The EU Charter of Fundamental Rights and the Legal Order of Third Countries: A commentary on the *Schrems/PNR data* jurisprudence

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Nine years after it came into force, the Charter of Fundamental Rights of the EU is still revealing its potentiality. Certainly, the Charter is not in itself very different to other Bills of Rights, be it at a national or at an international level. But the Charter is the Bill of Rights of a supranational polity and just as this union of sovereign states is largely unique, so, in many ways, is its Charter of Rights.

Take for instance one of the *classics*, the field of application of the Charter. As it was to be expected, its addressees are not only the institutions and agencies of the Union but also the Member States, with an important *caveat* though: only in so far as they *implement* Union law. This is simply because it is impossible to judge on the EU law that is being implemented without at the same time reviewing the corresponding implementing national provision: The fundamental rights concerned should be the same for both legal orders in these situations. It is certainly Member Stare law in the formal sense, but at the same time, and for an important part, it is but the result of a work of reception of EU law in the national sphere.

A contrario, and without any need to specify it, the Charter of Fundamental Rights does *not* addresses itself to *the rest* of the States in the international community, that is, third countries. This is simply because the legal order of the Union, and the Charter as a part of it, is only binding on the Union and its Member States.

Concerning third countries and the relation of the Union with them another category appears in EU primary law, that of *human* rights, or as the TEU frequently calls them, "human rights and fundamental liberties", following the language of the ECHR. "*Human* rights" is the usual term for the rights and freedoms with a universal, overarching character that are supposed to prevail in the international community of states[1]. It only makes sense that this should be the category to which the Union commits itself in the Treaty on European Union, as it states that "In its relations with the wider world, the Union…shall contribute to…the protection of human rights" (art. 3, paragraph 5), proclaiming "the universality and indivisibility of human rights as a principle guiding the action of the Union in the international scene" (art. 21.1 TUE)[2]. Fundamental rights, in contrast, are the constitutional expression of the commitment of a given political community, in the exercise of the plenitude of its power, to a certain, usually higher, standard in the protection of individual rights and freedoms, as the driving force of its legitimacy. As such, they are not supposed to function as binding law

[1] B. BRANDTNER/A. ROSAS, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice", *European Journal of International Law*, 1998, n° 9, p. 468-490 ; A. ROSAS, "The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?, *Adam Mickiewicz University Law Review*, p. 7-24; A. THIES, "General Principles in the Development of EU External relations Law", *in*, M. CREMONA/A. THIES (eds.), "The European Court of Justice and External Relations Law. Constitutional Challenges". Oxford, Hart, 2014, p.139-163.

[2] By way of an exemple, in his Opinion in (the) case *Western Sahara Campaign*, Advocate General Melchior Wathelet invites the Court of Justice of the European Union (« the Court ») to declare invalid the acts of the Union donnant approbation et implémentant un accord de partenariat dans le secteur de la pêche entre l'Union européenne (à l'époque encore Communauté européenne) et le Royaume du Maroc datant de 2007, après avoir constaté l'incompatibilité de cet accord, entre autres, avec le droit à l'autodétermination des peuples en tant que partie des *droits de l'homme*. Case *Western Sahara Campaign and The Queen contre Commissioners for Her Majesty's Revenue and Customs* (C-266/16), opinion of 10 of January 2018, EU:C:2018:1, point 99.

for other political communities nor should the Union expect third countries to abide by its own Charter of Rights[3].

Only by way of exception, in very particular circumstances, can fundamental rights find application outside the Union. As Advocate General Melchior Wathelet wrote in his opinion in the Front Polisario case[4], this would certainly be the case where "an activity is governed by EU law and carried out under the effective control of the EU and/or its Member States but outside their territory[5]."

Against this backdrop, it may come as a surprise that the ECJ decided in 2015 and confirmed in 2017 to *scrutinize* the law and practices of a third country not with the yardstick of human rights, but with the one provided by the EU Charter of Fundamental Rights. I shall refer to this case law as the Maximilian *Schrems/Passenger Name Record* jurisprudence[6] (or *Schrems/PNR*). Importantly,

[3] O. DE SCHUTTER, "The New Architecture of Fundamental Rights Policy in the EU", *European Yearbook on Human Rights*, 2011, p. 107-141; id., *The implementation of the Charter of Fundamental Rights in the EU institutional framework*, European Parliament, Study for the AFCO Committee, 2016, 55-67.

