THE HIGH COURT

Record No: 2013/ 765JR

IN THE MATTER OF AN APPLICATION TO INTERVENE

BETWEEN:

MAXIMILIAN SCHREMS

Plaintiff

-and-

DATA PROTECTION COMMISSIONER

Defendant

ON THE APPLICATION OF
DIGITAL RIGHTS IRELAND LIMITED

Applicant

AFFIDAVIT OF ANTOIN O'LACHTNAIN

I, **Antoin O'Lachtnain**, Director of Digital Rights Ireland Limited, having its registered office at 10 Castlehill, Bennettsbridge Road, Kilkenny, aged 18 years and upwards, **MAKE OATH** and say as follows:

1. I am a businessman and a Director of Digital Rights Ireland Limited, an Irish rights body devoted to defending civil, human and legal rights in the digital age which is a non-party Applicant to the within proceedings.

2. I make this Affidavit in order to ground the Notice of Motion had herein, and I seek admission to the above-entitled proceedings for Digital Rights Ireland Limited ("the Applicant") with the status of *amicus curiae* in these proceedings. I make this Affidavit with the full authority and consent of the Applicant, and from a perusal of the company's books and accounts in my custody and control. I do so from facts within my own knowledge save where otherwise appears, and where so appearing I believe same to be true and accurate.

3. I beg to refer to the proceedings had herein when produced.

Digital Rights Ireland Limited

4. I say that the Applicant was founded in 2005 and is a not for profit undertaking devoted to defending civil, human and legal rights in a digital age. It seeks to inform and educate members of the public regarding their rights in the information society and where possible to vindicate and assist in vindicating those rights. Its funding is derived from modest donations from members of the public.

5. I say that Applicant is a member of the European Digital Rights Initiative – EDRI, and also works with other civil rights groups such as the Irish Council for Civil Liberties, the UK based Privacy International and the US based Electronic Frontier Foundation.

6. The Applicant successfully applied for, and was granted *locus standi* before this Honourable Court, in a case entitled *Digital Rights Ireland Limited v Minister for Communication and Ors.* [2010] IEHC 221. In that matter a number of rights issues were successfully litigated before this Honourable Court, resulting in a number of matters being referred to the Court of Justice of the European Union, for reference. I beg to refer to a copy of the judgment of Mr Justice McKechnie in that case, upon which pinned together and marked with the letters **"AOL 1"** I have signed my name prior to the swearing hereof. I would in particular draw the attention of this Honourable Court to the findings of Mr Justice McKechnie that the Applicant was a "sincere and serious litigant" and that in the context of that case it was appropriate to grant the Applicant the ability to advance arguments on behalf of citizens in general, in the nature of an *actio popularis* (paragraphs 91-93).

7. I say that in the subsequent reference to the Court of Justice of the European Union, it was held that the Directive the subject of the reference, 2006/24/EC (the "Data Retention Directive") was invalid having regard to Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. I beg to refer to a copy of the judgment of the Court in that case, upon which pinned together and marked with the letters "**AOL 2**" I have signed my name prior to the swearing hereof.

8. I note that the Foreword to the 2013 annual report of the Office of the Data Protection Commissioner, written in May of this year by the Commissioner, Mr. Hawkes, contained the following paragraph:

> *"The recent decision of the Court of Justice of the European Union to invalidate the Data Retention Directive has clearly set out the need for proportionality in this area. The lack of such proportionality led my predecessor, Joe Meade, to take enforcement action against the initial Irish data retention regime, action that has now been vindicated by the CJEU judgment. The CJEU judgement also shows the importance of*

challenging such privacy-destroying measures, as was done in this case by Digital Rights Ireland, supported by the Irish Human Rights Commission."

I beg to refer in this regard to a copy of the said Foreword, upon which pinned together and marked with the letters "**AOL 3**" I have signed my name prior to the swearing hereof.

9. I say that the Applicant operates a website at www.digitalrights.ie designed to facilitate information about the various civil, legal and human rights that arise in the digital age. The Applicant's website is available to this Honourable Court in assessing the *bona fides* of this Application. The Applicant has also sought to inform public debate through other means including newspaper articles, meetings with elected representatives, submissions to official bodies and the organising of public events on issues such as privacy and copyright reform. The Applicant has made submissions to the Oireachtas Joint Committee on Transport and Communications hearings on social media, and has made a joint submission with Catherine Murphy TD and Stephen Donnelly TD and McGarr Solicitors to the government's Copyright Review Committee.

10. I say that Applicant is a *bona fide* organisation with credibility and a track record of success in informing public debate and assisting with vindicating the rights of the general public on the Internet and within the information society.

Interest in the within proceedings

11. I say that the Applicant maintains a strong interest in these proceedings owing to the fact that this will be the first time a Court of a member state of the European Union has sought have examined the effect of Commission Decision 2000/520/EC of 26 July 2000 ("the Decision") *vis-á-vis* the provisions of European Union law, and in particular with regard to Articles 7 & 8 of the Charter of Fundamental Rights of the European Union. I say that the said decision affects the personal data of every citizen of the European Union.

12. I say that although the proceedings had herein relate solely to data controlled by Facebook, that the Decision and the principles at issue in this reference to the Court of Justice relate to *all* data transferred to the United States, including sensitive and intimate personal such as email communications.

13. I say and believe that the Decision, which was made prior to the coming into force of the Charter, may not comply with the requirements of the said Articles 7 & 8, and that it is in the interests of the citizens of the European Union that such compliance or otherwise be examined to the fullest possible extent allowed by the nature of the proceedings. I further say and believe that the herein proceedings offer the best opportunity for such an examination.

14. The Applicant is concerned to ensure that, given the significance of the matters before this Honourable Court that all the issues which are before it are fully ventilated and explored. This is particularly so given the operation of the Decisions impacts not merely on the parties to this action but also on parties not currently before this court. These parties would include, *inter alia*, not only Irish data subjects, but also Irish data controllers who are customers of US-based "cloud computing" services which operate under the aegis of the Safe Harbour Agreement. Accordingly the Applicant would seek leave to put before the court matters which those persons might seek to raise were they themselves directly represented.

Any role exercised as *amicus curiae*

15. The Applicant, though it seeks to address questions of national and European Union law, is concerned to take no position of partisanship in respect of the dispute between the parties herein. The Applicant, despite taking a keen interest in the proceedings, did not seek to intervene at an earlier stage, when there was nothing it could add to what was, at that stage, a narrow domestic Judicial Review. Further, it would not have been helpful or appropriate for the Applicant to seek to intervene whilst there were live matters of controversy between the parties. However, having considered the judgement of this Honourable Court of 18th June, 2014, and in particular paragraph 82 where it is stated

> *"The Commissioner has rather demonstrated scrupulous steadfastness to the letter of the 1995 Directive and the 2000 Decision"*

the Applicant considers that the proceedings have passed that stage of controversy during which an intervention might be of a partisan and inappropriate nature.

16. I say and believe that, notwithstanding that the herein proceedings are at the trial rather than the appellate stage, that no controversy of fact now exists between the parties, and that the remaining questions are more akin to those examined at appellate level. This is particularly so where the certain questions are to be referred to the Court of Justice of the European Union, albeit by way of preliminary reference rather than appeal. Accordingly, I say and believe that the admission of the Applicant as *amicus curiae* would cause no inequality of arms as between the parties herein.

17. I note, in this regard, that both Mr. Schrems and the Data Protection Commissioner made public statements welcoming this Court's judgment of the 18th June, 2014, and looking forward to the consideration of important matters of public interest by the Court of Justice of the European Union.

18. I say therefore that it is with the utmost consideration and respect for this Honourable Court and the parties to this litigation that the Applicant applies to intervene for standing as *amicus curiae* in the circumstances.

19. I say and believe that the Applicant can maintain a neutral role in assisting this Honourable Court in certain matters that may arise, and by bringing expertise to this case in areas that might not otherwise be available, or be ventilated by the parties seeking to protect their own discrete interests.

The Applicant's role before this Honourable Court

20. I say that the Applicant may, if given leave to do so by this Honourable Court, apply to this Honourable Court to refer to the Court of Justice, not only the question proposed in the Judgement of 18th June, 2014, but also a question regarding the validity of Decision itself. I say that in the aforementioned case of *Digital Rights Ireland Limited v Minister for Communication and Ors*, a question not originally by either of the parties was included in the final reference to the Court of Justice at the application of the Irish Human Rights Commission, as *amicus curiae*.

21. I say and believe, and the Applicant will submit, that a question is "raised" for the purposes of Article 267 of the TFEU where it is raised by any party in the proceedings, including an *amicus curiae*. I further say, and the Applicant will submit, that such a question having been raised, this Honorable Court may refer it to the Court of Justice of the European Union if it considers that a decision on the question is necessary to enable it to give judgment.

22. I say that, as social media data, by definition, relate to a person's location, acquaintances and opinions, the processing of such data raises, in addition to issues of privacy and data protection, questions of freedom of expression, freedom of association and freedom of movement, as enshrined in both the Charter of Fundamental Rights and *Bunreacht na hÉireann*. I say that the Applicant is willing to make submissions to the Court on these matters should the court so permit.

23. I say that the applicant, being an Irish civil society organisation, is additionally well placed, upon the resumption of the herein proceedings subsequent to a ruling by the Court of Justice of the European Union, to raise and ventilate issues relating to the Irish public interest, as distinct from that of the Plaintiff as an individual.

The Applicant's role before the Court of Justice of the European Union

24. I say and believe that it is likely that the institutions of the European Union and many member states are likely to make observations to the Court of Justice of the European Union to the effect that the Decision precludes any further investigation by an independent office holder, notwithstanding any events subsequent to the Decision. In such circumstances, I say and believe that it may be of assistance to that Court to hear observations, not only from the Plaintiff as an individual party, but from an *amicus curiae* with a broad public interest concern for privacy, data protection and other fundamental

rights. I say that the Applicant, with the experience and expertise available to it, and its experience in litigating fundamental rights, and in particular privacy and data protection matters at a European Union level, is well placed to fulfil such a role.

25. I say that the Applicant is a member of European Digital Rights (EDRI), an international non-profit association under Belgian law recognised by decree Nr7/CDLF/14.853/S of 12th February 2003 and registered in Brussels in Belgium. As a member of this association of privacy and civil rights organisations the Applicant can assist the court by highlighting issues which have arisen in other jurisdictions regarding Decision 2000/520/EC and the ability of data protection regulators to consider the operation of the "Safe Harbour" agreement.

26. I say that the Applicant, as a member of the broad European civil society community is well positioned to present arguments, perspectives and factual materials drawn to its attention by other members of this community.

The Charter of Fundamental Rights of the European Union

27. I say and believe, and the applicant will submit that the Decision, insofar as it allows, or in the alternative, fails and has failed to safeguard against indiscriminate access to personal data by foreign law enforcement authorities, infringes Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

28. I say and believe and the applicant will submit that if the Decision does not permit indiscriminate access to personal data by foreign law enforcement authorities, that any transfer where such access is likely, or in any event, not adequately safeguarded against, is not a transfer for the purposes of the Decision and is therefore unlawful under European Union and Irish law.

29. I say and believe and the Applicant will submit that Even in the event that the data of European Citizens is not in fact subject to indiscriminate access by foreign law enforcement authorities, that Article 8.3 of the Charter is relevant. That provision states that compliance with Data Protection laws "*shall be subject to control by an independent authority*".

30. I say and believe and the applicant will submit that a single Commission Decision, particularly one relying on self-certification, cannot be said to provide control by an independent party, unless that decision admits of the possibility of investigation by a domestic data protection regulators in light of contemporary developments. I say and believe and the applicant will submit that that no supervisory role played by any body outside the European Union, such as, for example, the United States Federal Trade Commission can fulfill this Charter requirement for control by an independent authority.

31. Further, or in the alternative, if the Decision forbids any such further investigation by domestic data protection regulators, it cannot be said to be comply with the Charter requirement of control by an independent authority.

32. I say and believe and the Applicant will submit that insofar as it allows, or in the alternative, fails and has failed to safeguard against indiscriminate access to electronic communications by foreign law enforcement authorities, the Decision has an inhibitory or "chilling" effect on freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. I say that in this respect the Decision infringes the right to freedom of Expression as guaranteed by Article 11 of the Charter.

33. I say and believe and the Applicant will submit that insofar as it allows, or in the alternative, fails and has failed to safeguard against indiscriminate access by foreign law enforcement authorities to social media data, including data relating to an individual's personal relationships, family connections, civic activities and political opinions and affiliations, the Decision has an inhibitory or "chilling" effect on Freedom of assembly and of association. I say that in this respect the Decision infringes the right to freedom of assembly and of association as guaranteed by Article 12 of the Charter.

This Application

34. I say that I instructed the Applicant's agent McGarr Solicitors to consider this Application at the earliest and next possible return date, and have instructed that the usual formalities be adhered to pursuant to Order 63A of the Rules of the Superior Courts.

35. I say further that I instructed the Applicant's Agent to comply with any other necessary or relevant practice direction, before appearing in the matter.

36. I also instructed that positive consent be sought from the parties to the litigation in advance of any application before this Honourable Court, which would in turn assist this Honourable Court in its assessment of the application.

37. On or about the 25th day of June, solicitors for the Applicant in the main proceedings herein contacted solicitors for the Applicant and stated that should an application for admission as *amicus curiae* be made by the Applicants herein, they were instructed to make no objection. I beg to refer in this regard to a true copy of the said email, upon which marked with the letters "**AOL 4**" I endorse my name prior to the swearing hereof.

38. I say that the said communication having been received, I immediately instructed solicitors for the Applicant herein to notify solicitors for the Respondent in the main proceedings herein of the intended application, and sought their consent. I say that at the time of the swearing the herein, the matter was being considered by the Respondant.

39. Further I say and believe that the Applicant's interest in this matter is *bona fide* and relevant in the circumstances.

Costs

40. I say that should this Honourable Court accede to this application, then the Applicant's Costs incidental to this intervention as *amicus curiae,* will be borne entirely by the Applicant.

41. I humbly pray this Honourable Court for an Order in terms of the Notice of Motion to intervene as *amicus curiae* had herein.

SWORN by the said **Antoin O'Lachtnain**
At 14 City Gate, Lower Bridge Street, Dublin 8
In the County of the City of Dublin
This 20th day of June · 2014
Before me a ~~Commissioner for Oaths/~~
Practising Solicitor and I know the Deponent

Antoin O'Lachtnain

~~Commissioner for Oaths~~/Practising Solicitor

This Affidavit is filed on behalf of the Applicant by McGarr Solicitors, Solicitors for the Applicant, 12 City Gate, Lower Bridge Street, Dublin 8 this day of 2014.

THE HIGH COURT
Record No: 2013/ 765JR

IN THE MATTER OF AN APPLICATION TO INTERVENE

BETWEEN:

MAXIMILIAN SCHREMS

Plaintiff

-and-

DATA PROTECTION COMMISSIONER

Defendant

ON THE APPLICATION OF DIGITAL RIGHTS IRELAND LIMITED

Applicant

AFFIDAVIT OF ANTOIN O'LACHTNAIN

MCGARR SOLICITORS
SOLICITORS FOR THE APPLICANT
12 CITY GATE
LOWER BRIDGE STREET
DUBLIN 8

THE HIGH COURT

Record No: 2013/ 765JR

IN THE MATTER OF AN APPLICATION TO INTERVENE

BETWEEN:

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Plaintiff

-and-

DATA PROTECTION COMMISSIONER

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DIGITAL RIGHTS IRELAND LIMITED

Applicant

AFFIDAVIT OF ANTOIN O'LACHTNAIN

EXHIBIT "AOL1"

Deponent

~~Commissioner for Oaths~~/~~Practising~~ Solicitor

Neutral Citation Number: [2010] IEHC 221

THE HIGH COURT

2006 3785 P

DIGITAL RIGHTS IRELAND LIMITED

Plaintiff

-and-

THE MINISTER FOR COMMUNICATION, MARINE AND NATURAL RESOURCES,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE COMMISSIONER OF AN GARDA SIOCHÁNA,

IRELAND AND THE ATTORNEY GENERAL

Defendants

-and-

THE HUMAN RIGHTS COMMISSION

Notice Party

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 5th day of May 2010

1. The Plaintiff is a limited liability company, limited by guarantee, incorporated under the Companies Acts 1963-2003, on the 4th November 2005, and has its registered office at 1 Caiseal na Rí, Cashel, Co. Tipperary. It has as one of its objects, in its Memorandum of Association, the promotion and protection of civil and human rights, particularly those arising in the context of modern communication technologies.

