 of the Charter. (113)

– The administrative surveillance and judicial control measures

306. Control by an independent authority, which is required by both Article 8(3) of the Charter and the second subparagraph of Article 16(2) TFEU, is an essential element of respect for the protection of individuals with regard to the processing of personal data in the Union. (114)

307. It is clear from the terms of the agreement envisaged that the contracting parties are aware of that requirement, although, and I shall return to this point, the agreement envisaged does not fully satisfy it.

308. With the objective of ensuring that the level of protection afforded by the Canadian competent authority, where it processes and uses PNR data, is, according to Article 5 of the agreement envisaged, ‘adequate … within the meaning of relevant EU data protection law’, that authority must, in particular, comply with the measures provided for in Article 10 of the agreement envisaged, that is to say, control by an ‘overseeing authority’. That authority must have ‘effective powers to investigate compliance with the rules related to the collection, use, disclosure, retention, or disposal of PNR data’. Those powers also include the power to conduct compliance reviews, make recommendations to the Canadian Competent Authority and refer violations of law related to the agreement envisaged for prosecution or disciplinary action. Under Article 14(1) of the agreement envisaged, the overseeing authority is to receive, investigate and respond to complaints

lodged by individuals concerning their request for access to, correction of or annotation of their PNR data.

309. It follows that it is indeed the contracting parties' intention to ensure that the processing of personal data by the CBSA is subject to an effective mechanism for the detection and review of any violations of the rules of the agreement envisaged affording protection of passengers' privacy and personal data, in order to ensure a level of protection that is intended to be 'substantially equivalent' to that which individuals would enjoy if their personal data were processed and retained within the Union.

310. It follows that control by an independent authority, required in particular by Article 8(3) of the Charter, is fully applicable in the present case.

311. In fact, the particular feature of the overseeing authority put in place in the agreement envisaged that attracts criticism from the Parliament and the EDPS in respect of its complete independence is that it is bicephalous. Article 10 of the agreement envisaged presents that authority as *either* an 'independent public authority' *or* an 'authority created by administrative means that exercises its functions in an impartial manner and that has a proven record of autonomy'.

312. The first of those authorities, as is clear from the letter of 25 June 2014 from the Mission of Canada to the European Union (115) and the explanations provided by the Commission during the proceedings before the Court, designates the Canadian Privacy Commissioner, whose status, mode of appointment, fixed term of office of seven years, investigative powers, including the power to investigate matters on his own initiative, are laid down in the Canadian Privacy Act 1985. (116) It should be pointed out that none of the interested parties has cast doubt on the fact that the Canadian Privacy Commissioner, who reports exclusively to the Chambers of the Canadian Parliament, enjoys independence and impartiality that allow him to perform his tasks without being subject to any external influence or directions, in particular from the Executive. (117)

313. It is apparent from the explanations provided to the Court that, under the Privacy Act, the powers of the Canadian Privacy Commissioner extend to complaints from any individual alleging a breach of the rules on privacy and personal data protection by a federal public institution in Canada.

314. However, the alternative wording of Article 10(1) of the agreement envisaged gives the impression that the processing of PNR data by the CBSA might also be wholly assumed by the 'authority created by administrative means that exercises its functions in an impartial manner and that has a proven record of autonomy', that is to say by the Recourse Directorate of the CBSA, which was set up under the 2006 Agreement.

315. However, irrespective of the guarantees referred to in the letter of 25 June 2014 from the Mission of Canada to the European Union, according to which the Recourse Directorate of the CBSA will receive no directions from the other operational bodies of the latter, that directorate, like all the other bodies of the CBSA, continues to be directly

subordinate to the responsible Minister, from whom it may receive directions. (118) Since it is liable to be subject to influence of, in particular, a political nature on the part of the authority to which it is responsible or more generally the Executive, the Recourse Directorate of the CBSA cannot be regarded as an independent supervisory authority for the purposes of Article 8(3) of the Charter.