[4] Case Council of the European Union/*Front Populaire pour la libération de la Saguía el Hamra et Rio de Oro (Front Polisario)*, C-104/16 P (Judgment of 21 December 2016, EU:C:2016:973, opinion of the 13 September 2016, EU:C:2016:677).

[5] «As regards the claim made by the Council and the Commission that, in relying on Articles 1 to 3, 5, 15, 16, 17, 31 and 32 of the Charter of Fundamental Rights in paragraph 228 of the judgment under appeal, the General Court conferred on its provisions an extraterritorial effect contrary to Article 51 thereof, it should be noted at the outset that, as is acknowledged by the Kingdom of Belgium and the Commission, fundamental rights may, in some circumstances, produce extraterritorial effects. That is certainly the case where an activity is governed by EU law and carried out under the effective control of the EU and/or its Member States but outside their territory. (128) (Opinion of Advocate General Wathelet, point 270, *cit*. n. 5)

[6] Case *Maximilian Schrems v Data Protection Commissioner*, C-362/14 (« *Schrems1* »), judgment of 6 October 2015, EU:C:2015:650 and opinion of 23 September 2015,

it is not only the substantive provisions of the Charter (that is the enunciation of the different rights and freedoms) that are concerned but also the *operational programme*, so to speak, of the Charter, or, again, in the language of the Charter itself, the general provisions governing the interpretation and application of the Charter (Chapter VII). This is relevant because the difference between the category of *human* rights and that of *fundamental* rights frequently lies not so much in the description of the different rights, which may be literally identical, but in the general regime of their protection, and in particular, in the provisions concerning the admissibility of a *limitation* of a fundamental right.

The *Schrems/PNR* line of cases, surprising as it may appear concerning external relations, was not new in itself, that is, with respect to the scope given to the protection of the fundamental rights involved in a *situation* of collection and processing of personal data. On the contrary, to a large extent, these cases are, substantially, merely the consequence of a previous doctrine, although one relating to an internal setting. In a couple of perfectly well known cases, handed down in 2014 and 2016 respectively, the ECJ adopted a very strong position on the protection of the fundamental rights concerned in the collection and processing of personal data. For the sake of this presentation I shall call this the *Digital Rights Ireland (or DRI)/Tele2 Sverige* doctrine, taking into account that the second ruling is younger than *Schrems*[7]. It may well be said that *Schrems* exists

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EU:C:2015:627; Opinion 1/15 (Agreement PNR UE-Canada), of 26 July 2017, EU:C:2017:592; opinion of 8 September 2016, EU:C:2016:656.

[7] CJ, Judgment of 8 April 2014, *Digital Rights Ireland Ltd y Minister for Communications*, C-293/12 and *Kärnter Landesregierung and others*, C-594/12, EU:C:2014:238, and Opinion of 19 December 2013, EU:C:2013:845; Judgment of the 21 December 2016, *Tele2 Sverige AB v Post-*

because of *Digital Rights Ireland*, or to put it in another way, the existence of *Schrems* is hardly conceivable without the previous existence of *DRI*. For its part, *Tele2 Sverige* is also the logical consequence of *DRI*, as applied to Member States.

In the following I begin with a brief summary of the *DRI* and *Tele2 Sverige* case-law (1), that will be followed by a description of the *Schrems/PNR* doctrine (2), the significance of which I shall try to present in the form of closing remarks (3).

1. The fundamental rights at stake in the collection and processing of personal data: The internal dimension (*Digital Rights Ireland* and *Tele2Sverige*)

It can easily be demonstrated that the case law of the ECJ in the field of data protection has had a decisive role in consolidating the new paradigm of protection of fundamental rights contained in the Charter. A few months after the entry into force of the Charter, still in 2010, the ECJ was already making full use of the *operational programme* of article 52, paragraph 1 of the Charter in the *Schecke/Eifert* case, dealing with the publication of the beneficiaries of a EAGGF programme[8]: In the case, the Grand Chamber engages in a careful analysis of the different conditions the limitation of a fundamental right must fulfil to be acceptable: Provided for by law, respect of the essence of the rights and freedoms, general interest and respect of the principle of proportionality.

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och telestyreisen, C-203/15 *and Secretary of State for the Home Department / Tom Watson and others*, C-298/15, EU:C:2016:970, and Opinion of the 19 July 2016, EU:C:2016:572.