2. The First and Second Named Defendants are Ministers of Government and corporations sole and have their principal offices at 29/31 Adelaide Road and St. Stephen's Green in the City of Dublin, respectively.

3. The Third Name Defendant ("The Garda Commissioner") is the person charged with responsibility for the Garda Síochána and has his principal offices at Garda HQ Phoenix Park in the City of Dublin. He is entrusted with a purported power under section 63(1) of the Criminal Justice (Terrorist Offences) Act 2005 to issue a Direction or Directions to telecommunications services providers.

4. The Fourth Named Defendant is Ireland and the Fifth Named Defendant is the law officer of the State designated by the Constitution of Ireland and is sued in his representative capacity.

5. The Notice Party, joined as such in these proceedings, is a statutory body corporate established by section 4 of the Human Rights Commission Act 2000. It is so joined pursuant to section 8(h) of the aforesaid Act and

appears as *amicus curiae* in the above entitled proceedings.

6. This judgment relates to the following three matters, the first two moved by the Defendants and the third by the Plaintiff, all of which were heard by way of preliminary issues:

> i) The *locus standi* of the Plaintiff;
>
> ii) Whether security for costs should be granted against the Plaintiff;
>
> iii) Whether a reference to the Court of Justice ("CoJ") under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") (formerly Article 234 of the Treaty establishing the European Communities ("TEC")) should be made.

Background:

7. The background to the case, as the Plaintiff alleges, is that in or around the 25th April 2002 the Minister for Public Enterprise, the predecessor of the First Named Defendant, issued a direction under s. 110(1) of the Postal Telecommunications Services Act 1983 (as amended by the Interception of Postal Packets and Telecommunication Messages (regulations) Act 1993) to certain telecommunications services providers to retain telecommunications data. Such direction was to be treated as confidential. Following this direction the First Named Defendant came into possession of, and had and exercised control over, data relating to the Plaintiff, its members and other users of mobile phones.

8. By letter dated 19th December 2002 the Data Protection Commissioner advised the Department of Communications, Marine and Natural Resources that the above-mentioned direction was *ultra vires*, constitutionally invalid and was in breach of the Data Protection Acts 1988/2003 and S.I. 192 of 2002; with the grounds therefor being that as the objectives sought by the direction amounted to a derogation from the then existing data protection legislative scheme, the same could only be enacted through primary legislation. The Data Protection Commissioner advised the Defendants that failing a satisfactory response he would issue judicial review proceedings to challenge the validity of any direction(s) the Minister purported to make under the Postal Telecommunications Services Act 1983.

9. Some of the concerns of the Data Protection Commissioner were addressed in Part 7 of the Criminal Justice (Terrorist Offences) Act 2005 ("CJ(TO)A 2005"), which made provision for the retention of traffic and location data, relating to communications transmitted by fixed line or mobile telephone, and access to such data retained for law enforcement and security purposes.

10. The Plaintiff alleges that on a date or dates unknown, following the coming into force of the above Act of 2005, the Garda Commissioner issued a direction under the provisions thereof to telecommunications service providers to retain data.

11. The European legal framework in place at the time was governed by

Directive 95/46/EC ('on the protection of individuals with regard to the processing of personal data and on the free movement of such data') and Directive 97/66/EC ('concerning the processing of personal data and the protection of privacy in the telecommunications sector'), later repealed by Directive 2002/58/EC ('concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)'). These Directives aimed to harmonise the position of Member States:

> *"[T]o ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community"* (Article 1, Dir. 2002/58/EC)

The focus of these Directives was thus the protection of privacy rights arising from data retention.

12. On 6th May 2006 Directive 2006/24/EC ('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') was published. Article 1 of Directive 2006/24/EC states:

> *"1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.*
>
> *2. This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registration user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network."*

The ultimate purpose of this Directive was to clarify the right of Member States to legislate obligations of disclosure upon communications services providers in relation to traffic and location data, and to harmonise the minimum and maximum periods of retention of the specified data, namely to six months and 2 years respectively (Article 6).

13. In this case the Plaintiff alleges that the Defendants have wrongfully exercised control over data, in that they have illegally processed and stored data relating to the Plaintiff, its members, and other mobile phone users contrary to: (i) statute, (ii) EC law, and (iii) the Constitution, in particular having regard to the Plaintiff's asserted rights to privacy, to travel and to communicate (Arts. 40.3.1°, 40.3.2° and 40.6.1°), and (iv) the European Convention on Human Rights ("ECHR"), in particular the right to private life, to family life, and to privileged communication (Arts. 6(1), 8 and 10). These allegations involve a claim that s. 63(1) of the CJ(TO)A 2005 is invalid on the within grounds and further that Directive 2006/24/EC is contrary to the

Charter of Fundamental Rights ("CFR") and the ECHR.

14. The synopsis last given is simply that: the proceedings as shown by the pleadings are detailed and complex. For present purposes I would adopt as useful the following summary of the remedies sought by the Plaintiff:

i) Declarations to the effect that the Minister for Communications and/or the Garda Commissioner have acted in breach of the Data Protection Acts 1988/2003 and/or in breach of EU law;

ii) Declarations to the effect that s. 63(1) of the CJ(TO)A 2005 is null and void for breach of the Constitution and/or EU law, and/or is incompatible with Ireland's obligations under the ECHR;

iii) A Declaration that the State has failed in its obligation to give effect to EU law;

iv) A Declaration that Directive 2006/24/EC is null and void for breach of the EC Treaty and/or on the grounds that it was adopted without any legal basis;

v) Reliefs including injunctive reliefs directed towards the lawfulness of the April 2002 communication by the Minister for Public Enterprise;

vi) If necessary, a Declaration that s. 110 of the Postal and Telecommunications Services Act 1983, as amended, is repugnant to the Constitution;

vii) Injunctions restraining the Defendants from acting under or giving effect to the impugned instruments including the EC Directive;

viii) An Order pursuant to Art. 267 TFEU referring the following questions to the CoJ for a preliminary ruling:

- Whether Directive 2006/24/EC is valid notwithstanding:
  - a) Article 6(1) and (2) of the Treaty on European Union ("TEU")
  - b) Article 3a TEU and 21 TFEU (formerly Articles 10 and 18 TEC)
  - c) Articles 7, 8, 11 and 41 of the CFR
  - d) Article 5 TEU (formerly Article 5 TEC) (the principle of proportionality)
- Whether Directive 2006/24/EC regulating data protection is invalid insofar as it lacks a correct legal

basis in EU law (this question has now been abandoned in light of Ireland v. European Parliament and Council of the European Union (Case C-301/06) (delivered on the 10th February 2009)).

ix) Damages;

x) Such other consequential reliefs and costs.

***Locus Standi*:**

Submissions:-
15. Arguments were made on behalf of the parties in relation to the *locus standi* of the Plaintiff to claim infringement of certain of the rights, asserted by it or on its own behalf and by it on behalf of other mobile phone users as an *actio popularis*. As being the moving party, it would be convenient to firstly deal with the Defendants' submissions in this regard.

16. The Defendants object to the extent of the rights claimed by the Plaintiff since the latter is a non-natural legal entity: in particular they deny it has the required standing to assert certain of the personal rights which it seems to rely upon. Further, whilst the Plaintiff describes itself as a non-governmental organisation ("NGO"), it has no formal status or recognition as such, either under domestic or international law. Nor does it have a significant track record of any substance, having been incorporated no earlier than the 4th November 2005.

17. The Defendants argue that for the courts to entertain a constitutional challenge, it must be demonstrated that the litigant's rights have either been infringed or directly threatened. In relation to the rights claimed on behalf of others, the Plaintiff is in a different position since it is not a natural person. The doctrine of incorporation prevents a company from asserting rights on behalf of its members, except insofar as they are co-extensive with its own. A company therefore cannot assert rights which only its members would have; they must do that themselves. Furthermore, the Plaintiff cannot assert the putative rights of others, regardless of whom they may be, as firstly such would be a claim to *ius tertii*, contrary to the Supreme Court decision in *Cahill v. Sutton* [1980] I.R. 269, and secondly the position of the other people, namely in this case members of the Plaintiff company and "other users of mobile phones", is *nihil ad rem* (see *Norris v. Attorney General* [1984] I.R. 36 at 58). In addition it is claimed that a company cannot have a right to private life or privacy, a right to family life, a right to travel (and to confidentiality of travel) and a right to communicate; the Plaintiff having no physical manifestation.

18. Even if the Plaintiff does have some rights, those rights are limited. Whether commercial expression by non-media companies is protected under Article 40.6.1° is, the Defendants assert, unclear (*Attorney General v. Paperlink* [1984] ILRM 373 cited). With regards to a company's right to privacy, the Defendants draw attention to *Caldwell v. Mahon* [2007] 3 I.R. 542, where Hanna J. held that although a right to privacy exists in connection with the conduct of business affairs, such a right must be considered as being at "*the outer reaches of and the furthest remove from the core personal right*

to privacy".

19. The Defendants therefore contend that, in circumstances where the right is asserted over the fact and attendant circumstances of communication, as opposed to the content therein, the Plaintiff company has only the most limited right to privacy; certainly the purchase of a single mobile phone by the Plaintiff just over two months prior to the institution of these proceedings, cannot operate to confer standing upon it.

20. Further, the Defendants say, there is an over abundance of potential litigants who would have full standing to advance all aspects of the Plaintiff's claim; any natural person who uses a mobile phone, any person criminally charged against whom the D.P.P. proposes to offer retained telecommunications data as evidence, the Human Rights Commission, the Data Protection Commissioner – and this is to name but a few. This is not a situation where the persons potentially prejudiced would be unable to assert their rights, as with the unborn in *S.P.U.C. v. Coogan* [1989] I.R. 743. Instead it is a situation more akin to those at issue in *L'Henryenet v. Ireland* [1983] I.R. 193 where a fisherman was precluded from challenging the constitutionality of the Fisheries Acts on the basis that there was no question of the owner of the vessel in question not being in a position to assert his own constitutional rights.

21. Nor are there circumstances in this case which would merit a relaxation of the normal rules on standing. Such were considered in *Construction Industry Federation v. Dublin City Council* [2005] 2 I.R. 496, where the Supreme Court concluded, according to the Defendants, that there were two broad principles in this regard. Firstly, standing might be conceded to a person not directly affected in circumstances where administrative error (or maladministration) would otherwise go unchallenged, and secondly, a representative litigant should not be granted standing in circumstances where the interest it seeks to assert is that of its members and its members are themselves in a position to litigate.

22. This is not a case, either, involving the breach of a constitutional norm; that is a right which is constitutionally mandated, for example the administration of justice in public, the safeguarding of the institution of marriage, or the prohibition on the endowment by the State of any religion. The maintenance of these benefits all citizens equally and generally, such that one potential *bona fide* litigant is unlikely to be better qualified than any other. Nor is a public interest asserted, merely a collection of individual rights.

23. Finally, the Plaintiff cannot confer standing upon itself by virtue of its Memorandum of Association (*S.P.U.C. v. Coogan*[1989] I.R. 734 at 742).

24. Before embarking on a recitation of its position with regards to *locus standi*, it is convenient to deal with a submission made by the Plaintiff to the effect that this issue should not be determined as a preliminary one; instead it should take its normal place within the body of the action and await the Courts decision on all of the issues raised. I respectfully disagree with this assertion: I am satisfied that it is correct in this case to deal with *locus standi* as a preliminary issue. It is vital to the running of any case that the areas of dispute are laid out clearly. The issue of whether or not a Plaintiff has *locus standi* is fundamental, firstly to its existence as a plaintiff, and secondly to the range of arguments which may be advanced by it. Thus

matters which a Plaintiff has no standing to bring are no longer relevant. If a Plaintiff should be found to lack standing in respect of all his claims, he will have no case at all. It is in the interests of all concerned, in particular with regards to costs and time, that this determination should be made as early as possible in the litigation, so that all future preparation and argument may be made without the need to consider matters which are, in actuality, extraneous and/or irrelevant. It is of course acknowledged that the Court may not always usefully adopt this approach, as there may well be cases where the critical framework can only be established at trial and after procedural steps, such as discovery *etc.* have been engaged upon. In this case however, I am satisfied that there has been sufficient engagement to properly inform a decision as to the standing of the Plaintiff *vis-à-vis* the various rights asserted by it.

25. By way of substantive reply, the Plaintiff asserts that this is a case where there should be a justified relaxation of the rules of standing. It notes the comments of Henchy J. in the Supreme Court in *Cahill v. Sutton* [1980] I.R. 269 at 285, that:

> *"This rule, however, being a rule of practice, must like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal locus standi on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional vision that has been invoked."*

The learned Judge gives examples of where the rules might be relaxed. These include where those prejudicially affected may not be in a position to assert their rights adequately, or in time, or if the impugned provision is directed at or operable against a group, which includes the challenger, or with whom the challenger may be said to have a common interest.

26. Drawing parallels with the liberal approach to *locus standi* in *Crotty v. An Taoiseach* [1987] 1 I.R. 713, the Plaintiff says that it is clear that the impugned provisions, which relate to the retention of data in respect of mobile phone, internet and e-mail communication of all persons who use such services, affect virtually every citizen and entity in the State, including the Plaintiff. In support of this contention the decision of the European Court of Human Rights ("ECtHR") in*Copland v. the United Kingdom* (Case 62617/00, 3rd April 2007) [2007] ECHR 253, was cited, in which it was held that the collection and storage of such personal data amounted to an interference with Art. 8 rights (ECHR). A more liberal approach should therefore be allowed, in the Court's discretion, to the issue of standing.

27. In response to the argument that as a company the Plaintiff should not be allowed to assert such broad interests, reference is made to *S.P.U.C. v. Coogan* [1989] 1 I.R. 734 and to *Blessington Heritage Trust Limited v. Wicklow County Council and Others* [1999] 4 I.R. 571. In the latter case, McGuinness J. held that a limited company had *locus standi* to bring proceedings challenging a planning decision. The Plaintiff also drew attention to the Supreme Court's comments on*locus standi* in *Lancefort Limited v. An*

Bord Pleanála and Others (No. 2) [1999] 2 I.R. 270 at 308. Keane J. in that case went on to conclude that a company could have *locus standi* to bring proceedings even if it was unable to point to any proprietary or economic interest in the impugned decision, and that a company may not be denied standing merely because it was not in existence at the time of the relevant decision.

28. In further submissions it is said that where the subject matter of the litigation involves questions of Community law, although in general procedural rules will be governed by national law, it must be borne in mind that there is an overriding obligation on the national court to uphold Community law, and national procedural rules should not operate in such a way as to undermine a claimant's right to effective judicial protection. As noted by Keane J. in *Lancefort v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270 at 312:

> *"[T]he requirements of national law as to standing may in some instances have to yield to the paramount obligation on national Courts to uphold the law of the European Union."*

The Plaintiff seeks to make valuable use of this comment, noting that since this case involves a reference to the CoJ under Article 267 TFEU, the rules relating to *locus standi* (and security for costs) should be relaxed to take that into account.

Standing and Interest:-

29. In considering this issue, it should be noted that with regards to the alleged infringements of the Plaintiff's rights, it is only necessary for the Court, in the context of deciding *locus standi*, to determine that a limited company may avail of such rights. It is not necessary for the Court to determine the extent or breadth of those rights. It is therefore sufficient for the Plaintiff to show that those rights are affordable to companies including it, and that the actions of the Defendants could affect them; if it can it will have *locus standi* to litigate as to whether those rights have in fact been infringed. Despite what follows, the context in which the discussion takes place should not be forgotten.

30. The seminal case in this regard is the decision of the Supreme Court in *Cahill v. Sutton* [1980] I.R. 269. Henchy J. proffered that:

> *"The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, by the operation of the statute."* (*ibid.* at 286)

However, this must also be read in light of his comments at p. 283 of the report where he stated that:

> *"While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional ... [w]ithout concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality."*

In his judgment, O'Higgins C.J. felt that were this to be otherwise it might

open the doors of the courts to "the busybody and the crank" (*ibid.* at 277).