316. Consequently, in so far as Article 10 of the agreement envisaged provides, in essence, that the supervisory authority may be either the Canadian Privacy Commissioner or the Recourse Directorate of the CBSA, it does not constitute a clear and precise rule systematically ensuring control by an independent authority, within the meaning of Article 8(3) of the Charter, of respect for the private life and protection of the personal data of the individuals concerned by the PNR data processing provided for by the agreement envisaged. It is for the contracting parties to dispel the ambiguity resulting from the drafting of Article 10(1) of that agreement and to ensure that control of compliance with the fundamental rights guaranteed by Articles 7 and 8 of the Charter is entrusted to an independent supervisory authority, within the meaning of Article 8(3) of the Charter.

317. As for Article 14(1) of the agreement envisaged, which concerns administrative redress, it is apparent from the explanations provided by the Commission that, under the Canadian Privacy Act of 1985, the Canadian Privacy Commissioner is not competent to hear requests for access, correction or annotation of PNR data from persons not present in Canada, that is to say, requests submitted by those persons on the basis of Articles 12 and 13 of the agreement envisaged.

318. According to the explanations provided the Commission, the investigation of requests for access, correction or annotation, and the replies to those requests submitted by persons not present in Canada, as is undoubtedly the position of most citizens of the Union, are within the remit of the Recourse Directorate of the CBSA.

319. In its observations, and in its replies to the questions put by the Court, the Commission stated that a person whose request for access to his PNR data, or for correction or annotation of that data, has been rejected by the Recourse Directorate of the CBSA could, via an agent present in Canada, file a complaint with the Canadian Privacy Commissioner.

320. However, there is no reference in the agreement envisaged to the existence of that administrative appeal to the Canadian Privacy Commissioner, nor is its existence apparent from any provision of Canadian law brought to the knowledge of the Court. Provided that it is actually conceivable, I consider that the possibility of such an appeal should be clearly indicated in the agreement envisaged, in such a way as to enable everyone to be aware of the scope of the procedural rights recognised to him by that measure. If such a possibility does not in fact exist, the Canadian Privacy Commissioner should in my view be able to assume directly the task of responding to any request for access, correction or annotation submitted by an individual not present in Canada. If none of those options is provided for, no independent supervisory authority would be

competent to examine requests of that type, even though it is exclusively such requests that will be submitted by citizens of the Union with regard to their own personal data. The possibility that such a situation may arise means, in my view, that the contracting parties have not struck a fair balance between the objectives pursued by the agreement envisaged.

321. In any event, Article 14(1) of the agreement envisaged should clearly state that requests for access, correction and annotation submitted by passengers not present on Canadian territory may be brought, either directly or by means of an administrative action, before an independent public authority.

322. On the other hand, and in the interest of completeness, it does not appear to me that the criticisms put forward by the Parliament, namely that Article 14(2) of the agreement envisaged is liable to infringe Article 47 of the Charter, are well founded.

323. Article 14(2) of the agreement envisaged provides that Canada is to ensure that any individual who is of the view that their rights have been infringed by a decision or action in relation to their PNR data may seek effective judicial redress in accordance with Canadian law by way of judicial review, or such other remedy which may include compensation.

324. As the Council has claimed, that provision ensures that individuals, irrespective of their nationality, their domicile or whether or not they are present in Canada, are able to benefit from effective judicial protection, within the meaning of Article 47 of the Charter. The fact that Article 14(2) of the agreement envisaged provides that the 'effective judicial remedy' may take the form not only of judicial review but also of an action for compensation shows that Canada undertakes to ensure that all individuals concerned may pursue effective legal remedies.

325. I would add that it follows from Article 14(1) of the agreement envisaged that an authority which has rejected a request for access, correction or annotation must inform the complainant of the procedure for initiating the legal redress referred to paragraph 2 of that article, which ensures that adequate individual information is made available to the citizens of the Union concerned.

326. Contrary to the Parliament's suggestion, with reference to paragraph 95 of the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), such a situation is not comparable to the situation that led the Court to find in that case that there had been a failure to respect the essence of the fundamental right to effective judicial protection. That case concerned the legislation of a third country which the Commission had regarded as ensuring an adequate level of protection of fundamental rights but which, in the light of the information subsequently acquired, did not provide for *any* possibility for an individual to pursue legal remedies in order to have access to his own personal data or to obtain the rectification or erasure of such data.