[8] Regulation (CE) n. 1290/2005 of the Council, of 21 June 2005, concerning the financing of the Common Agricultural Policy.

It is nevertheless clear that the "flagship" of this new jurisprudence is *Digital Rights Ireland*, where the ECJ declares invalid in its entirety the very controversial Directive 2006/24[9]. The unconditional obligation imposed on Member States to provide, in their own legal order, for the universal retention for a fixed period of time (between six and twelve months) of certain personal data obtained from electronic communications is declared invalid as incompatible with a trias of fundamental rights proclaimed in the Charter (arts. 7, 8 and 47). A variety of concurrent circumstances help explain its resounding echo. Firstly, it can be read together with the contemporary *Google Spain*[10], symbolizing the consecration of the ECJ as a "court of human rights". Secondly, the radical difference in the number of persons affected: While *Schecke/Eifert* affected a small group of EU citizens, *Digital Rights Ireland*, as well as *Google Spain*, concerned all users of electronic communications. Thirdly and finally, the political relevance of this declaration of invalidity was not comparable to the declaration of invalidity in 2010 of a few provisions concerning the common agricultural policy.

The relevance of *DRI* derives from two facts more relevant for our present concern: on the one hand, the weight ascribed in general to the fundamental rights to privacy and the protection of personal data; on the other hand, the strict analysis of all of the conditions that need to be fulfilled to authorize a limitation of fundamental rights. Just as it did in *Schecke/Eifert*, the ECJ engages in a strict

[9] Directive 2006/24/CE 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

[10] CJ, Judgment of13 May 2014, *Google Spain, S.L., Google Inc. and Agencia Española de Protección de Datos (AEPD), Mario Costeja Fernández*, C-131/12. EU:C:214:317.

review of the conditions contained in art. 52, paragraph 1 CFR, with particular attention to the principle of proportionality in the sense of the Charter. It is mainly with regard to the obligation of a universal retention, largely deprived of safeguards, of a large amount of personal data imposed on the Member States that the ECJ, on the grounds of the principle of proportionality, comes to a declaration of invalidity.

In this context a question was still open, that of the consequences that *Digital Rights Ireland* should have on the legislation of the Member States on the matter, a legislation enacted in most of the cases in the form of transposing Directive 2006/24, just declared invalid by the *DRI* ruling. The question was presented one year later by the Swedish and British courts and answered by the ECJ at the end of 2016, a year after *Schrems*[11].

In the specific case of the Swedish proceedings, and as an immediate reaction to the *DRI* ruling, a Swedish telecommunications company, *Tele2 Sverige*, had put an end to the personal data retention provided for by the Swedish legislation transposing Directive 2006/24, considering it as clear that after *DRI* the kind of data retention introduced by the annulled directive had no place in the EU legal order. The Swedish authorities, however, considered the Swedish legislation to remain in force, notwithstanding the annulment of the directive. The reference for a preliminary ruling in the ensuing proceedings, in the absence of the annulled directive, was based on an older one, Directive 2002/58[12]. But, in order to accept that, the ECJ had to find that the national legislation had also been enacted with

[11] Cit. n. 6.

[12] Directive 2002/58/CE of the European Parliament and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

regard to the older directive, rejecting the arguments of some Member States in this regard[13]. In a subsequent step the ECJ had to examine whether Article 15, paragraph 1, of the said directive[14], interpreted in the light of the Charter, barred such national legislation as the one enacted both by the United Kingdom and Sweden.

The answer to these references could not be immediately derived from the *DRI* ruling, a decision that largely responded to the particular characters of Directive 2006/24. The ECJ had to engage in a largely new review of the concerned national legislation. But the inspiration could be no other than *DRI*. The reasoning in *Tele2 Sverige* is very close to that in *DRI*: After a careful examination of the conditions imposed by article 52.1 CFR the ECJ concluded that articles 7, 8, and 11 of the Charter prohibited national legislation that mustered the same degree of

[13] Article 1, paragraph 3, of the Directive provided that it "shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law."

[14] "Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union".

indetermination and the same lack of safeguards that characterized the annulled directive[15].

Taken together, *DRI* and *Tele2 Sverige* offer the image of a *round trip*: ten years after the adoption of directive 2006/24, after litigation questioning the legal basis of the directive and the behavior of some of the Member states "dragging their feet", as it were, in transposing the directive, it is finally declared invalid in 2014, followed two years later by the declaration of incompatibility of the national legislation not yet abrogated or annulled by the competent national authorities[16].