31. Both the High Court and Supreme Court considered the extent of this principle in *Crotty v. An Taoiseach* [1987] I.R. 713. In that case a challenge was brought in relation to the constitutionality of enacting the provisions of the Single European Act without a referendum. Issue was taken with the standing of the plaintiff as he was unable to show that he would be more affected by the statute than any other citizen who could bring the action. In the High Court, Barrington J. considered that:

> *"It does appear to me, assuming the plaintiff were otherwise devoid of constitutional standing, that he has raised matters which are common to him and to other citizens and which are weighty countervailing considerations which would justify, on their own, a departure from the rule in relation to locus standi. But it does appear to me that in relation to one matter – and it is a basic matter – the plaintiff clearly has a locus standi because his contention that what is being done involves an amendment to the Constitution which should be submitted to a referendum, and that he, as a citizen, has the right to be consulted in such a referendum and that his right has been infringed." (ibid.* at 733-734)

In the Supreme Court, Finlay C.J., with Henchy and Walsh JJ. concurring, agreed with the High Court. Finlay C.J. stated:

> *"The Court is satisfied, in accordance with the principles laid down by the Court in Cahill v. Sutton [1980] I.R. 269, that in the particular circumstances of this case where the impugned legislation ... will if made operative affect every citizen, the plaintiff has locus standi to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen, arising from the Act." (ibid.*at 766)

Thus it would appear that where the constitutionality of a law which will affect every citizen equally is impugned, a plaintiff will not necessarily be denied *locus standi* simply because he is unable to point to any specific prejudice or injury which the impugned legislation would visit upon him (see also para. 79 *et seq. infra*.).

Corporate Standing:-

32. The above cases of *Cahill v. Sutton and Crotty v. An Taoiseach* both relate to the *locus standi* of natural persons. Where the plaintiff is a corporate body do different considerations arise?

33. This question was considered in *S.P.U.C. v. Coogan* [1989] 1 I.R. 734. Referring to his decision *in A.G. (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593, Finlay C.J. quoted from p. 623 of that judgment as follows:

> *"If, therefore, the jurisdiction of the courts is invoked by a party who has a bona fide concern and interest in the protection of the constitutionally guaranteed right to life of the unborn, the courts, as the judicial organ of government of the State, would be failing in their duty as far as practicable to vindicate and defend that right if they were to refuse relief upon the grounds that no particular pregnant woman who*

> *might be affected by the making of an order was represented before the courts."*

He rejected as misconceived the defendant's proposition that this paragraph was qualified by reference to the special position of the Attorney General, and reaffirmed that the "*broad statement of principle contained in [this] paragraph remains unqualified*" ([1989] 1 I.R. 734 at 742). The general test with regards to *locus standi* should thus be:

> *"[T]hat of a bona fide concern and interest, interest being used in the sense of proximity or objective interest. To ascertain whether such bona fide concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected."* (*ibid.* at 742)

34. Whilst Walsh J. in the same case emphasised the nature and importance of the right in question (the right to life of the unborn), his comments in my view have a broader application, especially when considered in light of the rights claimed, in the case at hand. He stated at p. 743 of the report:

> *"The question in issue in the present case is not one of a public right in the classical sense ... but is a very unique private right and a human right which there is a public interest in preserving ... What is in issue in this case is the defence of the public interest in the preservation of that private right which has been guaranteed by the Constitution. It is a right guaranteed protection by public law as it is part of the fundamental law of the State by reason of being incorporated into the Constitution."*

The learned Judge further noted the exceptional importance of access to the courts, which was essential to the vindication of all other rights. Thus with regards to standing "*the essential question is has the plaintiff a bona fide interest to invoke the protection of the courts to vindicate the constitutional right in question*" (*ibid.* at 744). In relation to *Sutton v. Cahill* he was of the opinion that:

> *"The decision ... is not of such sweeping application as is sometimes thought. It can be understood only in the light of the narrow ground upon which the case was presented and argued and on the possible injustice to the defendant... It is quite clear ... that even in cases where it is sought to invalidate a legislative provision the Court will, where the circumstances warrant it, permit a person whose personal interest is not directly or indirectly presently or in the future threatened to maintain proceedings if the circumstances are such that the public interest warrants it. In this context the public interest must be taken in the widest sense."* (*ibid.* at 746-747)

Finally, as the Plaintiff was a company limited by guarantee, established for the sole object of protecting human life, a question arose as to its right to bring the application. Finlay C.J. notes that:

> *"I would accept the contention that [the plaintiff] could not acquire a locus standi to seek this injunction merely by reason of the terms of its articles and memorandum of association... [However] the particular right which it seeks to protect with its importance to the whole nature of our society, constitute sufficient grounds for holding that it is a person with a bona fide concern and interest and accordingly has the necessary legal standing to bring the action."* (*ibid.* at 742)

35. Whilst *Coogan* did not involve a constitutional challenge to any particular piece of legislation, there is no reason, in my view, as to why it would not equally apply to such a case. Therefore it would thus seem to me that, in principle, a company should not be prevented from bringing proceedings to protect the rights of others where, without otherwise being disentitled, it has a *bona fide* concern and interest, taking into account the nature of the right which it seeks to protect or invoke.

36. Some ten years after *S.P.U.C. v. Coogan* was decided, this issue was again addressed by the Supreme Court in*Lancefort Ltd. v. An Bord Pleanála & Ors. (No. 2)* [1999] 2 I.R. 270. At pp. 286-289 of the report, Denham J. said:

> *"In McGimpsey v. Ireland [1988] I.R. 567, Barrington J. held that it would be inappropriate for the court to refuse to hear the plaintiff's case on the grounds of lack of locus standi, particularly since the plaintiffs were patently sincere and serious people who had raised an important constitutional issue which affected them and thousands of others on both sides of the border. Prior to that case it had been accepted in Crotty v. An Taoiseach [1987] I.R. 713, that a citizen who was exposed to no greater injury than other citizens would still have status to challenge legislation on a treaty if he could show he was being denied a referendum and that the proposed Act violated the Constitution."*

This case related to an issue of environmental law, which the Court felt *"by [its] very nature affect[s] the community as a whole in a way a breach of an individual personal right does not."* (*ibid.* at 292)

37. Dealing specifically with the standing of a company, Denham J., in the same case, at p. 292 of the report stated that:

> *"Indeed both the public interest and the benefit of corporations was addressed in R. v. Pollution Inspectorate; ex p. Greenpeace (No. 2) [1994] 4 All E.R. 329. An issue was whether or not the limited company had locus standi in the judicial review, the law required it had 'sufficient interest'. Otton J. stated:-*
>
> > *'It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties.'"*

She continued that:

> *"A company is not barred per se from being a party to judicial review proceedings. A company may be formed for many reasons; once formed, it is a legal person with the right, inter alia, to litigate. The notice party in this case is a company, it is*

> *a vehicle. The applicant is also being used as a vehicle for people to pursue environmental objects. The fact that the applicant was established after the decision of the first respondent which is in issue does not exclude it per se from access to the courts, rather it is a factor for consideration in light of the history of the relevant events."*

She did note that the *bona fides* of the company may be a relevant factor in considering if it has *locus standi*, and in the circumstances the corporate veil may be lifted to determine this.

38. This having been established, the company should be considered in light of the public interest:

> *"Here we find a tension between the public interest as represented by public bodies established for that benefit by the State i.e. the first respondent, balanced against the right of persons (incorporated or not) to have access to court to litigate the issue as to whether the public interest, indeed the common good, is being protected. It is a fundamental right in a democracy that there be access to the courts. The fact that a statutory body has been given a public duty on behalf of the State does not mean that its decisions are not reviewable. Nor does it exclude other persons from raising related issues in the public interest."* (*ibid.* at 294)

Denham J. thus concluded at p. 296 *et seq.* that:

> *"I am satisfied that the applicant has locus standi in this case. In making this decision I have considered all the circumstances, fact and law as set out previously in this judgment. The fact that the applicant is a company does not bar it per se from the litigation, although its incorporation after the decision in issue by the first respondent must be considered carefully. Its bona fides, actions and documentation are all relevant. I agree with the trial judges that the veil of incorporation should be lifted and that the prior actions and involvement of the members be considered. On doing that, having also considered the documentation and actions of the applicant, I am satisfied that the applicant is acting bona fide...*
>
> *The common law on locus standi has been developed to aid the administration of justice. The crank, vexatious litigant and stranger is excluded from the courts. The applicant does not belong to any of these categories.*
>
> *The principles of locus standi have been extended by the courts in some cases to situations where concerned citizens have sought to protect the public interest. The analogy of those cases, where the constitutionality of laws was queried, should be applied in this case. The track laid by S.P.U.C. v. Coogan [1989] I.R. 734, Crotty v. An Taoiseach [1987] I.R. 713 and McGimpsey v. Ireland [1988] I.R. 567 and environmental actions such as Chambers v. An Bord Pleanála [1992] 1 I.R. 134 and R. v. Pollution Inspectorate; ex p. Greenpeace (No. 2) [1994] 4 All E.R. 329, is firm and the cases provide appropriate precedents. This approach is just, aids the administration of justice, would not permit the crank, meddlesome or vexatious litigant thrive, and yet enables the bona fide litigant for the*

> *public interest establish the necessary locus standi in the particular area of environmental law where the issues are often community rather than individual related. The administration of justice should not exclude such parties from the courts. Whether or not they succeed in their action is quite another matter - but they should not be excluded from the courts to litigate the issue."*

It should be noted that Denham J. was in the minority as to the ultimate outcome; the Court finding that the company lacked a "sufficient interest". However the principles of law enunciated above were effectively agreed with by Keane and Lynch JJ.

39. McGuinness J. in *Blessington Heritage Trust Ltd. v. Wicklow County Council & Ors* [1999] 4 I.R. 571 at 595, considering the extent to which companies incorporated for the protection of rights could be afforded standing, noted that:

> *"Over-reliance on the incorporation of companies such as the applicant in this case may tip the balance too far in favour of objectors or concerned local persons; on the other hand, blanket refusal of locus standi to all such companies may tip the balance too far in favour of the large scale and well-resourced developer. It seems to me that the balance is best preserved by the course followed by the learned Morris J. [in Lancefort Ltd. v. An Bord Pleanála [1998] 2 I.R. 511]. The court should look at the factual background in each case and, if necessary, maintain the balance by the making of an order for security for costs."*

It is true that that case related to a planning challenge, but McGuinness J's comments hold equally true in a situation where the challenge is to the constitutionality of an action of the State, or organs thereof. In truth, there is even more justification for a broad and balanced approach to this issue where a challenge, particularly one of substance, is made to the constitutionality of a statute, since there is a constitutional imperative for the courts to uphold the Constitution and any alleged breaches thereof should be treated in the most serious manner.

40. The Defendants sought to rely on the Supreme Court decision in *Construction Industry Federation v. Dublin City Council* [2005] 2 I.R. 496 as an example of where standing has been refused. The plaintiff in that case was an unincorporated association representing the interest of parties involved in the construction industry. The Court considered the English decision of *R. v. Inland Revenue Commissioners, ex parte Federation of Self-Employed Businesses Ltd.* [1982] 2 All E.R. 93, citing the *ratio* of the case as expressed in the headnote that:

> *"Whether an applicant for mandamus has a sufficient interest in the matter to which the application related ... depended on whether the definition (statutory or otherwise) of the duty alleged to have been breached or not performed expressly or impliedly gave the applicant the right to complain of the breach of non-performance."*(*ibid.* at 94)

The Court however, having considered the case law on *locus standi*, ultimately refused standing to the plaintiff saying:

> *"In the present case, the applicant claims to have a sufficient*

> *interest on the basis that the proposed scheme affects all or almost all of its members in the functional area of the respondent and, therefore, the applicant has a common interest with its members. However, it appears to me that to allow the applicant to argue this point without relating it to any particular application and without showing any damage to the applicant itself, means that the court is being asked to deal with a hypothetical situation, which is always undesirable. This is a challenge which could be brought by any of the members of the applicant who are affected and would then be related to the particular circumstances of that member. The members themselves are, in many cases, very large and financially substantial companies, which are unlikely to be deterred by the financial consequences of mounting a challenge such as this. Unlike many of the cases in which parties with no personal or direct interest have been granted locus standi, there is no evidence before the court that, in the absence of the purported challenge by the applicant, there would have been no other challenger. ..."*

Whilst dismissing any suggestion that the plaintiff was acting vexatiously or irresponsibly in seeking relief, the Court nonetheless could not "*see any justifiable basis upon which it can be said that the applicant has any interest other than that of its individual members.*"

41. In my opinion this case is entirely distinguishable from the one at hand, indeed the Supreme Court stated that"*consideration of this question must depend largely on the circumstances of the individual case*". The plaintiff in *C.I.F.* was not a company, but an unincorporated association. It was an action for judicial review, rather than a constitutional challenge. As pleaded it raised hypothetical questions, whereas if the action had been taken by any of its members, a firm, definite and concrete framework would have been established. In fact each such case would have been particular to that plaintiff, as separate variables would apply. It was also clear that the plaintiff would in no way be affected personally by the impugned provisions, as its interest was identified wholly with those of its members. The plaintiff was also seeking an order for *mandamus*, rather than *certiorari*, which may have been a factor. In the present case it is clear that the plaintiff has an interest in this matter separate and distinct from its members. Although there may be some overlap between the company's and its members' interests, this in no way precludes the company from relying on an interest it holds in its own right.

42. Nonetheless, the concept that a person, otherwise not prejudiced by the impugned action, may be found to have a sufficient interest was considered in *Cahill v. Sutton* [1980] I.R. 269 at 285-286, where Henchy J. stated:

> *"[T]he absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest – particularly in cases where, because of the nature of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision."*

Thus, can the Plaintiff herein assert the rights of its members, as distinct from members of the public in general? In order for it to so do, the Plaintiff

must have a "*common interest*" in the subject matter. From *C.I.F. v. Dublin City Council* it might be suggested that if that interest arises merely through its members, the action should be taken in their name, rather than in the company's. However, where an independent interest arises, a different question also arises. How closely are the rights asserted by the company concommitant with those of its members? If closely related, the company should be allowed to litigate those issues. However, if they are unrelated or only losely related, it is argued that the company should not be able to assert the interests of its members, since it would clearly not be best placed to litigate those issues.

43. A more flexible approach may also be necessary where questions of European law are raised. The CoJ noted as far back as 1963 that:

> *"The European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. ... [T]he Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the instutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibibility laid down... Where the Community institutions are responsible for the administrative implementation of such measures, natural and legal persons may bring a direct action before the Court against the implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national Courts and can cause the latter to request the Court of Justice for preliminary ruling."* (*Plaumann & T Co. v. Commission* [1963] ECR 95 at para. 23)

Considering this extract, Cooke J., a former member of the Court of First Instance and now a member of the High Court of Ireland, noted when speaking extra judicially, in October 2005:

> *"Membership of the Union involves radical transfer of regulatory competence to the organs of the Community from the Member states. What the European Court is saying in this judgment is that the far-reaching effects of this hand-over of power to the institutions is balanced by the guarantee that the legal order of the Treaty will protect the individual against the excessive and oppressive exercise of that power in a manner which is incompatible with superior rules of law and of fundamental human rights which the European Court will imply into the legal Order of the Community for the purpose."*

44. The continuing development by the CoJ of the principles of effective protection of rights derived from Community law in national courts can be seen in a number of cases; the first being *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. The Court in *Verholen & Ors. v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-

3757 noted at para. 24:

> *"While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection ... and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community legislation."*

The Court, more recently, in *Unibet (London) Ltd & Unibet (Int'l) Ltd v. Justitiekanslern* [2007] ECR I-2271 noted at paras. 37 – 45 that:

> *"[A]ccording to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).*
>
> *Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law. ... It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. ... Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. ... It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law. ... Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. ... In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)...*
>
> *Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in*

> *such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law."*

45. In summary, the Court held that the principle of effective judicial protection is a general principle of Community law, which flowed from the common traditions of the Member States, and the Member States must ensure judicial protection of an individuals rights under Community law. National procedural rules must therefore not undermine this right to effective judicial protection.

46. It is therefore clear that where issues of EU law arise in litigation, the Courts may be required to take a more liberal approach to the issue of standing so that a person's rights thereunder are not unduly hampered or frustrated. The rules on standing should be interpreted in a way which avoid making it "*virtually impossible*", or "*excessively difficult*", or which impedes or makes "*unduly difficult*", the capacity of a litigant to challenge EU measures of general application under Art. 267 TFEU (see also *Van Schijnel v. SPF* [1995] ECR I-4705, para. 17; *Amministrazione delle Finanze v. San Giogio* [1983] ECR 3595, para. 14). That is not to say that where questions of EU law are raised and a preliminary reference requested, the Court is automatically precluded from refusing a plaintiff standing. However, as was the case with regards to the power to grant interim relief in *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd & Ors.* [1990] ECR I-2433, if the Court would be otherwise minded to allow standing in relation to the questions raised, but for a strict application of the national rules on *locus standi*, the Court should nonetheless grant standing where to do otherwise would render the plaintiff's Community rights effectively unenforceable.

