Legal Service

BRUSSELS, 20 September 2012

TO THE ATTENTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

WRITTEN OBSERVATIONS

submitted pursuant to Article 23 of the Protocol on the Statute of the Court by the

EUROPEAN PARLIAMENT

represented by [name redacted], members of the European Parliament's Legal Service, acting as agents, having as their address for service: the European Parliament, Legal Service, KAD 06A007, L-2929 Luxembourg

in Case C-293/12

concerning a request for preliminary ruling lodged pursuant to Article 267 TFEU, by the High Court of Ireland (Ireland) in the case

Digital Rights Ireland v The Minister for Communications, Marine and Natural Recourses, the Minister for Justice, Equality and Law Reform, the Commissioner for the Garda Siochana, Ireland and the Attorney General,

INTRODUCTION

1. The request for a preliminary ruling made by the High Court of Ireland was notified to the European Parliament on 10 July 2012, by letter of the Court of Justice of the same day.

2. The national court referred the following questions to the Court of Justice.
3. Firstly, it asks whether "the restriction on the rights of the Plaintiff in respect of its use of mobile telephony arising from the requirements of Articles 3, 4, and 6 of Directive 2006/24/EC is 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?".

4. Secondly, the court asks specifically

"(i) Is Directive 2006/24/EC compatible with the right of citizens to move and reside freely within the territory of Member States laid down in Article 21 TFEU?
(ii) Is Directive 2006/24/EC compatible with the right to privacy laid down in Article 7 of the Charter and Article 8 ECHR?
(iii) Is Directive 2006/24/EC compatible with the right to the protection of personal data as laid down in Article 8 of the Charter?
(iv) Is Directive 2006/24/EC 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/EC compatible with the right to Good Administration laid down in Article 41 of the Charter?"

5. Thirdly, the court asks "to what extent do the Treaties - and specifically the principle of loyal cooperation laid down in Article 4.3 of the Treaty on European Union - require a national court to inquire into, and assess, the compatibility of the national implementing measures for Directive 2006/24IEC with the protections afforded by the Charter of Fundamental Rights, including Article 7 thereof (as informed by Article 8 of the ECHR)?".

7. As regards the question of the legal basis of Directive 2006/24/EC raised by the Plaintiff in the proceedings before the national court, the Court of Justice found in its judgment of 10 February 2009 in Case C-301/06\(^3\) that Directive 2006/24/EC was properly enacted under Article 95 TEC as a measure for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. In those circumstances, the Plaintiff no longer sought the national court to refer that question to the Court of Justice.

B. **ACTION BEFORE THE NATIONAL COURT**

8. The Plaintiff, Digital Rights Ireland, is a limited liability company concerned with the promotion and protection of human rights, particularly in the context of modern communication technologies. The Plaintiff issued proceedings on 11 August 2006 against the Defendants which include Ministers of the Government of Ireland and the Commissioner of An Garda Síochána (the Irish police force).

9. It alleges that around 25 April 2002, the Irish Minister for Public Enterprise issued a direction to telecom service providers to retain telecommunications data. The direction, issued under section 110(1) of the Postal Telecommunications Services Act 1983 (as

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amended in 1993), was to be treated as confidential. As a result of the direction, the
first named defendant's predecessor came, according to the Plaintiff wrongfully, to
possess and exercised control over data relating to the claimant, its members and other
users of mobile telephones.

10. In December 2002, the Irish Data Protection Commissioner advised the Department of
Communications, Marine and Natural Resources that the direction was *ultra vires*,
constitutionally invalid and in breach of the Irish Data Protection Acts since the
objectives sought by the direction could only have been achieved through enacting
primary legislation. The Data Protection Commissioner threatened to initiate judicial
review of any directions the Minister purported to make under the 1983 Irish Postal
Telecommunications and Services Act.

11. The High Court of Ireland indicates that in response to the Data Protection
Commissioner's concerns, some changes were made to Irish law when the Irish
Criminal Justice (Terrorist Offences) Act 2005 was enacted. That Act made provision
for the retention of traffic and location data relating to communications transmitted by
fixed line or mobile telephone and access to data retained for law enforcement and
security purposes.

12. The Plaintiff alleges that on a date after the 2005 Act came into force, the Garda
Commissioner issued a direction to telecommunications service providers to retain
telecommunication data. The Plaintiff claims that the retention of these data infringes:
the right to privacy; the right to family life; the right to communicate and the corollary
right to privileged communication; the right to travel and the right to travel
confidentially. The Plaintiff also claimed that section 63(1) of the 2005 Act was invalid.

13. The data retention scheme provided by the 2005 Act was repealed by the
Communications (Retention of Data) Act of 26 January 2011, implementing Directive
2006/24/EC. The Plaintiff considers the Directive contrary to the Charter of

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4 This implementing Act was adopted after the present case was brought to the national court, thus, no
arguments are raised by the Plaintiff with regard to this Act.
Fundamental Rights of the European Union (hereinafter, "the Charter") and the European Convention on Human Rights (hereinafter, "the ECHR").