327. The agreement envisaged, which constitutes an international commitment for Canada, does indeed require Canada to ensure that such remedies are put in place and are effective. To that extent, and having regard to the preventive nature of the opinion procedure, that fact is sufficient, in my view, to support the conclusion that Article 14(2) of the agreement envisaged is compatible with Article 47 of the Charter. (119)

VIII – **Conclusion**

328. In the light of the foregoing, I propose that the Court reply to the Parliament's request for an opinion along the following lines:

1. The act of the Council concluding the agreement envisaged between Canada and the European Union on the transfer and processing of Passenger Name Record (PNR) data, signed on 25 June 2014, must be based on the first subparagraph of Article 16(2) TFEU and Article 87(2)(a) TFEU, read in conjunction with Article 218(6)(a)(v) TFEU.

2. The agreement envisaged is compatible with Article 16 TFEU and Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union, provided that:

– the categories of Passenger Name Record (PNR) data of airline passengers listed in the annex to the agreement envisaged are clearly and precisely worded and sensitive data, within the meaning of the agreement envisaged, is excluded from the scope of that agreement;

– offences coming within the definition of serious transnational crime, provided for in Article 3(3) of the agreement envisaged, are listed exhaustively in the agreement or in an annex thereto;

– the agreement envisaged identifies in a sufficiently clear and precise manner the authority responsible for processing the Passenger Name Record data, in such a way as to ensure the protection and security of those data;

– the agreement envisaged expressly specifies the principles and rules applicable to both the pre-established scenarios or assessment criteria and the databases with which the Passenger Name Record data is compared in the context of the automated processing of that data, in such a way that the number of 'targeted' persons can be limited, to a large extent and in a non-discriminatory manner, to those who can be reasonably suspected of participating in a terrorist offence or serious transnational crime;

– the agreement envisaged specifies that only the officials of the Canadian competent authority are to be authorised to access the Passenger Name Record data and lays down objective criteria that enable the number of those officials to be specified;

– the agreement envisaged indicates, stating the reasons, precisely why it is objectively necessary to retain all Passenger Name Record data for a maximum period of five years;

– where the maximum five-year retention period for the Passenger Name Record data is considered necessary, the agreement envisaged ensures that all the Passenger Name Record data that would enable an airline passenger to be directly identified is 'depersonalised' by masking;

– the agreement envisaged makes the examination carried out by the Canadian competent authority relating to the level of protection afforded by other Canadian public authorities and by those of third countries, and also any decision to disclose Passenger Name Record data, on a case-by-case basis, to those authorities, subject to *ex ante* control by an independent authority or a court;

– the intention to transfer Passenger Name Record data of a national of a Member State of the European Union to another Canadian public authority or to a public authority of a third country is notified in advance to the competent authorities of the Member State in question and/or to the European Commission before any communication takes place;

– the agreement envisaged systematically ensures, by a clear and precise rule, control by an independent authority, within the meaning of Article 8(3) of the Charter of Fundamental Rights of the European Union, of respect for the private life and protection of the personal data of passengers whose Passenger Name Record data is processed; and

– the agreement envisaged makes clear that requests for access, rectification and annotation made by passengers not present on Canadian territory may be submitted, either directly or by means of an administrative appeal, to an independent public authority.

3. The agreement envisaged is incompatible with Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union in so far as:

– Article 3(5) of the agreement envisaged allows, beyond what is strictly necessary, the possibilities of processing Passenger Name Record data to be extended, independently of the purpose, stated in Article 3 of that agreement, of preventing and detecting terrorist offences and serious transnational crime;

– Article 8 of the agreement envisaged provides for the processing, use and retention by Canada of Passenger Name Record data containing sensitive data;

– Article 12(3) of the agreement envisaged confers on Canada, beyond what is strictly necessary, the right to make disclosure of information subject to reasonable legal requirements and limitations;

– Article 16(5) of the agreement envisaged authorises Canada to retain Passenger Name Record data for up to five years for, in particular, any specific action, review, investigation or judicial proceedings, without a requirement for any connection with the purpose, stated in Article 3 of that agreement, of preventing and detecting terrorist offences and serious transnational crime; and

– Article 19 of the agreement envisaged allows Passenger Name Record data to be transferred to a public authority in a third country without the Canadian competent authority, subject to control by an independent authority, first being satisfied that the public authority in the third country in question to which the data is transferred cannot itself subsequently communicate the data to another body, where relevant, in another third country.