47. In relation to the foregoing I respectfully agree with the view of Gilligan J. in *The Irish Penal Reform Trust Ltd. & Ors. v. The Governor of Mountjoy Prison & Ors.* [2005] IEHC 305, that:

> *"[W]hether or not SPUC v. Coogan was indeed restricted to the right to present argument on behalf of the unborn child is not wholly relevant to the present case. The simple fact is that Cahill v. Sutton allows, in plain terms, for the relaxation of the personal standing rules where those prejudiced may not be in a position to adequately assert their constitutional rights. It does not restrict this category of persons to the living, the dead or the unborn nor does it give any indication of what category of person may not be in a position to adequately assert their constitutional rights. If a person is incapable of adequately asserting his constitutional rights for whatever reason, I am of the view that Cahill v. Sutton would support a relaxation of the personal standing rules, provided the relevant person or body is genuine, acting in a bona fide manner, and has a defined interest in the matter in question."*

I would add only that the nature, extent, importance and application of the asserted right may be of high relevance in the exercise of the Court's discretion when dealing with this rule of practice.

48. As can therefore be seen from the above case law, a plaintiff may be granted *locus standi* where, having regard to the rights in question, it can

show either that it has a *bona fide* concern or interest in the provisions seeking to be impugned, or else that the rights which it seeks to protect are of general importance to society as a whole; this provided the Plaintiff is not a crank, meddlesome or a vexacious litigant. I should say that this latter point was not seriously argued, and I am firmly of the opinion that the Plaintiff herein is not such a litigant.

49. I would emphasise, however, that the Court should keep in mind the tension, on the one hand, between the public interest, as represented by public bodies established by the State, and, on the other, the right of access to the Court to litigate issues relating to whether the public interest is being protected (*per* Denham J. in *Lancefort (No. 2)*). Ultimately, the Court has a duty to prevent the unconstitutional abuse of public power, be it through legislation or otherwise. Thus where it is clear that a particular public act could adversely affect the constitutional, European, or Convention rights of a Plaintiff, or indeed society as a whole, a more relaxed approach to standing may be called for in order for the Court to uphold that duty, and vindicate those rights.

The Rights of a Company:-

50. It is obvious that if a plaintiff can show actual or potential infringement of a constitutional right, it must have *locus standi*. In this context it is therefore necessary to consider which rights, if any, a company, and therefore the Plaintiff herein, may have. If it is possible that these rights may be infringed by the actions of the Defendants, the Plaintiff has standing to challenge such. However, which constitutional and/or Convention rights can be afforded to corporate persons?

51. Some personal rights are clearly inapplicable to a company. Keane J. commented in the High Court in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321 that:

> *"Undoubtedly, some at least of the rights enumerated in Article 40, s 3, sub-s 2 – the right to life and liberty – are of no relevance to corporate bodies and other artificial entities."* (*ibid.* at 346)

In that case he considered that property rights under Article 40.3 of the Constitution, particularly, were in a different category and therefore capable of being enjoyed by corporate bodies. He noted that there would be:

> *"[A] spectacular deficiency in the guarantee to every citizen that his or her property rights will be protected against 'unjust attack', if such bodies were incapable in law of being regarded as 'citizens', at least for the purposes of [Article 40.3]."* (*ibid.* at 345)

It is therefore clear that some constitutional rights may be enjoyed by companies; leaving aside the extent to which they may differ from those rights as enjoyed by human persons.

52. Nonetheless it is necessary to examine the nature of the rights claimed by the Plaintiff in the present case. Broadly speaking, the Plaintiff claims that the retention of digital data infringes several rights, in particular:

> i) the right to privacy;

ii) the right to family life;

iii) the right to communicate, and the corollary right to privileged communication;

iv) the right to travel, and the attendant right to travel confidentially.

In these regards, the Plaintiff has referred to Article 40.3.2° of the Constitution, Articles 8 and 10 of the ECHR, Articles 7, 8, 11 and 41 CFR, Article 3a TEU and 21 TFEU (formerly Articles 10 and 18 TEC), Article 6(1) and (2) TEU, Articles 7, 8, 11 and 41 of the CFR, and Article 5 TEU (formerly Article 5 TEC) (the principle of proportionality). I shall now endeavour to outine the extent of these rights and consider how and if they may be applied to a corporate person.

Privacy:-

53. As noted, rights of privacy may be derived from a number of sources. In an Irish context, it is well established that a person has a constitutional right to privacy (*Kennedy v. Ireland* [1987] I.R. 587). Privacy in business transactions was considered by Hanna J. in *Caldwell v. Mahon* [2007] 3 I.R. 542 at 548. Reviewing the previous case law "*in the context of business transactions conducted through limited liability companies*", Hanna J. was of the opinion that *Haughey v. Moriarty* [1999] 3 I.R. 1 was of limited value when "*seen against the background of seeking a discovery order of a citizen's personal bank account.*" Nor did he gain much assistance from *Hanahoe v. Hussey* [1998] 3 I.R. 69, noting in particular that although it involved a raid on a solicitor's office, such was lawful, and further, not only did the firm sue, but so did the solicitors personally:

> *"Therefore, insofar as the focus of the Court was turned upon the 'invasion' of the applicant's privacy, it was done so in the context of the solicitors carrying on their practice as solicitors in premises belonging to them. This they did with all the panoply of confidentiality and security attendant upon such practice, long recognised and protected by the courts."*

54. Ultimately Hanna J. was reluctant to hold that no such right existed, and indeed saw no reason why it should not, but:

> *"[S]uch a right can only exist at the outer reaches of and the furthest remove from the core personal right to privacy."*

In this regard he adopted with approval the *dicta* of Ackerman J. in the South African case of *Bernstein v. Bester* [1996] (4) B.C.L.R. (S.A.) 449, noting that:

> *"Given the distance at which the applicant's right to privacy in his business affairs stands from the 'inviolable core', such right must become subject to the limitation and exigencies of the common good and they weigh all the more heavily against it, subject at all times to the requirements of constitutional justice and fair procedures."* ([2007] 3 I.R. 542 at 548-549)

It is therefore clear that even though it may be accepted that there is a right to privacy in business transactions, that right may be limited by the

exigencies of the common good, with the threshold for such interference being relative and being case or circumstance specific.

55. However, it is still open to question whether an independent right of privacy exists for the benefit of the company, as distinct from its members. It must be remembered that limited liability companies are legal creations; they are therefore afforded certain privileges, but also have imposed on them certain responsibilities and limitations, *e.g.*, *inter alia*, filing accounts, director's and shareholder's meetings, details of directors, and being amenable to enquiries and investigation under the relevant company legislation. These are, to a greater or lesser extent, all matters open to the public. A private citizen would clearly not be obliged to conduct his business subject to such requirements. Some commentators have suggested that in an Irish constitutional context, the right to privacy is concerned with securing individual autonomy. Such autonomy considerations could not apply to a corporate actor (see O'Neill, "*The Constitutional Rights of Companies*(2007), Ch. 15).

56. Despite such concerns, I am satisfied, as Hanna J. was, that there must exist a right to privacy in respect of business transactions carried out by corporate bodies. However, this right, given the legal and factual nature of such artificial persons, will inevitably be narrower than that applicable to natural persons. No serious suggestion could be made that regulations which sought annual returns or required the keeping of proper books and accounts would be invalidly interfering with a company's right to privacy. In contrast, a requirement to divulge trade secrets may be quite a different matter. In general, I am satisfied that such a right to privacy must extend to companies as legal entities, separate and distinct from their members as natural persons. Such entities are an integral part of modern day business. It is therefore paramount that the interests of such legal persons are protected in the Courts. Much of the case law considering a company's right to privacy is considered in the context of the invasion of its premises, however this is not the only way in which a company's privacy might be invaded. As I have said, access may be sought to confidential information or research, or to information or documents generated as part of delicate business negotiations. Commerce and industry could not survive if such access was unregulated. It is therefore clear to me that in principle some right of privacy must exist at least over some areas of a company's activity. Having so decided, it is not necssary to determine where precisely on the spectrum such rights may fall.

57. In European law such a right is readily apparent from Arts. 7 and 8 CFR and Article 8 ECHR. For the sake of clarity it is worthwhile setting out these provisions. Article 7 CFR, headed "*Respect for private and family life*" provides:

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

Article 8 CFR, headed "*Protection of personal data*" 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 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. ..."

Article 8 ECHR states:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

58. In *Hoechst AG v. Commission* [1989] ECR 2859, and two companion cases (*Dow Benelux NV v. Commission* [1989] ECR 3137 and *Dow Chemical Iberica SA v. Commission* [1989] ECR 3165) the Court of Justice held that corporate privacy protection was a fundamental principle of Community law. However, referring to Art. 8 ECHR, the Court noted that this should not be taken as being a right to inviolability of business premises:

> *"The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. ... Nonetheless ... any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection againt arbitrary or disproportionate intervention. The need for such protection must be recognised as a general principle of Community law."* ([1989] ECR 2859 at paras. 18 – 19)

59. Subsequently, however, this issue was considered by the European Court of Human Rights ("ECtHR") in *Niemietz v. Germany* (1992) 16 EHRR 97. In that case the ECtHR ruled explicitly that the right to respect for private life in Art. 8 ECHR did extend to business premises since:

> *"to interpret the words 'private life' and 'home' as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by public authorities (see, for example, Marckx v. Beligium...)."*

Nonetheless such a right could be legitimately interfered with under Art. 8(2), and such interference *"might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case."*

60. The ECtHR, in *Société Colas Est and Others v. France* [2002] III-421, reiterated this point, noting that:

> *"[T]he Convention is a living instrument which must be*

interpreted in the light of present-day conditions (see, mutatis mutandis, Cossey v. the United Kingdom, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 in fine). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see Comingersoll v. Portugal [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (see, mutatis mutandis, Niemietz, cited above, p. 34, § 30)."

61. These cases were later acknowledged by the CoJ in, *inter alia*, *Roquette Frères SA v. Commission* [2002] ECR I-9011, which noted that it was now clear from the jurisprudence of the ECtHR that the protections afforded to the family home under Article 8 may apply to business premises, although potentially subject to a greater level of legitimate interference.

62. Despite being supportive of some level of privacy right for corporate persons, it should be noted that the above European case law was primarily concerned with privacy in the context of premises and search and seizures. Whether such rights could therefore be said to extend to the collection of call data is, as a result, open to question. However, I am satisfied that there is recognised in both Irish and European law a right to privacy in business. Admittedly, such a right may be subject to a high level of justified interference, compared with the equivalent rights of natural persons; however for present purposes it is unnecessary to enter into discussion as to the legitimate scope of such rights; it is enough that they exist, and that they may have been infringed. In any event, it is clear that privacy with regards to personal data is explicitly within the contemplation of Art. 8 CFR. I can see no reason why such a right, although possibly more limited, may not apply to companies. Indeed such information may be commercially sensitive. The company would therefore have a great interest in protecting such data. I would thus allow the Plaintiff *locus standi* to raise issues relating to interference with its rights of privacy, whatever they might ultimately be found to be.

<u>*Family and Marital Privacy*</u>:-

63. As has been noted, corporate persons, by virtue of their nature, may not be capable of holding certain rights. Although not in the context of companies, by analogy I would note the comments of Henchy J. in *Norris v. A.G.* [1984] I.R. 36 at 68, where he found that the plaintiff did not have *locus standi* since:

"[A]s an irremediably exclusive homosexual, he will never marry. Therefore, he has no standing to argue what would in this case be abstract constitutional rights of married couples."

Similarly, but in the context of corporate persons, in *Malahide Community Council Ltd. v. Fingal County Council* [1997] 3 I.R. 383 at 399, in a passage explicitly referred to as *obiter*, Lynch J. noted that:

"As an artificial body or person lacking the five senses of

human persons, it can never experience the pleasure of open spaces, beautiful gardens and woods or the physical satisfaction of sports facilities: it can never be nauseated by foul smells nor deafened by noisy industry or loud and raucous music nor have a cherished view of open spaces obstructed by new buildings."

64. It is therefore clear that it could not be possible for a corporate person to claim a right to marital privacy; such is obviously absurd, since it is unable to marry, reproduce or have children; it cannot form a family. I cannot therefore see how the Plaintiff could have a sufficient concern and interest in these matters. I would therefore refuse the Plaintiff standing in this regard.

Communication:-

65. That persons have a right to communicate would seem implicit in rights of free speech and freedom of association under Art. 40.6.1° of the Consitution (see *e.g.* the comments of Barrington J. in *The Irish Times v. Ireland* [1998] 1 I.R. 359 at 405; and *Attorney General v. Paperlink Ltd.* [1984] ILRM 373). However, in the current context it is clear that the alleged breaches of any right to communication are not claimed to be such that the right of the company to communicate is being restricted, rather it is a breach of what has been described as a right to confidential communication.

66. With regards to natural persons such a right has been considered in the context of phone tapping and other communications interception, *e.g.* e-mail monitoring. In this context, Hamilton P. noted, in *Kennedy v. Ireland* [1987] I.R. 487 at 593, that there had in that case been:

"[A] deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs and such interference constitutes an infringement of the constitutional rights to privacy of the three plaintiffs."

67. Such a right to communicate must, I feel, be inextricably linked to notions of privacy. As noted such a right to privacy is not absolute. In particular, it may need to be balanced against the duty of the State to investigate and detect serious crime. Nonetheless, there has been much consideration of the status of evidence collected through such methods. Finlay C.J. in *D.P.P. v. Kenny* [1990] 2 I.R. 110 at 134 noted that:

"[E]vidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary circumstances which justify the admission of the evidence in its (the court's) discretion."

68. Considering physical surveillance undertaken by the Gardaí in relation to certain drug deals, the Court of Criminal Appeal in *People (D.P.P.) v. Byrne* [2003] 4 I.R. 423 noted that it had *"no doubt and no reason to doubt that this was a perfectly proper operation set up on foot of reasonable*

information and all this was demonstrated by the result." Nonetheless it is clear that where surveillance is undertaken it must be justified and generally should be targeted. Finlay C.J. in *Kane v. Governor of Mountjoy Prison* [1988] I.R. 757 at 769 noted that:

> *"[I]f overt surveillance of the general type proved in this case were applied to an individual without a basis to justify it, it would be objectionable, and I would add, would be clearly unlawful. ... [S]uch surveillance is capable of gravely affecting the peace of mind and public reputation of any individual and the courts could not, in my view, accept any general application of such a procedure by the police, but should require where it is put into operation and challenged, a specific adequate justification for it."*

69. Although *Kenny* and *Byrne* could be said to relate to physical surveillance, I can see no logical reason why the Court's comment could not apply *mutati mutandis* to electronic surveillance. A person has a right not to be unjustifiablysurveilled; such is therefore a general right to confidential communication. Given my comments in relation to privacy generally *supra*, I can see no reason why such a right would not equally apply to corporate persons.