More importantly, the *DRI/Tele2 Sverige* jurisprudence has played a decisive role in the consolidation of a new paradigm in the protection of fundamental rights in the Union. This paradigm strengthens the identity of fundamental rights in the EU, keeping pace with the constitutional standards of the Member States considered the frontrunners in the matter. In this regard, the formula of article 52, paragraph 1 CFR concerning the limitations of fundamental rights occupies center stage. These conditions are addressed to the public authorities, to the EU legislator as well as to those of the Member States, but it is at the same time the operational scheme that the ECJ as well as the national judiciary is supposed to follow when a fundamental right of the Charter is restricted or limited. Under the conditions of article 52.1 CFR the main role falls upon the principle of proportionality. Without prejudice to the relevance of the other conditions

[15] See the references to the freedom of opinion in points 92, 101, 107 et 112 of the Judgment, with citation of the points 25 and 70 of the *DRI* Judgment.

[16] As it follows from the Judgment pronounced on the occasion of the case *Tele2 Sverige* (jointed cases C-203/15 and C-698/15, point 58), the Court of Appeal (at the origin of the request for a preliminary ruling in case C-698/15, *Watson*) points out that six national Courts have declared null and void their national laws on the basis of the *DRI* doctrine.

imposed by article 52, paragraph 1 CFR, it is the various steps in the review of the proportionality requirement, as originally taken from the constitutional jurisprudence of some Member States, that will characterise the protection of fundamental rights in the Union.

2. The fundamental rights at stake in the collection and processing of personal data: The external dimension (*Maximilian Schrems* and *Passenger Name Record*)

Both *Digital Rights Ireland* and *Tele2 Sverige* had considered the lack of safeguards for transfers of personal data outside the Union as a serious objection to the validity or the compatibility of the directive of 2006 or the national legislation[17]. This was the question the ECJ had to answer first in *Schrems* and then in *PNR*. More to the point, the Court had to adjudicate on the level of protection, either existing or foreseen, for personal data in third countries and, consequently on the validity or compatibility of acts of the Union authorizing the transfer of the said personal data to third countries. In other respects, both from a material and a procedural perspective, these are very different cases, one concerns a decision of the Commission (*Schrems*), the other an international agreement (*PNR*); procedurally one is a request for a preliminary ruling, the other

[17] « [...]it should be added that that directive *does not require the data in question to be retained within the European Union*, with the result that it cannot be held 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, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out *on the basis of EU law*, is *an essential component* of the protection of individuals with regard to the processing of personal data…» (*Digital Rights Ireland, pt. 68)*; "In particular, the national legislation must make provision for the data to be retained within the European Union…" (*Tele2 Sverige*, pt. 122).

a request for an opinion on a draft agreement. But the similarities between both cases are also remarkable.

Shrems offered the Court, in the first place, the opportunity to decide whether the strict doctrine contained in *DRI*[18] could apply by analogy outside the frontiers of the Union. The legal framework for the transfer of personal data to third countries was, at the time, Chapter IV of Directive 95/46[19]. Paragraphs 1 and 6 of Article 25 of the directive were crucial in this regard: the first one required an "adequate" level of protection of personal data in the third countries receiving the transfer of such data from the territory of the Union[20]; the second one empowered the Commission to issue a statement of "adequacy" with regard to a third country. In the case at hand, that was what the Commission had done 15 years earlier with the so called Safe Harbor scheme regarding the United States of America[21].

The questions addressed by the High Court of Ireland were related to Directive 95/46 "in the light of articles 7, 8 and 47 of the Charter" and more precisely on the question a) whether the competent national authorities were absolutely

[18] *Tele2 Sverige* still pending at the date of the *Schrems* ruling.

[19] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Today replaced by Chapter V of Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2017 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation).

[20] *A contrario*, recital 57 of the directive declared that, **"**Whereas… the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited…"

[21] 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

bound by the Community finding on the adequacy of the legal and factual situation in the concerned third country, and b) whether the said authorities were allowed to take into consideration factual developments intervening after the Commission decision. The ECJ answered both questions in the affirmative. But it went a significant step further.