---

1 – Original language: French.

---

2 – Proposal for a Council Decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record Data (COM(2013) 528 final).

---

3 – See Council Decision 2012/381/EU 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 (OJ 2012 L 186, p. 3).

---

4 – See Council Decision 2012/472/EU 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 (OJ 2012 L 215, p. 4).

---

5 – See Position of the European Parliament adopted at first reading on 14 April 2016 with a view to the adoption of Directive (EU) 2016/… of the European Parliament and of the Council on the use of passenger name record (Passenger Name Record) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (EP-PETC1-COD(2011) 0023).

---

6 – See paragraphs 65 to 135 of this Opinion. It should be noted that, following the decision of the Court, this is also the first time that the Court will have the benefit of an 'Opinion', presented and published before it delivers its opinion.

---

7 – See Council Decision 2006/230/EC of 18 July 2005 on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of API/Passenger Name Record data (OJ 2006 L 82, p. 14).

---

8 – Directive 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 data (OJ 1995 L 281, p. 31).

---

9 – Commission Decision of 6 September 2005 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the Canada Border Services Agency (OJ 2006 L 91, p. 49).

---

10 – Pursuant to Article 7, Decision 2006/523 expired three years and six months after the date of its notification. It could have been extended in accordance with the procedure laid down in Article 31(2) of Directive 95/46, but was not.

---

11 – See Article 5 of the 2006 Agreement.

---

12 – OJ 2011 C 81 E, p. 70.

---

13 – See points 7 and 9 of the resolution.

---

14 – SEC(2010) 1082, SEC(2010) 1083 and SEC(2010) 1084 respectively.

---

15 – See, respectively, footnotes 3 and 4 above.

16– The full text of the Opinion of the EDPS in German, English and French is available at the following internet address: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2013/13-09-30_Canada_EN.pdf.

---

17 – Although that has not been disputed, I would make clear, for all purposes, that the subject matter of the request for an opinion does indeed relate to an 'agreement envisaged', within the meaning of Article 218(11) TFEU, since although the agreement at issue in the present case had already been signed by the Council when the matter was referred to the Court, it has still not been concluded. See, to that effect, Opinion 3/94 of 13 December 1995 (EU:C:1995:436, paragraphs 18 and 19).

---

18 – See, in particular, Opinion 1/75 of 11 November 1975 (EU:C:1975:145); Opinion 1/08 of 30 November 2009 (EU:C:2009:739, paragraphs 108 and 109); and Opinion 1/13 of 14 October 2014 (EU:C:2014:2303, paragraph 43).

---

19 – Although it has not been disputed, I would add, for all practical purposes, that the Court has already held that the fact that the measure authorising signature of the agreement has not been the subject of an action for annulment does not mean that a request for an opinion raising the question whether an agreement envisaged is compatible with EU primary law is inadmissible. See, to that effect, Opinion 2/00 of 6 December 2001 (EU:C:2001:664, paragraph 11).

---

20 – See Opinion 2/00 du 6 December 2001 (EU:C:2001:664) and Opinion 1/08 of 30 November 2009 (EU:C:2009:739).

---

21 – Opinion 2/00 of 6 December 2001 (EU:C:2001:664, paragraph 5) and Opinion 1/08 of 30 November 2009 (EU:C:2009:739, paragraph 110).

---

22 – See, to that effect, Opinion 2/00 of 6 December 2001 (EU:C:2001:664, paragraph 5) and Opinion 1/08 of 30 November 2009 (EU:C:2009:739, paragraph 110).

---

23 – See, to that effect, Opinion 2/00 of 6 December 2001 (EU:C:2001:664, paragraph 6).

---

24 – See Opinion 1/75 of 11 November 1975 (EU:C:1975:145, p. 1362).

---

25 – See judgment of 11 June 2014, *Commission* v *Council* (C-377/12, EU:C:2014:1903, paragraph 34 and the case-law cited).