70. Under Art. 8 ECHR "everyone has the right to respect for ... his correspondence." Of course this right may be interfered with, but such must be in accordance with Art. 8(2). As with the Irish jurisprudence, the ECtHR stresses that where surveillance is provided for it must be the subject of *"adequate and effective guarantees against abuse"* (*Malone v. United Kingdom* [1984] 7 EHRR 14). The ECtHR in the case of *Klass v. Germany* (1979-80) 2 EHRR 214 noted that:

> *"[P]owers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions. ... The Court, being aware of the danger such a [telecoms interception] law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."* (*ibid.* at paras. 42 and 49)

71. It is therefore clear that the interception of telephone conversations without lawful justification or surveillance is in general illegal (see *Kennedy v. Ireland* [1987] I.R. 587). Although the collection of what might be called "physical" surveillance, is obviously useful, so too may the data associated with telecommunications messages. These data can potentially yield a wealth of information about the user, including, *inter alia*, who has been called, the duration of conversations, and where calls were made from. Of course technically it is the phone number which is identified, and not the caller; thus I may give you my phone to use; similarly with regards to the "called" phone. The ECtHR considered the question of whether the collection of such data would amount to an interference with Art. 8 ECHR in the case of *Copland v. United Kingdom* (Case 62617/00, 3rd April 2007) [2007] ECHR 253. The Court rejected the argument by the UK that the fact that there was no actual listening in on the conversations meant that there was no infringement of the

claimant's rights. At paragraph 43 of its judgment the Court recalls that:

> *"[T]he use of information relating to the date and length of telephone conversation and in particular the numbers dialled can give rise to an issue under Article 8 as such information constitutes an 'integral element of the communications made by telephone' (see Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, §84). The mere fact that these data may have been legitimately obtained ... is no bar to finding an interference with rights guaranteed under Article 8 (ibid). Moreover, storing of personal data relating to the private life of an individual also falls within the application of Article 8 §1 (see Amann, cited above, §65). Thus, it is irrelevant that the data held ... were not disclosed or used against the applicant in disciplinary or other proceedings.*
>
> *Accordingly, the Court considers that the collection and storage of personal information relating to the applicant's telephone, as well as her e-mail and internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8."*

72. Thus in the context of this application it would appear to me that the storage of communications data, even without use, may be an interference with a person's rights under Art. 8 ECHR. Therefore I would reject any assertion by the Defendants that it would be necessary for this information to be used before any challenge could be mounted to its collection. It is clear that the retention of such data, *prima facie*, may be an interference with the Plaintiff's rights to privacy. In this regard I would draw support from Art. 8 FCR which provides for the protection of personal data. Consequently I would therefore allow the Plaintiff *locus standi* in this regard. However, I would stress, that is not to say that such interference is not legitimately justified or that the Plaintiff would be ultimately successful in its action; that is, and must be, a matter for the full hearing.

<u>*Travel:*</u>-

73. The Plaintiff also claims that the actions of the Defendants are an infringement of its rights to travel and, in particular, its right to confidential travel. In *State (M) v. Attorney General* [1979] I.R. 73 the Court outlined what it perceived to be a citizens right to travel. Having considered *Ryan v. Attorney General* [1965] I.R. 294, a seminal case with regards to unenumerated rights, Finlay P. noted:

> *"I have considered carefully whether there should be any special reason why the learned judge ... should have confined to a right to free movement within the State that which might be described ordinarily as a right to travel. ... [S]ubject to conditions, acceptable to the State, it appears to me that the citizens of the State may have a right (arising from the Christian and democratic nature of the State — though not enumerated in the Constitution) to avail of such facilities without arbitrary or unjustified interference by the State. ... [S]ubject to the obvious conditions which may be required by public order and the common good of the State, a citizen has*

> *the right to a passport permitting him or her to avail of such facilities as international agreements existing at any given time afford to the holder of such a passport. To that right there are obvious and justified restrictions, the most common of which being the existence of some undischarged obligation to the State by the person seeking a passport or seeking to use his passport — such as the fact that he has entered into a recognisance to appear before a criminal court for the trial of an offence. ... Furthermore, one of the hallmarks which is commonly accepted as dividing States which are categorised as authoritarian from those which are categorised as free and democratic is the inability of the citizens of, or residents in, the former to travel outside their country except at what is usually considered to be the whim of the executive power. Therefore, I have no doubt that a right to travel outside the State in the limited form in which I have already defined it (that is to say, a right to avail of such facilities as apply to the holder of an Irish passport at any given time) is a personal right of each citizen which, on the authority of the decisions to which I have referred, must be considered as being subject to the guarantees provided by Article 40 although not enumerated."* (*ibid.* at pp. 80 – 81)

74. It is important to note that the Court in considering the right to travel saw it as analogous to a right to a passport. Even if such were in doubt, it would therefore appear that the right to travel is a person's right which can only be enjoyed by natural persons; a corporation requires no passport. I can see of no real sense in which a company could "travel" in the manner as mentioned. It is true that it may be present in many jurisdictions, but that is not the same thing as travel. At most the movement of companies to and from countries is a matter of establishment. To talk realistically of companies travelling is nonsensical. I would therefore, on similar grounds as with rights of family and martial privacy, conclude that the Plaintiff cannot avail of this right, and thus does not have *locus standi* to raise it on its own behalf.

75. I should of course briefly also acknowledge the right to travel within the European Union, derived from, *inter alia*, Arts. 20 and 21 TFEU (formely Arts. 17 and 18 TEU), and confirmed in subsequent case law (see *e.g. Baumbast and R. v. Secretary of State for the Home Department* [2002] ECR I-7091; *Zhu and Chen v. Secretary of State for the Home Department* [2004] ECR I-9925; *Trojani v. CPAS* [2004] ECR I-7573). This right too is not absolute and may be restricted in certain circumstances.

76. In any event, it is not physical travel which is being impeded, it is the confidential nature of the travel which is alleged to be infringed. Unlike a right to communicate, a right to travel will inevitably be more circumscribed. The right to confidential travel must necessarily be split as between national and international travel.

77. With regards to the latter, as Finlay P. noted in *State (M) v. Attorney General* it must in any event be reliant on international agreements. Pragmatically, States must have an interest, or the capacity to have such an interest, in those who enter their borders. It is therefore not easy to conceive of how a right to confidential international travel could operate in practice. Nonetheless, even should such a right exist it would necessarily be extremely

limited.

78. There may be greater force in the argument that there is a right to confidential travel within the State, however I have no doubt that, as with surveillance, such a right might be circumscribed, *inter alia*, in the interests of preventing crime. In any event, I am satisfied that neither of these rights may be invoked by the Plaintiff since, as stated, it is incorporeal and therefore lacks the ability to travel in the sense which is implicit in the right as recognised.

Actio Popularis:-

79. Despite the foregoing, it may nevertheless be possible for the Plaintiff to litigate matters which do not, or cannot, affect it personally and specially in limited circumstances. The seminal case in this regard *is Crotty v. An Taoiseach*[1987] 1 I.R. 713, which is referred to in detail at para. 31 *supra*. It is sufficient to recap that Mr. Crotty's inability to point to any prejudice specific to him personally, as distinct from him as a member of the public, did not deprive him of the necessary standing.

80. However, as noted above, different considerations may apply to limited companies. One of the primary concerns of rules relating to *locus standi* is to prevent those litigants who are meddlesome, frivolous or vexatious from unduly burdening the Court, and those parties whom are sued. Therefore, cases should be brought primarily by persons who have a particular interest in the subject matter. In striving to achieve this outcome, the Courts have available the deterrent to impose cost orders against the former group, which may include companies with limited liability. However, there can be concern if such litigants are in fact merely straw-men, or straw-companies, behind which the true litigants hide so as to evade any order for costs which might ultimately be made against them. In those circumstances the Court must examine the nature of the company and its purpose, lifting the veil if required, together with the surrounding circumstances of the case, and the rights which it seeks to vindicate.

81. The Supreme Court in *S.P.U.C. v. Coogan* [1989] 1 I.R. 734 recognised the right of the plaintiff company to litigate to prevent a breach of the Constitution where it had a *bona fide* concern and interest, with Finlay C.J. noting that:

> *"To ascertain whether such bona fide concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected."*

Therein he noted that with regards to the right to life of the unborn there could never be a victim or potential victim who could sue. Thus given that "*there can be no question of the plaintiff being an officious or meddlesome intervenient in this matter*", considering that the plaintiff in that case had taken proceedings, which had been successfully brought to conclusion by the Attorney General, and "the particular right which it seeks to protect with its importance to the whole nature of our society", these facts "constitute sufficient grounds for holding that it is a person with a *bona fide* concern and interest and accordingly has the necessary legal standing to bring the action." In this context the learned Chief Justice made it clear that a Company could not, by virtue only of its memorandum and articles of association, meet such criteria.

82. Similarly, Walsh J. therein noted at p. 744 of the report that:

> *"One of the fundamental political rights of the citizen under the Constitution, indeed one of the most valued of his rights, is that of access to the Court...*

He put it further at pp. 746 – 747 of the report:

> *"It is quite clear from [East Donegal Co-Operative Livestock Mart Ltd v. Attorney General [1970] I.R. 317, O'Brien v. Keogh [1972] I.R. 144, Cahill v. Sutton [1980] I.R. 269] and other decisions that even in cases where it is sought to invalidate a legislative provision the Court will, where the circumstances warrant it, permit a person whose personal interest is not directly or indirectly or in the future threatened to maintain proceedings if the circumstances are such that the public interest warrants it. In this context the public interest must be taken in the widest sense."*

83. In *Blessington Heritage Trust Limited v. Wicklow County Council and Others* [1999] 4 I.R. 571, McGuinness J. considered the position of a limited company which sought to challenge a grant of planning permission:

> *"In cases like the instant case it may well be argued, as it was in Lancefort Ltd. v. An Bord Pleanála (Unreported, High Court, Morris., 6th June, 1997), that companies such as the Applicant company have been incorporated simply to afford the true Applicants 'a shield against an award of costs' to use the words of the learned Morris J. I have no doubt that this is a relevant factor and one which must cause concern to a developer such as the Notice Party. However, it could also be argued that in cases such as the present the individual member of the public may in practice be denied access to the Courts – or at least have that access made more difficult – by the danger of an award of costs against him in a case where his opponent is a large development company with resources which enable it to pursue lengthy and costly litigation with comparative impunity." (ibid.* at 595)

He notes, see para. 39 *supra*., that over-reliance may, of course, tip the balance too far in favour of objectors, but ultimately:

> *"The Court should look at the factual background in each case and, if necessary, maintain the balance by the making of an order for security for costs."*

84. In *Lancefort Limited v. An Bord Pleanála and Others (No. 2)* [1999] 2 I.R. 270 at 308, Keane J. felt that:

> *"The authorities reflect a tension between two principles which the Courts have sought to uphold: ensuring on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies, do not escape scrutiny by the Courts because of the absence of indisputably qualified objectors, and, on the other hand, that the critically important remedies provided by the law in these areas are not abused.*
>
> *In the latter area, the courts have dwelt on occasions on the*

> *dangers of giving free rein to cranks and busybodies. But it is to be borne in mind that the citizen who is subsequently seen to have performed a valuable service in, for example, bringing proceedings to challenge the constitutionality of legislation, while exposing himself or herself to an order for costs, may at the outset be regarded by many of his or her fellow citizens as a meddlesome busybody. The need for a reasonably generous approach to the question of standing is particularly obvious in cases where the challenge relates to an enactment of the Oireachtas or an act of the executive which is such a nature as to affect all the citizens equally: see, for example, Crotty v. An Taoiseach [1987] I.R. 713. But it is also the case that severely restrictive approach to locus standi where the decision of a public body is challenged would defeat the public interest in ensuring that such bodies obey the law."* (Emphasis added)

Keane J. further noted that:

> *"It is also the case that the requirements of national law as to standing may in some instances have to yield to the paramount obligation on national Courts to uphold the law of the European Union." (ibid.* at 312)

85. Keane J. went on to conclude that a company could have *locus standi* to bring proceedings even if it was unable to point to any proprietary or economic interest in the impugned decision. He also concluded that a company may not be denied standing merely because it was not in existence at the time of the relevant decision, and that the law:

> *"[R]ecognises the right of persons associating together for non-profit making or charitable activities to incorporate themselves as limited companies and the fact that they have chosen so to do should not of itself deprive them in every case of locus standi." (ibid.* at 318)

86. Given that the comments made in both *Blessington* and *Lancefort (No. 2)* related to planning decisions, it must be the case that they apply with equal, if not greater, force in circumstances where the impugned actions involve constitutional rights and acts of the Oireachtas; indeed it can be seen from the underlined passage above that Keane J. in *Lancefort (No. 2)* was firmly of the view that a more generous approach to *locus standi* is merited in such circumstances. I would respectfully agree. So too may the fact that European Union law is at issue be a consideration – in particular, I would note, the rules as to *locus standi* should not unduly impede possible references to the CoJ; they should not be so restrictive as to effectively deny a plaintiff redress before the Court.

87. However, as was noted in *S.P.U.C. v. Coogan* the nature of the rights which the Plaintiff seeks to vindicate must, nonetheless, be taken into account. I would also reiterate the comments of Gilligan J. in *The Irish Penal Reform Trust Ltd. & Ors. v. The Governor of Mountjoy Prison & Ors.* [2005] IEHC 305 (see para. 40 *supra.*), where he said:

> *"The simple fact is that Cahill v. Sutton allows, in plain terms, for the relaxation of the personal standing rules where those prejudiced may not be in a position to adequately assert their constitutional rights."*

Conclusions on Locus Standi:-

88. Ultimately as Gilligan J. noted in *The Irish Penal Reform Trust Ltd.*:

> *"[T]he approach I take to this matter is primarily one of discretion. I take into account the nature of the I.P.R.T. and the extent of its interest in the issues raised and the remedies which it seeks to achieve and the nature of the relief as sought. I am satisfied that if I were to deny standing to I.P.R.T. those whose interests it represents may not have an effective way of bringing the issues that are involved in these proceedings before the court."*

I too am primarily dealing with the issue of *locus standi* as one of informed discretion. I have no doubt, given the concerns expressed by the Plaintiff in their submissions, that it is acting *bona fides* and is neither being a crank, meddlesome or vexious.

89. The Plaintiff is the owner of a mobile phone, and as such can be affected by issues relating to privacy and communications in relation thereto. Such privacy in the carrying out of business transactions, *etc.*, is important for any company. Indeed these rights are not merely important to businesses, but, it must be thought, of great importance to the public at large. There is thus a significant element of public interest concern with regards to the retention of personal telecommunications data, and how this could affect persons' right of privacy and communication. Further, as will be considered in relation to security for costs, from a pragmatic point of view, were the Plaintiff debarred from continuing these proceedings it is unlikely that any given mobile communications user, although specifically affected by the impugned legislation, would bring the case; given the costs that would be associated with any such challenge. It is therefore clear that the impugned legislation does in fact have the potential to be, in the words of Finlay C.J. in *S.P.U.C. v. Coogan* [1989] 1 I.R. 743 of *"importance to the whole nature of our society"*.

90. I would also add that that the Human Rights Commission has been joined as *amicus curiae*. It would seem to support the Plaintiff's contention that this case raises matters of fundamental public importance regarding persons' human rights. As an independent organisation which has no vested interest in the outcome of this matter, and which was established by statute to, *inter alia*, *"keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights"*, the fact that it sought to be included in this matter as a notice party, principally so that should the matter come before the European Courts it would be able to make submissions, to some extent affirms the position taken by the Plaintiff, namely its *bona fide* interest and concern in seeking to litigate the matter, and supports the proposition that this is a matter of fundamental public importance.

91. In coming to my conclusions, and in light of the case law considered above, I have taken into account:

> i) The Plaintiff is a sincere and serious litigant – it is not a vexatious litigant or a crank;

ii) This case raises important constitutional questions;

iii) The impugned provisions affect almost all of the population;

iv) It would be an effective way to bring the action – individual owners of mobile phones would be unlikely to litigate the matter;

v) The Plaintiff's right of access to the Court, and the Court's duty to uphold the Constitution and ensure that suspect actions are scrutinised;

vi) The public good which is being sought to be protected.

92. Therefore, for the reasons given above, I grant *locus standi* to the Plaintiff in relation to alleged infringements, potential or otherwise, of rights to privacy and communication, and having regard to all of the circumstances of the case, including the nature of the Plaintiff company, the Plaintiff should be able to litigate these matters fully; that is both with regards to the infringement of the Plaintiff's rights as a legal person, and also with regards to natural persons. As stated, the level of interference between these two persons may not be the same. Natural persons may be afforded greater protection of these rights than companies. It would therefore seem to me, pragmatically speaking, that it would be sensible to allow the Plaintiff to advance these arguments in full. Were the Plaintiff only allowed to advance its arguments on the grounds that it would infringe a company's rights it could leave open the question of whether natural persons' rights were nevertheless infringed. It must be in the interests of justice and Court time, that such be litigated in circumstances where the Plaintiff is not in reality put at any disadvantage in pleading on behalf of citizens in general.

93. I would reiterate that it is clear that the Plaintiff has, purely in its personal capacity, *locus standi* with regards to infringements of its rights to privacy and communication. This I would hold even if there were no other greater interests in the matter. However, given that the impugned legislation could have a possible effect on virtually all persons, I would also grant the Plaintiff *locus standi* to litigate these matters generally as what might be termed an *actio popularis*.

Security for Costs:

94. The Defendants' second application was for security for costs against the Plaintiff under s. 390 of the Companies Act 1963.