Always following the argumentative lines of advocate general Yves Bot, the ECJ reviewed the validity of the Commission decision, considering that a ruling on the validity was also implied in the referral of the High Court. It declared that a decision on adequacy as the one considered in article 25 paragraph 6 could only retain its validity as long as the circumstances existing at the time of the decision had not changed over time, failing which the decision could become invalid[22]. In the case at hand, this meant that the validity of the Commission decision of 2000 had to be analyzed in the light of the legal and factual situation in the United States prevailing in 2015. Before that analysis could be undertaken the court had to decide on the meaning of the formula "adequate level of protection", used by the directive 95/46[23]. The Court, in this regard following the view of the High Court, considered that the formula and in particular the adjective "adequate" had to be construed, at the time, in the light of the relevant articles of the Charter.

[22] In the words of the opinion of the advocate general, "The obligation for the third country to ensure an adequate level of protection is thus an ongoing obligation. While the assessment is made at a specific time, retention of the adequacy decision presupposes that no circumstance that has since arisen is such as to call into question the initial assessment made by the Commission" (point 147).

[23] Thus, Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and, as the Advocate General has observed in point 139 of his Opinion, is intended to ensure that the high level of that protection continues where personal data is transferred to a third country2 (*Schrems1*, point 72, emphasis added).

Again agreeing with its advocate general[24], the Court took the view that the level of protection required by EU law when transferring personal data out of the Union had to be "essentially equivalent" to the one existing inside the Union.[25] It thus essentially substituted an "essential equivalence requirement" for the "adequacy requirement". By doing so it replaced a rather autonomous term ("adequate") with a term that requiring an exercise of comparison between two legal orders. This was bound to have significant consequences: In practical terms it implied the scrutiny of the legal and factual situation in a third country with the yardstick of the fundamental rights guaranteed in the Union[26].

And this is how the *operational programme* of article 52, paragraph 1 CFR came to be activated in the legal order of a third country as if it was a Member State:

[24] "Although the English word 'adequate' may be understood, from a linguistic viewpoint, as designating a level of protection that is just satisfactory or sufficient, and thus as having a different semantic scope from the French word 'adéquat' ('appropriate'), the only criterion that must guide the interpretation of that word is the objective of attaining a high level of protection of fundamental rights, as required by Directive 95/46" (point 142 of the Opinion).

[25] « […]as the Advocate General has observed in point 141 of his Opinion, the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter » (point 73 of the Judgment). Cfr. Gabe Maldoff & Omer Tene, "Essential Equivalence" and European Adequacy after Schrems: The Canadian Example, Wisconsin International Law Journal, 2017.

[26] « […]the Commission can find, on the basis of Article 25(6) of Directive 95/46, that a third country ensures an adequate level of protection only where, *following a global assessment of the law and practice in the third country in question*, it is able to establish that that third country offers a level of protection that is essentially equivalent to that afforded by the directive, even though the manner in which that protection is implemented may differ from that generally encountered within the European Union" (point 141 of the Opinion, emphasis added**).**

DRI would be constantly cited "by analogy", as if we still were analyzing events inside the Union[27].

The best example of this use of the Charter as a yardstick of the legal order of a third country is the language of the Court concerning such a classical category as the "essence" of the fundamental rights concerned. In the case we analyze, the essence of the rights to privacy[28] and to an effective remedy[29] is declared compromised or ignored. One of the defining categories of the doctrine of fundamental rights in the Member States, as well as in the Charter, is the object of import and transplant to the United States.

With *Schrems* a "situation" (in the sense of *Wachauf* and *ERT*) is born, in which *the* legal order of a third country is scrutinized (with the details still to be discussed)[30]. Two years later, Opinion 1/15 of the Court provides for a confirmation of this "situation" in an admittedly different substantive and

[27] See the constant citation of *DRI* by the advocate general: points 68, 69, 70, 73, 74, 75, 76, 79, 80, 86 of the Opinion.

[28] "In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising *the essence of the fundamental right* to respect for private life, as guaranteed by Article 7 of the Charter (see, to this effect, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 39) » (pt. 94, emphasis added. In other languages, "contenu essentiel", "Wesensgehalt", "contenido esencial"). Similarly the advocate general in his examination of the practice of the U.S. intelligence services (pt. 177).

[29] « Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect *the essence of the fundamental right* to effective judicial protection, as enshrined in Article 47 of the Charter » (pt. 95, emphasis added).