---

26 – See, in particular, judgments of 6 November 2008, *Parliament* v *Council* (C-155/07, EU:C:2008:605, paragraph 36); of 19 July 2012, *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraph 44); of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025, paragraph 43) and of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:453, paragraph 44). It should be noted that, on this point, the Court's case-law does not seem entirely consistent, since some judgments, rather strangely, merely mention the pursuit of a number of indissociably linked objectives, without reference to the components of the act under examination. See, for example, judgments of 29 April 2004, *Commission* v *Council* (C-338/01, EU:C:2004:253, paragraph 56), and of 11 June 2014, *Commission* v *Council* (C-377/12, EU:C:2014:1903, paragraph 34).

---

27 – See, in particular, judgments of 6 November 2008, *Parliament* v *Council* (C-155/07, EU:C:2008:605, paragraphs 76 to 79), and of 19 July 2012, *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraphs 45 to 49).

---

28 – The chosen procedural legal basis, namely Article 218(6)(a)(v) TFEU, requires that the Council may not adopt the decision concluding an international agreement without having obtained the consent of the Parliament where that agreement covers 'fields to which … the ordinary legislative procedure applies', does not form the subject matter of the request submitted by the Parliament and is not the object of controversy between the interested parties. That provision appears to be the appropriate procedural basis for the act concluding the agreement envisaged.

---

29 – See judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and (C-318/04, EU:C:2006:346, paragraphs 57 to 59).

---

30 – OJ 2011 L 288, p. 1.

---

31 – Judgment of 6 May 2014, *Commission* v *Parliament and Council* (C-43/12, EU:C:2014:298, paragraph 42).

---

32 – According to the second sentence in that article of the agreement envisaged, 'an air carrier that provides PNR data to Canada under this Agreement is deemed to comply with European Union legal requirements for PNR data transfer from the European Union to Canada'.

---

33 – Article 20 of the agreement envisaged states, in particular, that the contracting parties 'shall ensure that air carriers *transfer* PNR data to the Canadian Competent Authority exclusively on the basis of the push method …' (emphasis added).

---

34 – Article 21(1) of the agreement envisaged, concerning the frequency of PNR data transfer, states that 'Canada shall ensure that the Canadian Competent Authority *requires* an air carrier to *transfer* the PNR data …' (emphasis added).

---

35 – See paragraph 21 of this Opinion.

---

36 – See also, along similar lines, Opinion of Advocate General Kokott in *Parliament* v *Council* (C-263/14, EU:C:2015:729, point 67).

---

37 – See judgment of 6 May 2014, *Commission* v *Parliament and Council* (C-43/12, EU:C:2014:298, paragraphs 48 and 49).

---

38 – See, by analogy, judgment of 30 May 2006, *Parliament* v *Counciland Commission* (C-317/04 and C-318/04, EU:C:2006:346, paragraph 56).

---

39 – Article 23(2) of the agreement envisaged confirms the importance ascribed to the security of citizens of the Union when it states that the contracting parties are to cooperate to pursue the coherence of their respective PNR data processing regimes in a manner that 'further enhances the security of citizens of Canada [and] the European Union'.

---

40 – See, to that effect, by analogy, judgment of 30 May 2006, *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2006:346, paragraph 59).

---

41 – See, to that effect, judgment of 10 February 2009, *Ireland* v *Parliament and Council* (C-301/06, EU:C:2009:68, paragraph 83).

---

42 – Emphasis added.

---

43 – See the citations of Decision 2012/381 and Decision 2012/472, cited in footnotes 3 and 4, respectively, above.

---

44 – See, in particular, judgments of 10 January 2006, *Commission* v *Council* (C-94/03, EU:C:2006:2, paragraph 50); of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025, paragraph 48); and of 18 December 2014, *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449, paragraph 36).

---

45 – OJ 2008 L 350, p. 60.

---

46 – See Opinion of Advocate General Léger in Joined Cases *Parliament* v *Council and Commission* (C-317/04 and C-318/04, EU:C:2005:710, point 160).

47 – See judgment of 6 October 2015, Schrems (C-362/14, EU:C:2015:650, paragraphs 28 and 45 and the case-law cited).

48 – See the case-law cited in footnote 27 of this Opinion.