95. The Defendants state that it is not contested that were they successful in these proceedings the Plaintiff would be unable to discharge their costs. The Plaintiff, which is limited by guarantee, has only eight subscribers, each of whom has acknowledged a liability to contribute to the assets of the company in an amount limited to the sum of €1. Further, the accounts of the Plaintiff, from the most recent accounts, as presented to the Court, for period ended 31st December 2006, show that it had a gross income of €1,606 and administrative expenses of €6,421 resulting in a loss that year of €4,815. The sole asset of the company is cash totalling €435, against a total of €5,250

due to creditors, resulting in a deficit of €4,815.

96. The Defendants assert that they have a *bona fide* defence in that they deny retention of any mobile telecommunications data related to the Plaintiff, they deny the irrationality, unreasonableness and procedural defects claimed in respect of the directions alleged, and deny any alleged breaches of constitutional or Convention rights. Further, the Defendants invoke the common good, in particular considerations of public policy and public order, and the obligation under the Constitution to ensure that the authority of the State is not undermined. In the alternative, such restrictions as may exist are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime and the protection of the rights and freedoms of others.

97. The Defendants further content that, on the basis of a *bona fide* defence, once the Court is satisfied as to the Plaintiff's financial incapacity, the burden shifts to Plaintiff to show that there are "special circumstances" which justify a refusal by the Court to order security for costs. The Defendants deny that such exist in this case.

98. Although not accepting that the onus lies upon it, instead stating that the burden is on the Defendants to persuade the Court that an order should be made, the Plaintiff argues that the Court should exercise its discretion and refuse the order so sought. In this regard it points to the nature of the proceedings, concerning as they do the validity of acts done and measures designed to ensure that data is retained in respect of mobile phone, internet and e-mail communications of all persons who use such services, and thereafter is available for access and use by State Authorities, which in essence the Defendants are in these proceedings. It argues, therefore, that this is a matter of such gravity and importance as to transcend the interests of the parties before the Court and that clarification is required in the interests of the common good.

99. The Plaintiff also claims that, as with the issue of *locus standi*, national procedural rules should not frustrate a remedy under European law. Thus, given the fact that this case is seeking a Reference to the CoJ on matters relating to the validity of national and Community laws, the Court should be slow to order security for costs where that in itself would have the effect of preventing such a Reference.

100. Ultimately both parties accept that the question of ordering security for costs under section 390 of the Companies Act 1963 ("the 1963 Act") is a matter of Court discretion, with the Defendants relying on the impecuniousness of the Plaintiff and their raising of a *bona fide* defence, whereas the Plaintiff heavily asserts the overriding public interest in allowing this case to proceed.

101. I would firstly say in this regard that s. 390 of the 1963 Act does not place an obligation on the Court to grant security for costs merely because the plaintiff company is impecunious and the defendant asserts a *bona fide* defence. Kingsmill Moore J., considering s. 278 of the Companies Act 1908 which is in almost identical terms as s. 390 of the 1963 Act, in *Peppard and Co. Ltd. v. Bogoff* [1962] I.R. 180 at 188, made it clear that:

"[T]he section does not make it mandatory to order security for

> *costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised in special circumstances."*

In that case the Court found such special circumstances on the grounds that, on the plaintiff's case, any impecuniousness may have been due to the wrongs of the defendant, and secondly that there was a co-plaintiff who was a natural person resident in the jurisdiction who could be fixed with costs in the event that the defendant won.

102. It now falls to consider what "circumstances" may be "special" so as to entitle an impecunious plaintiff company to proceed without having to give security for costs.

103. Although pleaded in the parties' submissions, no argument was advanced during the hearing in relation to the delay of the Defendants in bringing this application. Nonetheless I would briefly comment in this regard. I would agree with Kingsmill Moore J. in *Peppard & Co. v. Bogoff* (*ibid.*) that delay, unless it is inordinate and culpable, does not weigh greatly against the defendant in an application for security for costs (*S.E.E. Company Ltd. v. Pubic Lighting Services*[1987] ILRM 255 and *Beauross Ltd. v. Kennedy* (Unreported, High Court, Morris J., 18th October 1995) considered); although of course in some circumstances delay can be a significant factor in refusing such an application (see for example *Dublin International Arena Limited v. Campus Stadium Ireland Developments Ltd.* [2008] 1 ILRM 496). I feel that the former is the case here, and although it may be of some relevance, my decision is not based on any findings in relation to delay, given that it was not properly advanced at the hearing.

104. One of the recognised "special circumstances" which a Court may take into account in refusing an order for security for costs is that the case involves questions of fundamental public importance. Morris J. in *Lancefort Ltd. v. An Bord Pleanála & Ors* [1998] 2 I.R. 511 at 516 in this regard notes:

> *"I have considered the Supreme Court authorities in Midland Bank Ltd v. Crossley-Cooke [1969] I.R. 56 and Fallon v. An Bord Pleanála [1992] 2 I.R. 380. I consider in the context of the applicant's opposition to the application these are relevant authorities and in particular that part of the judgment of the Chief Justice where he says at p. 384:*
>
> > *'The second mandatory condition, as it were, laid down in the judgment [in Midland Bank Ltd. v. Crossley-Cooke][sic.] is that the Court should not ordinarily entertain an application for security for costs if it is satisfied that the question at issue in the case is a question of law of public importance...'"*

Nonetheless Morris J. concluded that:

> *"I am of the view that while a challenge to the constitutionality of a section which permits An Bord Pleanála to materially contravene a development plan must be regarded as of importance, I am unable to conclude that the point is of such gravity and importance that it transcends the interest and considerations of the parties actually before the court."*

105. The above decision of Morris J. was considered by Laffoy J. in *Villiage*

Residents Association Ltd. v. An Bord Pleanála (No. 2) [2000] 2 I.R. 321 at 333 where she stated:

> *"It is well settled that the Supreme Court should not ordinarily entertain an application for security for costs on an appeal to that court if it is satisfied that the question at issue in the case is a question of law of public importance (per Finlay C.J. in Fallon v. An Bord Pleanála [1992] 2.I.R. 380 at p. 384)... I am of the view that it is appropriate in this case to consider whether a question of law of public importance exists, as Morris J., as he then was, did on the application for security in Lancefort Ltd. v. An Bord Pleanála [1998] 2 I.R. 511. However, for the reasons outlined earlier for rejecting the applicant's contention that this case raises an issue of general public importance, I consider that it does not raise a question of law of public importance. For the same reasons I am of the view that the criteria for determining whether a question of law of public importance exists which can be extrapolated from the judgment of Morris J. in Lancefort Ltd. v. An Bord Pleanála [1998] 2 I.R. 511 - whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also - are not met."* (Emphasis added)

I would respectfully agree with both Morris and Laffoy JJ. in relation to the above statements of law, and with their conclusions in those cases.

106. It has been advanced, in a similar way as was advanced in relation to *locus standi* (see para. 28 *supra*.), that the European element of this case should weigh against the granting of security for costs in circumstances where the granting of such would deny the applicant effective redress. I agree with the Plaintiff that this is a factor which I should take into account. However, I also concur with and note the statement of Denham J., in *Dublin International Arena Limited v. Campus Stadium Ireland Developments Ltd.* [2008] 1 ILRM 496 at paragraph 24, that the involvement of EC Directives"*[does] not preclude an application for security for costs."* It is therefore a relevant factor, to the extent that security for costs should not unduly restrict access to judicial remedy, but it could not in my opinion, in and of itself, constitute a "special circumstance", such that it would be determinative of the matter without more.

107. Finally, with regards to the onus of proof, I would endorse the views of Finlay C.J. in *Jack O'Toole Ltd. v. McEoin Kelly Associates* [1986] I.R. 277 where at 283 he held that:

> *"It is clear that there is no presumption, either in favour of the making of an order for security for costs or against it, but I am satisfied that where it is established or conceded ... that a limited liability company which is a plaintiff would be unable to meet the costs of a successful defendant, that if the plaintiff company seeks to avoid an order for security for costs it must, as a matter of onus of proof, establish to the satisfaction of the judge the special circumstances which would justify the refusal of an order."*

108. Although the Court *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270 considered that the granting of security for costs might be a way of redressing any imbalance between the parties where a company seeks to litigate rights, I do not consider that this should be the case here. Having regard to the foregoing, I am satisfied, as stated with regards to *locus standi*, that the matters pleaded in this case do raise issues of significant public importance, which are of *"such gravity and importance as to transcend the interests of the parties"* and *"it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases."* Given the rapid advance of current technology it is of great importance to define the legitimate legal limits of modern surveillance techniques used by governments, in particular with regard to telecommunications data retention; without sufficient legal safeguards the potential for abuse and unwarranted invasion of privacy is obvious. Its effect on persons, without their knowledge or consent, also raises important questions indicative of a *prima facie* interference with all citizens' rights to privacy and communication (*Copland v. United Kingdom* considered). That is not to say that this is the case here, but the potential is in my opinion so great that a closer scrutiny of the relevant legislation is certainly merited with regards to its potential interference with important and fundamental rights of persons, both natural and legal. I would therefore refuse the Defendants' application for security for costs on the above grounds.

Article 267 of TFEU Reference:

109. The Plaintiff has brought a motion calling for a Reference to the CoJ under Article 267 of TFEU. The questions to be asked all relate to the validity of Directive 2006/24/EC, in particular with rights under the EU and EC Treaties, the CFR and the ECHR. Questions relating to whether the Directive was issued under the appropriate Treaty heading were live matters at the time of the hearing as the Irish Government was then involved in ongoing litigation in the CoJ on this point. Since the hearing, the CoJ has ruled against the Irish government on the issue (*Ireland v. European Parliament and Council of the European Union* (Case C-301/06) (delivered on the 10th February 2009)). The Court found that Directive 2006/24/EC was properly enacted under Art. 95 TEC, since it was apparent that differences between national rules adopted for the retention of data were liable to have a foreseeable direct impact on the functioning of the internal market which would become more serious over time. Further, the provisions of the Directive are essentially limited to the activities of service providers and do no not govern access to data, or its use by police or judicial authorities. However, the CoJ expressly stated that the action related solely to the choice of legal basis for the Directive, and *"not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy..."* (*ibid.* at para. 57).

110. The Plaintiff notes that there is a complete discretion, under Article 267(2), for a judge to refer a question when he considers that a decision on it is necessary to enable it to give judgment. However in this case the Plaintiff also seeks to ground its application under Article 267(3), which states:

> *"Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision*

> *there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice"* (emphasis added)

The Plaintiff argues that where a question of the validity Community law is raised the national court must make a reference since there is no effective judicial remedy under national law because a national judge may not declare a Community instrument invalid (*Foto-Frost v. Hamptzollant Lübeck-Ost* (Case 314/85) [1987] ECR 4199).

111. Attention is drawn to the exceptions to the requirement to make a Reference. These are that, firstly, the matter is not required in order for the national court to rule on the matter case (see *Weinand Meilickev. ADV/ORGA F.A. Meyer AG*[1992] ECR I-4871; *Corsica Ferries Italia Slr v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; *Monin Automobiles-Maison de Deux-Roues* [1994] ECR I-195). Secondly the Community law issue is governed by previous authority (see *CILFIT*; D*a Costa en Schaake NV v. Nederlandse Belastingadministratie* [1963] ECR 31; *Foglia v. Novello II*[1981] ECR 3045). Thirdly the application of Community law is so obvious as to leave no doubt to the national court (see*CILFIT v. The Minister for Health* [1982] ECR 3415). In the Plaintiff's opinion none of these operate in this case. A useful summary in relation to references to the CoJ can be found in *Kelly v National University of Ireland* [2008] IEHC 464.

112. The Defendants admit that, in relation to the Article 267 Reference, it is a matter of discretion for the Court, but argues that at this point a Reference would be premature. They say that, in circumstances where the Plaintiff has elected to bring proceedings by way of plenary action, and must therefore provide evidence, including *viva voce* evidence, to be examined in open court, and where this has yet to be done, there is therefore as of now, no way of evaluating what the final evidential framework will be. What evidence exists is, by definition, one-sided. In this regard reliance is placed upon*Irish Creamery Milk Suppliers Association v. Ireland* (Joined Cases 36 and 71/80) [1981] ECR 735, where the CoJ stated at paragraph 6 that:

> *"The need to provide an interpretation of Community law which will be of use to the national court makes it essential ... to define the legal context in which the interpretation requested should be placed. From that aspect it might be convenient, in certain circumstances, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so as to enable the latter to take cognisance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called to give."*

Thus where the legal and factual context in the case has yet to be properly defined a Reference at this stage should be refused. The Plaintiff, the Defendants submit, fails to acknowledge that significant factual and national law issues remain to be determined concerning the nature and extent of the fundamental rights directly affected by the provisions of the Directive, as well as the extent, if any, to which any such rights are capable of being enjoyed or invoked by an artificial legal entity.

113. In relation the Article 267 Reference, I am satisfied that there is sufficient information before me to make such a Reference to the CoJ. I do not think that the application is premature; it is possible to define the context of the Reference (*Irish Creamery Milk Suppliers Association v. Ireland* [1981]

ECR 735 considered). This is not a case which requires significant *viva voce* evidence to properly define the context or issues in the case. It is a challenge to specific legislative provisions which speak for themselves. I am also satisfied that the Reference is required since I am unable to rule on the validity of Community law (see *Foto-Frost v. Hamptzollant Lübeck-Ost* (Case 314/85) [1987] ECR 4199). I would therefore grant the application for a Reference under Article 267 TFEU.

114. With regards to the questions to be referred I do not propose to deal with those at this juncture. Instead I would invite the parties to submit suggestions, either individually or in the form of agreed questions between them, as to the content and wording of the questions to be referred, taking into account my findings in this decision.

Conclusion:

115. Thus in summary:

> i) I grant the Plaintiff *locus standi* to bring an *actio popularis* in respect of whether the impugned provisions violate citizens' rights to privacy and communications, but not with regards to family and marital privacy or travel;
>
> ii) I refuse the Defendants' motion for security for costs;
>
> iii) I grant the Plaintiff's motion for a Reference to the Court of Justice under Article 267 TFEU.

THE HIGH COURT

Record No: 2013/ 765JR

IN THE MATTER OF AN APPLICATION TO INTERVENE

BETWEEN:

MAXIMILIAN SCHREMS

Plaintiff

-and-

DATA PROTECTION COMMISSIONER

Defendant

ON THE APPLICATION OF
DIGITAL RIGHTS IRELAND LIMITED

Applicant

AFFIDAVIT OF ANTOIN O'LACHTNAIN

EXHIBIT "AOL2"

Antoin Ó Lachtnain

Deponent

Julia Hussey

~~Commissioner for Oaths~~/Practising Solicitor

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DEN EUROPÆISKE UNIONS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN UNION
EUROOPA LIIDU KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
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EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

CVRIA
LUXEMBOURG

JUDGMENT OF THE COURT (Grand Chamber)

8 April 2014 *

(Electronic communications — Directive 2006/24/EC — Publicly available electronic communications services or public communications networks services — Retention of data generated or processed in connection with the provision of such services — Validity — Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union)

In Joined Cases C-293/12 and C-594/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the High Court (Ireland) and the Verfassungsgerichtshof (Austria), made by decisions of 27 January and 28 November 2012, respectively, received at the Court on 11 June and 19 December 2012, in the proceedings

Digital Rights Ireland Ltd (C-293/12)

v

Minister for Communications, Marine and Natural Resources,

Minister for Justice, Equality and Law Reform,

Commissioner of the Garda Síochána,

Ireland,

The Attorney General,

intervener:

Irish Human Rights Commission,

and

* Languages of the case: English and German.