14. In its judgment of 5 May 2010 the High Court granted the Plaintiff legal standing 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. In the same judgment the High Court granted the Plaintiff's motion calling for a referral to the Court of Justice under Article 267 TFEU relating to the validity of Directive 2006/24/EC.

15. It follows from the reference for a preliminary ruling that the moot point in the dispute in the High Court of Ireland is whether Irish public authorities legally came into possession and exercised control over the mobile telephony data of the Plaintiff in accordance with "(i) statute, (ii) EU law, and in particular the requirements of the TEU and the CFR, (iii) the Constitution of Ireland, and (iv) the ECHR".

C. LEGAL FRAMEWORK

I. Background

16. The European Parliament recalls that, in view of the increased concerns about possible terrorist attacks after the attacks of 11 September 2001 in the United States and the subsequent attacks in Madrid and London, several Member States adopted considerably different rules on the retention of data by telecommunications providers for the purpose of the prevention, investigation, detection and prosecution of criminal offences. The Council, at its meeting of 13 July 2005, therefore reaffirmed the need for common measures on the retention of electronic communications data.

See Recital 5 of Directive 2006/24/EC. As indicated in the European Commission's extended impact assessment, SEC(2005) 1131 final, of 21 September 2005, the retention regimes introduced at that time or planned by the Member States varied significantly as to the scope, aim, duration of the data retention as well as the reimbursement possibilities and access to the data.

See Recital 10 of Directive 2006/24/EC.
17. The legal framework at that time and in particular Directive 2002/58/EC on Privacy and Electronic Communications, complementing Directive 95/46/EC as regards the electronic telecommunications sector, did not provide for a full harmonisation of the conditions under which national legislative measures could provide for the retention of the traffic data for "public order" purposes.

18. Bearing in mind the above-mentioned political context, and in order to remove the obstacles to the internal market provoked by technical and legislative divergences in Member States, the European Parliament and the Council adopted on 15 March 2006 Directive 2006/24/EC in order to harmonise the retention of certain "traffic and location" data.

II. Directive 2006/24/EC

19. Article 1(1) of Directive 2006/24/EC describes its purpose as follows:

"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."

20. Article 3 of Directive 2006/24/EC requires Member States to modify the existing obligations established by Articles 5, 6 and 9 of Directive 2002/58/EC concerning the storage of data:

"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

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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."

21. Articles 5 to 8 thereof seek to harmonise the requirements relating to retained data. Article 5 harmonises the categories of data to be retained, Article 6 harmonises the periods for which the data are to be retained and Articles 7 (Data protection and data security) and 8 (Storage requirements for retained data) harmonise the conditions under which the data are to be retained.

D. ADMISSIBILITY OF THE REFERENCE

22. While Parliament does not wish to formally contest the admissibility of the request for the preliminary ruling as such, it allows itself to make the following two remarks.

23. Firstly, according to settled case-law of the Court, the request for a preliminary ruling requires not only that "the national Court define(s) the factual and legislative context of the questions it is asking or, at the very least, explain(s) the factual circumstances on which those questions are based ... It is also important that the national court should set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling". 8

24. In Parliament's view, with regard to the latter requirement, the order of reference does not sufficiently set out the precise reasons for which the High Court questions the validity of Directive 2006/24/EC.

25. In fact, the order of reference contains only a summary of the factual and legislative context of the case, including a list of the claims, without, however, specifying the

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arguments of the parties with regard to the legality of the Directive and its compatibility with the fundamental rights raised.

26. Nor does the judgment of the High Court of 5 May 2010 attached to the order of reference refer to the legal arguments of the parties concerning the validity of the Directive, but is limited, almost in its entirety, to the issue of the legal standing of the Plaintiff.

27. In particular as regards the compatibility of Directive 2006/24/EC with the fundamental right to free movement, the freedom of expression and the fundamental right to good administration, the questions referred to the Court of Justice are of a very general nature and provide no further explanation as to why the Directive might violate these fundamental rights. A summary of the relevant arguments of the parties and of the position of the national court would, however, be required in order to allow other parties, such as Parliament, to submit their observations in an exhaustive manner.

28. Secondly, it appears to follow from the order of reference that at the centre of the dispute before the High Court lies the question of whether public authorities legally came into possession and exercised control over the mobile telephony data of the Plaintiff.

29. In this context it must be underlined that the Directive does not regulate either the access to data by the competent national authorities, or the use and exchange of the data by those authorities for law enforcement purposes. The regulation of these issues remains the competence of the Member States.

30. As the Court of Justice held in its judgment in Case C-301/06, the provisions of Directive 2006/24/EC "are essentially limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States".  