49 – Thus, at the hearing, in answer to a number of questions put by the Court, the Council's representative acknowledged that the three Member States concerned would not be able to vote on the adoption of an act by which they would not be bound. It seems to me, moreover, to be inconsistent on the Council's part to argue, as I have emphasised above, that the second question in the request for an opinion is inadmissible on the ground that the choice of Article 16 TFEU as the substantive legal basis for the act concluding the agreement envisaged, would have no impact, since the procedure for the adoption of measures based on that provision is the same as those procedures laid down in Articles 82(1)(a) and 87(2)(d) TFEU respectively, and to maintain, as regards the examination of the substance of that question, that those procedures are incompatible.

50 – See judgments of 22 October 2013, *Commission* v *Council* (C-137/12, EU:C:2013:675, paragraph 73), and of 18 December 2014, *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449, paragraph 37).

51 – See judgment of 19 July 2012, *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraph 80).

52 – On the latter article, see footnote 28 of this Opinion.

53 – In that regard, the Parliament draws a parallel with the approach taken in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 37).

54 – ECtHR, 1 July 2008, *Liberty and others v. United Kingdom* (CE:ECHR:2008:0701JUD005824300, paragraph 63).

---

55 – These expressions being used, respectively, by Ireland and the United Kingdom Government in their replies to the written question put by the Court.

---

56 – Likewise, verification of the degree of independence of the 'overseeing authority' established by the agreement envisaged requires that the Canadian legislation be taken into consideration: see points 311 to 316 below.

---

57 – I would point out, by way of reminder, that in accordance with Article 6(1) TEU the Charter is to have 'the same legal value as the Treaties'.

---

58 – See, on this criterion for the application of Articles 7 and 8 of the Charter, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 52); of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito* (C-468/10 and C-469/10, EU:C:2011:777, paragraph 42); and of 17 October 2013, *Schwarz* (C-291/12, EU:C:2013:670, paragraph 26).

---

59 – See, in particular, judgments of 9 November 2010 in *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 47), and of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito* (C-468/10 and C-469/10, EU:C:2011:777, paragraph 41).

---

60 – According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the rights guaranteed in Article 7 of the Charter 'correspond' to those guaranteed by Article 8 of the ECHR, while Article 8 of the Charter is 'based' on both Article 8 ECHR and Council of Europe Convention (No 108) of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States.

---

61 – Judgment of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 74).

---

62 – Judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraphs 34 and 35).

---

63 – Judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraphs 29 and 36).

---

64 – See, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 284 and 285).

---

65 – See, to that effect, judgments of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 75); of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 33); and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 87).

---

66 – See, to that effect, judgments of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 75); of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 33); and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 87).

---

67 – According to the information supplied to the Court, 28 million passengers took flights between Canada and the Union between April 2014 and March 2015.

---

68 – It should be noted that, in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 37), the Court considered that the impressions or sentiments generated in the minds of the public affected by rules on the processing and retention of personal data assumed a certain importance in the

assessment of the gravity of the interference with the fundamental rights safeguarded by Articles 7 and 8(1) of the Charter.

---

69 – As stated above, Article 11(1) of the agreement envisaged refers only to the information available on the Canadian competent authority's website, while paragraph 2 mentions only a rather vague obligation to work to promote transparency, preferably at the time of booking, consisting in informing passengers of, in particular, the reasons for PNR data collection and use.

---

70 – See, in particular, ECtHR, 24 April 1990, *Kruslin v. France* (CE:ECHR:1990:0424JUD001180185, paragraph 27), and ECtHR, 1 July 2008, *Liberty and others v. United Kingdom* (CE:ECHR:2008:0701JUD005824300, paragraph 59).

---

71 – See ECtHR, 1 December 2015, *Brito Ferrinho Bexiga Villa-Nova v. Portugal* (CE:ECHR:2015:1201JUD006943610, paragraph 47).

---

72 – See ECtHR, 2 August 1984, *Malone v. United Kingdom* (CE:ECHR:0802JUD000869179, paragraph 66).