Kärntner Landesregierung (C-594/12),

Michael Seitlinger,

Christof Tschohl and others,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), E. Juhász, A. Borg Barthet, C.G. Fernlund and J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, G. Arestis, J.-C. Bonichot, A. Arabadjiev, C. Toader and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2013,

after considering the observations submitted on behalf of:

- Digital Rights Ireland Ltd, by F. Callanan, Senior Counsel, and F. Crehan, Barrister-at-Law, instructed by S. McGarr, Solicitor,
- Mr Seitlinger, by G. Otto, Rechtsanwalt,
- Mr Tschohl and Others, by E. Scheucher, Rechtsanwalt,
- the Irish Human Rights Commission, by P. Dillon Malone, Barrister-at-Law, instructed by S. Lucey, Solicitor,
- Ireland, by E. Creedon and D. McGuinness, acting as Agents, assisted by E. Regan, Senior Counsel, and D. Fennelly, Barrister-at-Law,
- the Austrian Government, by G. Hesse and G. Kunnert, acting as Agents,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the French Government, by G. de Bergues and D. Colas and by B. Beaupère-Manokha, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by A. De Stefano, avvocato dello Stato,
- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes and C. Vieira Guerra, acting as Agents,

– the United Kingdom Government, by L. Christie, acting as Agent, assisted by S. Lee, Barrister,

– the European Parliament, by U. Rösslein and A. Caiola and by K. Zejdová, acting as Agents,

– the Council of the European Union, by J. Monteiro and E. Sitbon and by I. Šulce, acting as Agents,

– the European Commission, by D. Maidani, B. Martenczuk and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2013,

gives the following

Judgment

1 These requests for a preliminary ruling concern the validity of 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 (OJ 2006 L 105, p. 54).

2 The request made by the High Court (Case C-293/12) concerns proceedings between (i) Digital Rights Ireland Ltd. ('Digital Rights') and (ii) the Minister for Communications, Marine and Natural Resources, the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána, Ireland and the Attorney General, regarding the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications.

3 The request made by the Verfassungsgerichtshof (Constitutional Court) (Case C-594/12) concerns constitutional actions brought before that court by the Kärntner Landesregierung (Government of the Province of Carinthia) and by Mr Seitlinger, Mr Tschohl and 11 128 other applicants regarding the compatibility with the Federal Constitutional Law (Bundes-Verfassungsgesetz) of the law transposing Directive 2006/24 into Austrian national law.

Legal context

Directive 95/46/EC

4 The object of 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 (OJ 1995 L 281, p. 31), according to Article 1(1) thereof, is to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with regard to the processing of personal data.

5 As regards the security of processing such data, Article 17(1) of that directive provides:

'Member States shall provide that the controller must implement appropriate technical and organi[s]ational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.'

Directive 2002/58/EC

6 The aim of Directive 2002/58/EC 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), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11, 'Directive 2002/58), according to Article 1(1) thereof, is to harmonise the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and to confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the European Union. According to Article 1(2), the provisions of that directive particularise and complement Directive 95/46 for the purposes mentioned in Article 1(1).

7 As regards the security of data processing, Article 4 of Directive 2002/58 provides:

'1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the

state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

1a. Without prejudice to Directive 95/46/EC, the measures referred to in paragraph 1 shall at least:

– ensure that personal data can be accessed only by authorised personnel for legally authorised purposes,

– protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure, and,

– ensure the implementation of a security policy with respect to the processing of personal data,

Relevant national authorities shall be able to audit the measures taken by providers of publicly available electronic communication services and to issue recommendations about best practices concerning the level of security which those measures should achieve.

2. In case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the subscribers concerning such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, of any possible remedies, including an indication of the likely costs involved.'

8 As regards the confidentiality of the communications and of the traffic data, Article 5(1) and (3) of that directive provide:

'1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

...

3. Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes

of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.'

9 Article 6(1) of Directive 2002/58 states:

'Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).'

10 Article 15 of Directive 2002/58 states in paragraph 1:

'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.'

Directive 2006/24

11 After having launched a consultation with representatives of law enforcement authorities, the electronic communications industry and data protection experts, on 21 September 2005 the Commission presented an impact assessment of policy options in relation to the rules on the retention of traffic data ('the impact assessment'). That assessment served as the basis for the drawing up of the proposal for a directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005) 438 final, 'the proposal for a directive'), also presented on 21 September 2005, which led to the adoption of Directive 2006/24 on the basis of Article 95 EC.

12 Recital 4 in the preamble to Directive 2006/24 states:

'Article 15(1) of Directive 2002/58/EC sets out the conditions under which Member States may 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 that Directive.

Any such restrictions must be necessary, appropriate and proportionate within a democratic society for specific public order purposes, i.e. to safeguard national security (i.e. State security), defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications systems.'

13 According to the first sentence of recital 5 in the preamble to Directive 2006/24, '[s]everal Member States have adopted legislation providing for the retention of data by service providers for the prevention, investigation, detection, and prosecution of criminal offences'.

14 Recitals 7 to 11 in the preamble to Directive 2006/24 read as follows:

'(7) The Conclusions of the Justice and Home Affairs Council of 19 December 2002 underline that, because of the significant growth in the possibilities afforded by electronic communications, data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention, investigation, detection and prosecution of criminal offences, in particular organised crime.

(8) The Declaration on Combating Terrorism adopted by the European Council on 25 March 2004 instructed the Council to examine measures for establishing rules on the retention of communications traffic data by service providers.

(9) Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [signed in Rome on 4 November 1950], everyone has the right to respect for his private life and his correspondence. Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, inter alia, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. Because retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. ...

(10) On 13 July 2005, the Council reaffirmed in its declaration condemning the terrorist attacks on London the need to adopt common measures on the retention of telecommunications data as soon as possible.

(11) Given the importance of traffic and location data for the investigation, detection, and prosecution of criminal offences, as demonstrated by research and the practical experience of several Member States, there is a need to ensure at European level that data that are generated or processed, in the

course of the supply of communications services, by providers of publicly available electronic communications services or of a public communications network are retained for a certain period, subject to the conditions provided for in this Directive.'

15 Recitals 16, 21 and 22 in the preamble to Directive 2006/24 state:

'(16) The obligations incumbent on service providers concerning measures to ensure data quality, which derive from Article 6 of Directive 95/46/EC, and their obligations concerning measures to ensure confidentiality and security of processing of data, which derive from Articles 16 and 17 of that Directive, apply in full to data being retained within the meaning of this Directive.

(21) Since the objectives of this Directive, namely to harmonise the obligations on providers to retain certain data and to ensure that those data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(22) This Directive respects the fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union. In particular, this Directive, together with Directive 2002/58/EC, seeks to ensure full compliance with citizens' fundamental rights to respect for private life and communications and to the protection of their personal data, as enshrined in Articles 7 and 8 of the Charter.'

16 Directive 2006/24 lays down the obligation on the providers of publicly available electronic communications services or of public communications networks to retain certain data which are generated or processed by them. In that context, Articles 1 to 9, 11 and 13 of the directive state:

'Article 1

Subject matter and scope

1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.

2. This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.

Article 2

Definitions

1. For the purpose of this Directive, the definitions in Directive 95/46/EC, in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ..., and in Directive 2002/58/EC shall apply.

2. For the purpose of this Directive:

(a) "data" means traffic data and location data and the related data necessary to identify the subscriber or user;

(b) "user" means any legal entity or natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to that service;

(c) "telephone service" means calls (including voice, voicemail and conference and data calls), supplementary services (including call forwarding and call transfer) and messaging and multi-media services (including short message services, enhanced media services and multi-media services);

(d) "user ID" means a unique identifier allocated to persons when they subscribe to or register with an Internet access service or Internet communications service;

(e) "cell ID" means the identity of the cell from which a mobile telephony call originated or in which it terminated;

(f) "unsuccessful call attempt" means a communication where a telephone call has been successfully connected but not answered or there has been a network management intervention.

Article 3

Obligation to retain data

1. By way of derogation from Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within

their jurisdiction in the process of supplying the communications services concerned.

2. The obligation to retain data provided for in paragraph 1 shall include the retention of the data specified in Article 5 relating to unsuccessful call attempts where those data are generated or processed, and stored (as regards telephony data) or logged (as regards Internet data), by providers of publicly available electronic communications services or of a public communications network within the jurisdiction of the Member State concerned in the process of supplying the communication services concerned. This Directive shall not require data relating to unconnected calls to be retained.

Article 4

Access to data

Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of EU law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

Article 5

Categories of data to be retained

1. Member States shall ensure that the following categories of data are retained under this Directive:

(a) data necessary to trace and identify the source of a communication:

(1) concerning fixed network telephony and mobile telephony:

(i) the calling telephone number;

(ii) the name and address of the subscriber or registered user;

(2) concerning Internet access, Internet e-mail and Internet telephony:

(i) the user ID(s) allocated;

(ii) the user ID and telephone number allocated to any communication entering the public telephone network;

(iii) the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;

(b) data necessary to identify the destination of a communication:

(1) concerning fixed network telephony and mobile telephony:

(i) the number(s) dialled (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed;

(ii) the name(s) and address(es) of the subscriber(s) or registered user(s);

(2) concerning Internet e-mail and Internet telephony:

(i) the user ID or telephone number of the intended recipient(s) of an Internet telephony call;

(ii) the name(s) and address(es) of the subscriber(s) or registered user(s) and user ID of the intended recipient of the communication;

(c) data necessary to identify the date, time and duration of a communication:

(1) concerning fixed network telephony and mobile telephony, the date and time of the start and end of the communication;

(2) concerning Internet access, Internet e-mail and Internet telephony:

(i) the date and time of the log-in and log-off of the Internet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user;

(ii) the date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service, based on a certain time zone;

(d) data necessary to identify the type of communication:

(1) concerning fixed network telephony and mobile telephony: the telephone service used;

(2) concerning Internet e-mail and Internet telephony: the Internet service used;

(e) data necessary to identify users' communication equipment or what purports to be their equipment:

(1) concerning fixed network telephony, the calling and called telephone numbers;

(2) concerning mobile telephony:

(i) the calling and called telephone numbers;

(ii) the International Mobile Subscriber Identity (IMSI) of the calling party;

(iii) the International Mobile Equipment Identity (IMEI) of the calling party;

(iv) the IMSI of the called party;

(v) the IMEI of the called party;

(vi) in the case of pre-paid anonymous services, the date and time of the initial activation of the service and the location label (Cell ID) from which the service was activated;

3) concerning Internet access, Internet e-mail and Internet telephony:

(i) the calling telephone number for dial-up access;

(ii) the digital subscriber line (DSL) or other end point of the originator of the communication;

(f) data necessary to identify the location of mobile communication equipment:

(1) the location label (Cell ID) at the start of the communication;

(2) data identifying the geographic location of cells by reference to their location labels (Cell ID) during the period for which communications data are retained.

2. No data revealing the content of the communication may be retained pursuant to this Directive.

Article 6

Periods of retention

Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.

Article 7

Data protection and data security

Without prejudice to the provisions adopted pursuant to Directive 95/46/EC and Directive 2002/58/EC, each Member State shall ensure that providers of publicly available electronic communications services or of a public communications network respect, as a minimum, the following data security principles with respect to data retained in accordance with this Directive:

(a) the retained data shall be of the same quality and subject to the same security and protection as those data on the network;

(b) the data shall be subject to appropriate technical and organisational measures to protect the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful storage, processing, access or disclosure;

(c) the data shall be subject to appropriate technical and organisational measures to ensure that they can be accessed by specially authorised personnel only;

and

(d) the data, except those that have been accessed and preserved, shall be destroyed at the end of the period of retention.

Article 8

Storage requirements for retained data

Member States shall ensure that the data specified in Article 5 are retained in accordance with this Directive in such a way that the data retained and any other necessary information relating to such data can be transmitted upon request to the competent authorities without undue delay.

Article 9

Supervisory authority

1. Each Member State shall designate one or more public authorities to be responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to Article 7 regarding the security of the stored data. Those authorities may be the same authorities as those referred to in Article 28 of Directive 95/46/EC.

2. The authorities referred to in paragraph 1 shall act with complete independence in carrying out the monitoring referred to in that paragraph.

...

Article 11

Amendment of Directive 2002/58/EC

The following paragraph shall be inserted in Article 15 of Directive 2002/58/EC:

> "1a. Paragraph 1 shall not apply to data specifically required by [Directive 2006/24/EC] to be retained for the purposes referred to in Article 1(1) of that Directive."

...

Article 13

Remedies, liability and penalties

1. Each Member State shall take the necessary measures to ensure that the national measures implementing Chapter III of Directive 95/46/EC providing for judicial remedies, liability and sanctions are fully implemented with respect to the processing of data under this Directive.

2. Each Member State shall, in particular, take the necessary measures to ensure that any intentional access to, or transfer of, data retained in accordance with this Directive that is not permitted under national law adopted pursuant to this Directive is punishable by penalties, including administrative or criminal penalties, that are effective, proportionate and dissuasive.'

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-293/12

17 On 11 August 2006, Digital Rights brought an action before the High Court in which it claimed that it owned a mobile phone which had been registered on 3 June 2006 and that it had used that mobile phone since that date. It challenged the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications and asked the national court, in particular, to declare the invalidity of Directive 2006/24 and of Part 7 of the Criminal Justice (Terrorist Offences) Act 2005, which requires telephone communications service providers to retain traffic and location data relating to those providers for a period specified by law in order to prevent, detect, investigate and prosecute crime and safeguard the security of the State.

18 The High Court, considering that it was not able to resolve the questions raised relating to national law unless the validity of Directive 2006/24 had first been examined, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the restriction on the rights of the [p]laintiff in respect of its use of mobile telephony arising from the requirements of Articles 3, 4 ... and 6 of Directive 2006/24/EC incompatible with [Article 5(4)] TEU in that it is disproportionate and unnecessary or inappropriate to achieve the legitimate aims of:

(a) Ensuring that certain data are available for the purposes of investigation, detection and prosecution of serious crime?

and/or

b) Ensuring the proper functioning of the internal market of the European Union?

2. Specifically,

(i) Is Directive 2006/24 compatible with the right of citizens to move and reside freely within the territory of the Member States laid down in Article 21 TFEU?

(ii) Is Directive 2006/24 compatible with the right to privacy laid down in Article 7 of the [Charter of Fundamental Rights of the European Union ("the Charter")] and Article 8 ECHR?

(iii) Is Directive 2006/24 compatible with the right to the protection of personal data laid down in Article 8 of the Charter?

(iv) Is Directive 2006/24 compatible with the right to freedom of expression laid down in Article 11 of the Charter and Article 10 ECHR?

(v) Is Directive 2006/24 compatible with the right to [g]ood [a]dministration laid down in Article 41 of the Charter?

3. To what extent do the Treaties — and specifically the principle of loyal cooperation laid down in [Article 4(3) TEU] — require a national court to inquire into, and assess, the compatibility of the national implementing measures for [Directive 2006/24] with the protections afforded by the [Charter], including Article 7 thereof (as informed by Article 8 of the ECHR)?'

Case C–594/12

19 The origin of the request for a preliminary ruling in Case C-594/12 lies in several actions brought before the Verfassungsgerichtshof by the Kärntner Landesregierung and by Mr Seitlinger, Mr Tschohl and 11 128 other applicants, respectively, seeking the annulment of Paragraph 102a of the 2003 Law on telecommunications (Telekommunikationsgesetz 2003), which was inserted into that 2003 Law by the federal law amending it (Bundesgesetz, mit dem das Telekommunikationsgesetz 2003 — TKG 2003 geändert wird, BGBl I, 27/2011) for the purpose of transposing Directive 2006/24 into Austrian national law. They take the view, inter alia, that Article 102a of the Telekommunikationsgesetz 2003 infringes the fundamental right of individuals to the protection of their data.

20 The Verfassungsgerichtshof wonders, in particular, whether Directive 2006/24 is compatible with the Charter in so far as it allows the storing of many types of data in relation to an unlimited number of persons for a long time. The Verfassungsgerichtshof takes the view that the retention of data affects almost exclusively persons whose conduct in no way justifies the retention of data relating to them. Those persons are exposed to a greater risk that authorities will investigate the data relating to them, become acquainted with the content of those data, find out about their private lives and use those data for multiple purposes, having regard in particular to the unquantifiable number of persons having access to the data for a minimum period of six months. According to the referring court, there are doubts as to whether that directive is able to achieve the objectives which it pursues and as to the proportionality of the interference with the fundamental rights concerned.

21 In those circumstances the Verfassungsgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Concerning the validity of acts of institutions of the European Union:

Are Articles 3 to 9 of [Directive 2006/24] compatible with Articles 7, 8 and 11 of the [Charter]?

2. Concerning the interpretation of the Treaties:

(a) In the light of the explanations relating to Article 8 of the Charter, which, according to Article 52(7) of the Charter, were drawn up as a way of providing guidance in the interpretation of the Charter and to which regard must be given by the Verfassungsgerichtshof, must [Directive 95/46] and Regulation (EC) No 45/2001 of the European Parliament and of the Council [of 18 December 2000] on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [OJ 2001 L 8, p. 1] be taken into account, for the purposes of

assessing the permissibility of interference, as being of equal standing to the conditions under Article 8(2) and Article 52(1) of the Charter?