[30] « It is clear from the express wording of Article 25(6) of Directive 95/46 that it is *the legal order of the third country* covered by the Commission decision that must ensure an adequate level of protection» (point 74, emphasis added).

procedural setting: In lieu of a Commission decision a draft agreement with a third country, in lieu of a referral for a preliminary ruling a request of the European Parliament for an opinion on the basis of article 218 (11) TFEU.

In very simple terms, the envisaged agreement provided that "passenger name record" data collected from the passengers of transatlantic flights between Canada and the EU were to be transferred to the Canadian authorities in order to prevent terrorist offenses and other serious criminal offences. The European Parliament specifically invoked in its request for an opinion the Charter of Fundamental Rights as interpreted in *Digital Rights Ireland*.

In order to fully understand the connection of *PNR* with the *Schrems* case alleged here, it must be noted that although the agreement is intended to be the law both for Canada and for the EU, in its material contents it concerned the safeguards that Canada is supposed to provide for the protection of the personal data collected and processed in exchange of the transfer of these data to Canada.

The agreement included in its article 5 a formula we are by now familiar with: the requirement of an "adequate level of protection"[31]. As was to be expected the Opinion of the Court follows the formula that it had shortly before established in *Schrems*: the adequacy requirement, construed in the light of the Charter, is tantamount to an essential equivalence requirement. Accordingly this triggers the same consequences as in *Schrems* for the scrutiny to be undertaken: The legal framework foreseen for the protection of personal data in Canada should not be lower than the one existing in the EU, and that means the activation of the

[31] "…the Canadian Competent Authority is deemed to provide an adequate level of protection, within the meaning of relevant European law, for the processing and use of PNR data"

requirements contained in article 52.1 CFR for the limitations of fundamental rights (proportionality in particular). The ECJ arrived at a verdict of incompatibility of the agreement with EU law concerning sensible data[32], and made the final approval of the agreement dependent on the correction of a number of deficiencies found during the scrutiny.

III. **The *Schrems/PNR* doctrine: a commentary, in ten points**

One*: Schrems/PNR* does not put in doubt the clear principle stated in Article 51 CFR that the Charter is binding on the Union and, under certain conditions, on the Member States, but not on third countries. "In its relations with the wider world", as the TEU says, the prevailing category for the Union is that of *human* rights.

Two: Notwithstanding that principle, *Schrems/PNR* proves that there is, at least, one "situation" (in the sense of the *Wachauf*/*ERT* doctrine) where the Charter serves as a yardstick for the *scrutiny* of the law and/or the practices of a third country. This "situation" is by no means irrelevant: It concerns such a major domain as the *transfer* of personal data from the territory of the Union to third countries, a certainly momentous concern not only for fundamental rights but

[32] "As regards the transfer of sensitive data within the meaning of Article 2(e) of the envisaged agreement, that provision defines such data as any information that reveals 'racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership', or concerning 'a person's health or sex life'. Although none of the 19 headings set out in Annex to that agreement expressly refers to data of that nature, as, inter alia, the Commission confirmed in its answer to the questions posed by the Court, such information could nevertheless fall within the scope of heading 17. Furthermore, the fact that Articles 8 and 16 of the envisaged agreement lay down specific rules relating to the use and retention of sensitive data necessarily implies that the parties to that agreement have accepted that such data may be transferred to Canada» (Opinion 1/15, point 164).

also for global communications and the global economy at large. We shall call it *the transfer situation*.

Three: The *channel* through which the Charter enters the legal order of third countries is what might be called *the rule of equivalence*: The ECJ (*Schrems/PNR*) has construed the "*adequacy* requirement" contained at the time in Directive 95/46 (art. 25.6) or in the draft agreement Canada/EU as an "*essentially equivalent* requirement". The consequence is that there is no need to inquire into an autonomous meaning of the term "adequacy": Its purpose is to maintain the "high" level of protection required by EU law, accordingly the formula should be read as making the transfer of personal data conditional on a level of protection essentially equivalent to the one prevailing in the Union. The immediate consequence is that the protection of personal data effectively existing in the third country in question is to be measured by the same parameters as in the Union, that is, with the yardstick of the Charter: And this is how the Charter flows into the legal order of a third country.

Four: The *nature* of this scrutiny is merely *instrumental*: Since the Charter is in principle not binding for third countries, the scrutiny of the legal order of the third countries occurs only with the purpose of adjudicating on the compliance with the legal instrument of the Union that has made it possible (or intends to make possible) to transfer personal data out of the territory of the Union. In its judicial capacity the ECJ is not issuing any verdict whatsoever on the *rightfulness* of the behavior of the public authorities of a third state: It approaches the legal and factual situation in the third country in question, we could argue, as a mere question of fact, notwithstanding its implications for the EU legal order.