---

73 – See ECtHR, 6 July 2010, *Neulinger and Shuruk v. Switzerland* (CE:ECHR:2010:0706JUD004161507, paragraph 99), and ECtHR, 12 June 2014, *Fernández Martínez v. Spain* (CE:ECHR:2014:0612JUD005603007, paragraph 118).

---

74 – Judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 66).

---

75 – Judgment of 17 October 2013, *Schwarz* (C-291/12, EU:C:2013:670, paragraph 35).

---

76 – See, in particular, judgments of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 42), and of 13 January 2015, *Council and Others* v

Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 52).

---

77 – See in particular, to that effect, ECtHR, 12 June 2014, *Fernández Martínez v. Spain* (CE:ECHR:2014:0612JUD005603007, paragraph 117 and the case-law cited).

---

78 – See, generally, the reasoning in points 217 to 320 of this Opinion.

---

79 – See judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 42).

---

80 – See, in particular, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 74), and of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 46).

---

81 – See judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 48).

---

82 – See judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 78).

---

83 – See, by analogy, judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 49).

---

84 – According to the interested parties, only Air Canada provides flights between Denmark and Canada.

---

85 – As the Kingdom of Denmark is not participating in the agreement envisaged, it must therefore be regarded as a third country for the purposes of that agreement, whose cooperation relationship between the Canadian competent authority and its own authorities is governed by Article 19 of the agreement envisaged.

---

86 – See, to that effect, by analogy, judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 77).

---

87 – See, to that effect, judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 54), and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 91).

---

88 – See, to that effect, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 86), and of 17 October 2013, *Schwarz* (C-291/12, EU:C:2013:670, paragraph 46).

---

89 – See, to that effect, judgment of 17 October 2013, *Schwarz* (C-291/12, EU:C:2013:670, paragraph 53).

---

90 – See Document 9944, approved by the Secretary General of the ICAO and published under his authority. The English version of this document is available at the following internet address: www.iata.org/iata/passenger-data-toolkit/assets/doc_library/04-pnr/New Doc 9944 1st Edition PNR.pdf.

---

91 – See, in that regard, paragraph 3.8 of the Guidelines on Advance Passenger Information (API) drawn up in 2010 under the aegis of the World Customs Organisation, the International Air Transport Association and the ICAO, available at the following internet address: http://www.icao.int/Security/FAL/Documents/2010%20API %20Guidelines%20Final%20Version.ICAO.2011%20full%20x2.pdf. In the Union, the collection of API is governed by Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ 2004 L 261, p. 24).

---

92 – See, in particular, the information on the website of the Canadian Ministry of Citizenship and Immigration (Citizenship and Immigration Canada): www.cic.gc.ca/english/visit/apply-who.asp.

---

93 OJ 2006 L 105, p. 54.

---

94 – See paragraph 236 of this Opinion.

---

95 – I shall examine the last two provisions in greater detail below. See paragraphs 292 to 294 and 274 to 290, respectively, of this Opinion.

---

96 – See, on Article 18 of the agreement envisaged, paragraphs 295 to 304 of this Opinion.

---

97 – In the context of the application of Article 8 of the ECHR, the ECtHR applies the 'reasonable suspicion' test, which may justify the interception of an individual's private communications for reasons linked with the protection of public security. See, in that regard, ECtHR, 4 December 2015, *Zakharov v. Russia* (CE:ECHR:2015:1204JUD004714306, paragraph 260).

---

98 – See concerning that authority, paragraphs 311 to 313 of this Opinion.

---

99 – See concerning that authority, paragraphs 311 to 313 of this Opinion.

---

100 – See ECtHR, 12 January 2016, *Szabó and Vissy v. Hungary* (CE:ECHR:2016:0112JUD003713814, paragraph 77 and the case-law cited).

---

101 – See paragraphs 306 to 321 of this Opinion.

102 – Judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 68).

103 – Judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraphs 62 to 64).

104 – See below, paragraphs 306 to 316 of this Opinion.

105 – It should be noted, however, that Article 16(5)(b) of the agreement envisaged provides that the retention may be extended for 'an additional two-year period only to ensure the accountability of or oversee public administration so that it may be disclosed to the passenger should the passenger request it'. As such, that extension of the retention of the data, which did not feature in the observations of the interested parties, does not appear to raise any particular problems, since it is designed solely to protect the rights of passengers whose PNR data has been processed.