(b) What is the relationship between "Union law", as referred to in the final sentence of Article 52(3) of the Charter, and the directives in the field of the law on data protection?

(c) In view of the fact that [Directive 95/26] and Regulation ... No 45/2001 contain conditions and restrictions with a view to safeguarding the fundamental right to data protection under the Charter, must amendments resulting from subsequent secondary law be taken into account for the purpose of interpreting Article 8 of the Charter?

(d) Having regard to Article 52(4) of the Charter, does it follow from the principle of the preservation of higher levels of protection in Article 53 of the Charter that the limits applicable under the Charter in relation to permissible restrictions must be more narrowly circumscribed by secondary law?

(e) Having regard to Article 52(3) of the Charter, the fifth paragraph in the preamble thereto and the explanations in relation to Article 7 of the Charter, according to which the rights guaranteed in that article correspond to those guaranteed by Article 8 of the [ECHR], can assistance be derived from the case-law of the European Court of Human Rights for the purpose of interpreting Article 8 of the Charter such as to influence the interpretation of that latter article?'

22 By decision of the President of the Court of 11 June 2013, Cases C-293/12 and C-594/12 were joined for the purposes of the oral procedure and the judgment.

Consideration of the questions referred

The second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12

23 By the second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12, which should be examined together, the referring courts are essentially asking the Court to examine the validity of Directive 2006/24 in the light of Articles 7, 8 and 11 of the Charter.

The relevance of Articles 7, 8 and 11 of the Charter with regard to the question of the validity of Directive 2006/24

24 It follows from Article 1 and recitals 4, 5, 7 to 11, 21 and 22 of Directive 2006/24 that the main objective of that directive is to harmonise Member States' provisions

concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter.

25 The obligation, under Article 3 of Directive 2006/24, on providers of publicly available electronic communications services or of public communications networks to retain the data listed in Article 5 of the directive for the purpose of making them accessible, if necessary, to the competent national authorities raises questions relating to respect for private life and communications under Article 7 of the Charter, the protection of personal data under Article 8 of the Charter and respect for freedom of expression under Article 11 of the Charter.

26 In that regard, it should be observed that the data which providers of publicly available electronic communications services or of public communications networks must retain, pursuant to Articles 3 and 5 of Directive 2006/24, include data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services. Those data make it possible, in particular, to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. They also make it possible to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.

27 Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.

28 In such circumstances, even though, as is apparent from Article 1(2) and Article 5(2) of Directive 2006/24, the directive does not permit the retention of the content of the communication or of information consulted using an electronic communications network, it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter.

29 The retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, directly and specifically

affects private life and, consequently, the rights guaranteed by Article 7 of the Charter. Furthermore, such a retention of data also falls under Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, therefore, necessarily has to satisfy the data protection requirements arising from that article (Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662, paragraph 47).

30 Whereas the references for a preliminary ruling in the present cases raise, in particular, the question of principle as to whether or not, in the light of Article 7 of the Charter, the data of subscribers and registered users may be retained, they also concern the question of principle as to whether Directive 2006/24 meets the requirements for the protection of personal data arising from Article 8 of the Charter.

31 In the light of the foregoing considerations, it is appropriate, for the purposes of answering the second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12, to examine the validity of the directive in the light of Articles 7 and 8 of the Charter.

Interference with the rights laid down in Articles 7 and 8 of the Charter

32 By requiring the retention of the data listed in Article 5(1) of Directive 2006/24 and by allowing the competent national authorities to access those data, Directive 2006/24, as the Advocate General has pointed out, in particular, in paragraphs 39 and 40 of his Opinion, derogates from the system of protection of the right to privacy established by Directives 95/46 and 2002/58 with regard to the processing of personal data in the electronic communications sector, directives which provided for the confidentiality of communications and of traffic data as well as the obligation to erase or make those data anonymous where they are no longer needed for the purpose of the transmission of a communication, unless they are necessary for billing purposes and only for as long as so necessary.

33 To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way (see, to that effect, Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 75).

34 As a result, the obligation imposed by Articles 3 and 6 of Directive 2006/24 on providers of publicly available electronic communications services or of public communications networks to retain, for a certain period, data relating to a person's private life and to his communications, such as those referred to in Article 5 of the directive, constitutes in itself an interference with the rights guaranteed by Article 7 of the Charter.

35 Furthermore, the access of the competent national authorities to the data constitutes a further interference with that fundamental right (see, as regards

Article 8 of the ECHR, Eur. Court H.R., *Leander v. Sweden*, 26 March 1987, § 48, Series A no 116; *Rotaru v. Romania* [GC], no. 28341/95, § 46, ECHR 2000-V; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 79, ECHR 2006-XI). Accordingly, Articles 4 and 8 of Directive 2006/24 laying down rules relating to the access of the competent national authorities to the data also constitute an interference with the rights guaranteed by Article 7 of the Charter.

36 Likewise, Directive 2006/24 constitutes an interference with the fundamental right to the protection of personal data guaranteed by Article 8 of the Charter because it provides for the processing of personal data.

37 It must be stated that the interference caused by Directive 2006/24 with the fundamental rights laid down in Articles 7 and 8 of the Charter is, as the Advocate General has also pointed out, in particular, in paragraphs 77 and 80 of his Opinion, wide-ranging, and it must be considered to be particularly serious. Furthermore, as the Advocate General has pointed out in paragraphs 52 and 72 of his Opinion, the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance.

Justification of the interference with the rights guaranteed by Articles 7 and 8 of the Charter

38 Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms 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.

39 So far as concerns the essence of the fundamental right to privacy and the other rights laid down in Article 7 of the Charter, it must be held that, even though the retention of data required by Directive 2006/24 constitutes a particularly serious interference with those rights, it is not such as to adversely affect the essence of those rights given that, as follows from Article 1(2) of the directive, the directive does not permit the acquisition of knowledge of the content of the electronic communications as such.

40 Nor is that retention of data such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter, because Article 7 of Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks. According to

those principles, Member States are to ensure that appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data.

41 As regards the question of whether that interference satisfies an objective of general interest, it should be observed that, whilst Directive 2006/24 aims to harmonise Member States' provisions concerning the obligations of those providers with respect to the retention of certain data which are generated or processed by them, the material objective of that directive is, as follows from Article 1(1) thereof, to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. The material objective of that directive is, therefore, to contribute to the fight against serious crime and thus, ultimately, to public security.

42 It is apparent from the case-law of the Court that the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest (see, to that effect, Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* EU:C:2008:461, paragraph 363, and Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* EU:C:2012:711, paragraph 130). The same is true of the fight against serious crime in order to ensure public security (see, to that effect, Case C-145/09 *Tsakouridis* EU:C:2010:708, paragraphs 46 and 47). Furthermore, it should be noted, in this respect, that Article 6 of the Charter lays down the right of any person not only to liberty, but also to security.

43 In this respect, it is apparent from recital 7 in the preamble to Directive 2006/24 that, because of the significant growth in the possibilities afforded by electronic communications, the Justice and Home Affairs Council of 19 December 2002 concluded that data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime.

44 It must therefore be held that the retention of data for the purpose of allowing the competent national authorities to have possible access to those data, as required by Directive 2006/24, genuinely satisfies an objective of general interest.

45 In those circumstances, it is necessary to verify the proportionality of the interference found to exist.

46 In that regard, according to the settled case-law of the Court, 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 (see, to that effect, Case C-343/09 *Afton Chemical* EU:C:2010:419, paragraph 45; *Volker und Markus Schecke and Eifert* EU:C:2010:662, paragraph 74; Cases

C-581/10 and C-629/10 *Nelson and Others* EU:C:2012:657, paragraph 71; Case C-283/11 *Sky Österreich* EU:C:2013:28, paragraph 50; and Case C-101/12 *Schaible* EU:C:2013:661, paragraph 29).

47 With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).

48 In the present case, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict.

49 As regards the question of whether the retention of data is appropriate for attaining the objective pursued by Directive 2006/24, it must be held that, having regard to the growing importance of means of electronic communication, data which must be retained pursuant to that directive allow the national authorities which are competent for criminal prosecutions to have additional opportunities to shed light on serious crime and, in this respect, they are therefore a valuable tool for criminal investigations. Consequently, the retention of such data may be considered to be appropriate for attaining the objective pursued by that directive.

50 That assessment cannot be called into question by the fact relied upon in particular by Mr Tschohl and Mr Seitlinger and by the Portuguese Government in their written observations submitted to the Court that there are several methods of electronic communication which do not fall within the scope of Directive 2006/24 or which allow anonymous communication. Whilst, admittedly, that fact is such as to limit the ability of the data retention measure to attain the objective pursued, it is not, however, such as to make that measure inappropriate, as the Advocate General has pointed out in paragraph 137 of his Opinion.

51 As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight.

52 So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (Case C-473/12 *IPI* EU:C:2013:715, paragraph 39 and the case-law cited).

53 In that regard, it should be noted that the protection of personal data resulting from the explicit obligation laid down in Article 8(1) of the Charter is especially important for the right to respect for private life enshrined in Article 7 of the Charter.

54 Consequently, the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data (see, by analogy, as regards Article 8 of the ECHR, Eur. Court H.R., *Liberty and Others v. the United Kingdom*, 1 July 2008, no. 58243/00, § 62 and 63; *Rotaru v. Romania*, § 57 to 59, and *S. and Marper v. the United Kingdom*, § 99).

55 The need for such safeguards is all the greater where, as laid down in Directive 2006/24, personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data (see, by analogy, as regards Article 8 of the ECHR, *S. and Marper v. the United Kingdom*, § 103, and *M. K. v. France*, 18 April 2013, no. 19522/09, § 35).

56 As for the question of whether the interference caused by Directive 2006/24 is limited to what is strictly necessary, it should be observed that, in accordance with Article 3 read in conjunction with Article 5(1) of that directive, the directive requires the retention of all traffic data concerning fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony. It therefore applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. Furthermore, in accordance with Article 3 of Directive 2006/24, the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population.

57 In this respect, it must be noted, first, that Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.

58 Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of

suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.

59 Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.

60 Secondly, not only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law.

61 Furthermore, Directive 2006/24 does not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use. Article 4 of the directive, which governs the access of those authorities to the data retained, does not expressly provide that that access and the subsequent use of the data in question must be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating thereto; it merely provides that each Member State is to define the procedures to be followed and the conditions to be fulfilled in order to gain access to the retained data in accordance with necessity and proportionality requirements.

62 In particular, Directive 2006/24 does not lay down any objective criterion by which the number of persons authorised to access and subsequently use the data retained is limited to what is strictly necessary in the light of the objective pursued. Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal

prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits.

63 Thirdly, so far as concerns the data retention period, Article 6 of Directive 2006/24 requires that those data be retained for a period of at least six months, without any distinction being made between the categories of data set out in Article 5 of that directive on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned.

64 Furthermore, that period is set at between a minimum of 6 months and a maximum of 24 months, but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary.

65 It follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.

66 Moreover, as far as concerns the rules relating to the security and protection of data retained by providers of publicly available electronic communications services or of public communications networks, it must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data. In the first place, Article 7 of Directive 2006/24 does not lay down rules which are specific and adapted to (i) the vast quantity of data whose retention is required by that directive, (ii) the sensitive nature of that data and (iii) the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down.

67 Article 7 of Directive 2006/24, read in conjunction with Article 4(1) of Directive 2002/58 and the second subparagraph of Article 17(1) of Directive 95/46, does not ensure that a particularly high level of protection and security is applied by those providers by means of technical and organisational measures, but permits those providers in particular to have regard to economic considerations when determining the level of security which they apply, as regards the costs of implementing security measures. In particular, Directive 2006/24 does not ensure the irreversible destruction of the data at the end of the data retention period.

68 In the second place, 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 (see, to that effect, Case C-614/10 *Commission* v *Austria* EU:C:2012:631, paragraph 37).

69 Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.

70 In those circumstances, there is no need to examine the validity of Directive 2006/24 in the light of Article 11 of the Charter.

71 Consequently, the answer to the second question, parts (b) to (d), in Case C-293/12 and the first question in Case C-594/12 is that Directive 2006/24 is invalid.

The first question and the second question, parts (a) and (e), and the third question in Case C-293/12 and the second question in Case C-594/12

72 It follows from what was held in the previous paragraph that there is no need to answer the first question, the second question, parts (a) and (e), and the third question in Case C-293/12 or the second question in Case C-594/12.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 is invalid.

[Signatures]

THE HIGH COURT

Record No: 2013/ 765JR

IN THE MATTER OF AN APPLICATION TO INTERVENE

BETWEEN:

MAXIMILIAN SCHREMS

Plaintiff

-and-

DATA PROTECTION COMMISSIONER

Defendant

ON THE APPLICATION OF
DIGITAL RIGHTS IRELAND LIMITED

Applicant

AFFIDAVIT OF ANTOIN O'LACHTNAIN

EXHIBIT "AOL3"

Ant. O Lachtnain

Deponent

Julia Hussey

~~Commissioner for Oaths~~/Practising Solicitor

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Data Protection Commissioner

Twenty-Fifth Annual Report of the Data Protection Commissioner 2013

Presented to each of the Houses of the Oireachtas pursuant to section 14 of the Data Protection Acts 1988 & 2003.

Part 1

Foreword

2013 was the year of Edward Snowden, the NSA Contractor who revealed the extent of access by US and European intelligence agencies to personal data held by major internet and telecommunications companies. The revelations provoked a long-overdue debate on the proper balance in a democratic society between the protection of personal data and the obligation on governments to take measures against those who would use these services to further criminal objectives. The disclosures have already led to commitments by the US Administration to rein-in the activities of US intelligence services. They have also led to a re-examination of data flows between the EU and the USA under the "Safe Harbour" agreement.

The resulting debate has thrown a welcome spotlight on the general issue of State access to personal data. The recent decision of the Court of Justice of the European Union to invalidate the Data Retention Directive has clearly set out the need for proportionality in this area. The lack of such proportionality led my predecessor, Joe Meade, to take enforcement action against the initial Irish data retention regime, action that has now been vindicated by the CJEU judgment. The CJEU judgement also shows the importance of challenging such privacy-destroying measures, as was done in this case by Digital Rights Ireland, supported by the Irish Human Rights Commission.

But the CJEU judgment has significance beyond that of data retention. Our audits of State organisations have, in too many cases, shown scant regard by senior management to their duty to safeguard the personal data entrusted to them – a duty that is all the greater because of the legal obligation to provide such personal data to the State. Laudable objectives such as fraud prevention and greater efficiency must

meet a test of proportionality in the manner in which personal data is used. Failure to treat personal data with respect can only lessen the trust that should exist between the individual and the State. It will also lead inevitably to more formal enforcement action by my Office unless system-wide action is taken to improve current practice.

Trust is also essential between the individual customer and commercial entities. As explained later in the Report, many of the complaints we deal with are as a result of poor standards of customer service. The fact that we have to take enforcement action for repeat failures in this area is a source of concern.

We remain willing to assist organisations in any way we can to achieve higher standards of data protection. Our audits are part of this effort. We continue to prioritise for audit the increasing number of information-rich multinational companies that have chosen Ireland as a base for providing cross-border services.

As we face into a new and challenging era of data protection, with strengthened EU-wide legislation, I wish again to thank the staff of our Office who continue to do their often challenging work with cheerful commitment.

Billy Hawkes
Data Protection Commissioner
Portarlington, May 2014

THE HIGH COURT

Record No: 2013/ 765JR

IN THE MATTER OF AN APPLICATION TO INTERVENE

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MAXIMILIAN SCHREMS

Plaintiff

-and-

DATA PROTECTION COMMISSIONER

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Applicant

AFFIDAVIT OF ANTOIN O'LACHTNAIN

EXHIBIT "AOL4"

Antoin O Lachtnain

Deponent

Julia Hussey

~~Commissioner for Oaths~~/Practising Solicitor

"Gerard Rudden" <grudden@ahernrudden.com> 25 June 2014 14:36
To: <simon@mcgarrsolicitors.ie>
Reply-To: <grudden@ahernrudden.com>
Max Schrems

1 Attachment, 18 KB

Simon,

Further to our telephone conversation, I have taken my clients instructions.

He has instructed me that he is neutral as to whether your client should be appointed an *Amicus Curiae* in the current proceedings.

If your client wishes to make such an application, my client will not object.

As mentioned, the matter is in before Mr Justice Hogan on the 2nd prox.

Kind regards,

Gerard Rudden
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