Five: As for *the breadth* of the scrutiny, the potential standard by which to measure the collection and processing of personal data in a third country is the Charter in its entirety: In the case-law considered, it is the case of the *tandem* of articles 7 and 8 of the Charter in the first place, that is privacy and protection of personal data, but also, as *Schrems/PNR* has proven, the right to an effective remedy (art. 47), freedom of expression (art. 11) and equal treatment (art.21).

Six: As for *the standard* of the scrutiny it can be said that it takes place with the same intensity as if the ECJ were reviewing an act of the Union (like in *Digital Rights Ireland*) or of a Member State (like in *Tele2 Sverige*), with the obvious difference of the absence of a declaration of invalidity or of incompatibility of any provision of the legal order of a third country. The same conditions that the Charter imposes on the EU and the Member States for introducing a limitation of a fundamental right are *strictly* required for the justification of the actions of the third country, as well (essence, proportionality, etc.). Figuratively speaking, the Charter simply *ignores* that it is treading on foreign soil, and scrutinizes the legal order of the third country as if it were a Member State.

Seven: A negative finding of the ECJ, as already said, has no consequences for the legal order of the third country, which remains perfectly unaffected. Nevertheless, such a finding has immediate consequences for the legal order of the Union, be it already existent legislation (invalidity, *Schrems*), be it only legislation in the making (incompatibility, *PNR*). There has not yet been a case concerning an act of a Member State in the same situation, in which the Commission was in *Schrems*, but the extension of the doctrine by way of analogy seems evident: A similar act of a Member State should be subject to a similar

corresponding declaration of incompatibility. The legal act in question is in violation of primary law *because* it has not correctly evaluated the legal order of a third country or its practices in deciding on the transfer of personal data to the said territory outside the Union: The error in evaluating the law or practices of a third country has immediate consequences for the validity of the act of the Union or of a Member State.

Eight: The final question would be: Are we dealing with a specific "situation" (transfer of personal data outside the Union) in which the Charter is relevant for the legal order and the practices of a third country and in an indirect way for the EU legal order? Or, alternatively, is this the manifestation of a wider "principle", that is, a general rule with its own rationality? In other terms: Does the situation being discussed here result from the particular nature of automatized personal data and its borderless circulation across the Globe? Or is there a deeper rationale behind it, a *principle*, as it were?

Nine: The *Schrems/PNR* jurisprudence, the decisions themselves as well as the opinions of the advocates general, seem to speak in favor of the formulation of a *principle*. In *Schrems* we can read that art. 25.6 of directive 95/46 "is intended to ensure that the high level of that protection *continues* where personal data is transferred to a third country"[33]. And in *PNR* we likewise read "(t)hat right to the protection of personal data requires, inter alia, that the high level of protection of fundamental rights and freedoms conferred by EU law *continues* where personal data is transferred from the European Union to a non-member country"[34].

[33] Pt. 72.
[34] Pt. 134.

Ten: The repeated use of this language would argue in favor of formulating a *principle of continuity* in the sense that in their external relations the Union and the Member States would be under an obligation to *preserve* the quality of the fundamental rights enjoyed by the citizens of the Union as well as the residents in the Union[35]. Put otherwise, the Union and the Member States, in their external relations, should abstain or refrain from jeopardizing the high level of protection of the fundamental rights enjoyed by the citizens and residents of the Union. As a final remark: a principle formulated in such terms is ambitious: A general requirement of essential equivalence in the external relations of the Union is a far-reaching objective. At the moment, and with certainty, we can only speak of a single, although relevant situation, a transfer of personal data situation. To maintain the "essential equivalence requirement" in this domain is a challenge in and of itself. But at the same time it gives a strong signal for other developments.

[35] The idea is accurately conveyed by advocate General Yves Bot in *Schrems1*: «…the fact that the Commission has adopted an adequacy decision cannot have the effect of reducing the protection of citizens of the Union with regard to the processing of their data when that data is transferred to a third country by comparison with the level of protection which those persons would enjoy if their data were processed within the European Union» (point 106). Today, article 44 of the GDPR states, that "All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons *guaranteed by this Regulation is not undermined"*.