106 – See paragraph 224 of this Opinion.

107 – Namely, respectively, 'other names on PNR, including number of travellers on PNR'; 'all available contact information (including originator information)'; 'general remarks including other supplementary information (OSI), special service information (SSI) and special service request (SSR) information, to the extent that it contains any information capable of identifying a natural person'; and 'any advance passenger information (API) data collected for reservation purposes to the extent that it contains any information capable of identifying a natural person'.

108 – See paragraph 267 of this Opinion.

109 – See paragraphs 306 to 316 of this Opinion.

110 – See, by analogy, judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 73).

111 – See, respectively, Article 18(1)(a) to (d) and Article 19(1)(a) to (d) of the agreement envisaged. It follows from Article 18(2) and Article 19(3) of the agreement envisaged that the safeguards laid down in those provisions are also to apply to the transfer of analytical information containing PNR data.

112 – See, by analogy, ECtHR, 12 January 2016, *Szabó and Vissy v. Hungary* (CE:ECHR:2016:0112JUD003713814, paragraph 77).

113 – It should be pointed out, for all practical purposes, that Article 19(1)(h) of the PNR Agreement concluded with Australia states that PNR data may be transferred on a case-by-case basis to a third country authority only where the Australian Customs and Border Protection Service is satisfied that the receiving authority has agreed not to further transfer PNR data.

114 – See, to that effect, judgments of 16 October 2012, *Commission* v *Austria* (C-614/10, EU:C:2012:631, paragraphs 36 and 37); of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237, paragraphs 47 and 48); and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 68).

115 – This letter constitutes, in accordance with Article 30(2)(b) of the agreement envisaged, the notification through diplomatic channels of the identity of the two authorities referred to in Article 10 and Article 14(1) of that agreement.

116 – L.R.C., 1985, ch. P-21. The consolidated version of that Act, up to date as at 16 March 2016, is available on the website of the Department of Justice Canada: http://lois-laws.justice.gc.ca.

117 – In the context of the application of Article 8 of the ECHR, the ECtHR emphasises the independence which the supervisory body must enjoy vis-à-vis the Executive. See, as regards the monitoring of interceptions of private communications, ECtHR, 4 December 2015, *Zakharov v. Russia* (CE:ECHR:2015:1204JUD004714306, paragraphs 278 and 279).

---

118 – It is thus apparent from the provisions of the Canada Border Services Agency Act (S.S. 2005, c. 38) that the Minister is responsible for the CBSA (section 6.1), that the President of the CBSA has the control and management of that agency 'under the direction of the Minister' (section 8.1) and that the CBSA exercises the powers that relate to the border legislation conferred by the Act 'subject to any direction given by the Minister' (section 12.1). No provision of the Act mentions the Appeals Directorate or, *a fortiori*, confers on it a special status within the CBSA. The Act, up to date as at 16 March 2016, is available on the website of the Department of Justice Canada: http://lois-laws.justice.gc.ca

---

119 – I would add that, when the agreement envisaged has been concluded, Article 26 thereof provides for a joint review of its implementation one year after its entry into force and at regular intervals thereafter, and in any event four years after its entry into force. If the implementation of Article 14(2) of the agreement envisaged gives rise to difficulties, they could therefore be evaluated by the contracting parties and, if necessary, resolved in application of Article 25(1) of that agreement or, failing that, could lead the Union to suspend the application of the agreement, in accordance with the procedure laid down in Article 25(2) of the agreement envisaged. Furthermore, when the agreement envisaged has been introduced into the EU legal order, none of those procedures would in my view detract from the possibility for a national court of a Member State, hearing a dispute relating to the application of that agreement, to submit a question to the Court for a preliminary ruling on the validity of the decision concluding the agreement, in the light of Article 5 of the agreement envisaged and the circumstances that have arisen after that decision, by analogy with the Court's observation in paragraph 77 of the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650) concerning the examination of the validity of an adequacy decision adopted by the Commission. The question as to the influence that the opinion of the Court that will be delivered in the present case may have on the answer to be given to such a reference for a ruling on validity is outside the scope of this Opinion.