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9 Case C-301/06 Ireland v European Parliament and Council, paragraph 80.
31. It therefore appears doubtful to what extent an answer by the Court of Justice to the questions concerning the validity of the Directive is actually necessary to enable the High Court to give judgment in the case before it.

E. THE QUESTIONS REFERRED

I. Compatibility of the Directive with Article 5(4) TEU

32. Article 5(4) TEU provides that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

33. Since, according to Article 52(1) of the Charter, limitations on the exercise of the rights and freedoms recognised by the Charter may only be made subject to the principle of proportionality, this aspect will be further addressed in the context of the second question referred by the High Court regarding the compatibility of the Directive with the fundamental rights specifically raised. With regard to Article 5(4) TEU, Parliament limits itself to the following remarks.

a) Legitimate objective

34. In Parliament's opinion, by adopting Directive 2006/24/EC the EU legislature pursued a legitimate objective recognised by the Treaties in two respects.

35. In fact, the action by the legislature proved necessary in order to remove the obstacles provoked by the divergences in the telecommunication data retention rules in the Member States and to enable telecommunications providers to compete in the internal market on an equal footing. As the Court recognised "such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules".¹⁰

¹⁰ Case C-301/06 Ireland v European Parliament and Council, paragraph 71.
36. In addition, bearing in mind the political context of its adoption, according to Article 1(1) of the Directive, the data should be retained in a harmonised manner in all the Member States in order to ensure that they are available "for the purpose of the investigation, detection and prosecution of serious crime" as defined by each Member State in its national law. As underlined by Recitals 7 to 11 of the Directive, the availability of data relating to electronic communications is particularly important in this context and therefore a valuable tool for the purpose of law enforcement.

37. It is therefore evident that the Directive pursues in both respects a legitimate objective, firstly and predominantly that of the harmonisation of the internal market and secondly, that of the fight against serious crime.

b) Choice of legal instrument

38. With regard to the form of Union action under the principle of proportionality, the choice of the legal instrument of a directive was made to leave a large margin for its transposition by the Member States. The Commission justified the choice of the legal form of a directive explicitly as being less stringent than a regulation in view of the different technical architectures used by various telecommunication operators in different Member States.\(^{11}\)

39. Moreover, the Directive is limited in its scope, since it merely provides for the duty of service providers to store certain data for a specific period and imposes on Member States the adoption of measures to ensure that the data retained "are provided only to the competent national authorities in specific cases and in accordance with national law".\(^{12}\)

40. It falls therefore under the responsibility of the Member States to provide in their national law for further rules, namely on which national authorities will be competent to access and use the data, as well as on safeguards against disproportionate interference

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\(^{11}\) See point 3.5. of the European Commission's extended impact assessment (cited above).

\(^{12}\) Article 4 of Directive 2006/24/EC.
with fundamental rights, safeguards as to the security of data and to limit the risk of the abuse of data, as well as rules on judicial control.

41. Thus, the decision to provide for which authorities to have access to the data, under which conditions and under what control mechanism, is clearly up to the Member States. The Directive offers only the basic precondition for the use of these data, i.e. their availability for a certain period of time.

42. It follows from this limited scope that the Directive cannot in itself guarantee that retained data are being stored, retrieved and used in full compliance with the rights to privacy and to the protection of personal data. The responsibility for ensuring that these rights are upheld lies with Member States.

43. The legislature underlined that the laws and action by the Member States in this context "must fully respect fundamental rights as they result from the common constitutional traditions of the Member States and as guaranteed by the ECHR".13

44. This is in line with the settled case-law of the Court of Justice according to which "the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements." 14

II. Compatibility of the Directive with fundamental rights

a) The right to privacy laid down in Article 7 of the Charter and Article 8 ECHR

45. One of the main objections to the validity of Directive is its possible interference with the right to privacy laid down in Article 7 of the Charter and Article 8 ECHR. According to Article 7 of the Charter, "[everyone] has the right to respect for his or her
private and family life, home and communications". Pursuant to Article 8 ECHR "[everyone] has the right to respect for his private and family life, his home and his correspondence".

46. According to the case-law of the European Court for Human Rights (hereinafter, "the ECtHR"), the retention of traffic data (independently of whether or not the data are subsequently used) may constitute an interference with the right to private life and the protection of personal data as recognised by the Charter, as well as by the ECHR.  

47. Such limitations of fundamental rights must be, according to Article 52(1) of the Charter, "provided for by law and respect the essence of those rights" and, subject to the principle of proportionality, "may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

48. This means, in particular, that under the principle of proportionality any limitation of a fundamental right by the legislature must be justified as an appropriate and necessary measure to achieve a legitimate objective of the EU and preserve the essence of the fundamental right concerned.

49. As explained above, Directive 2006/24/EC pursues as one of its objectives the retention of data for the purpose of their availability for the "investigation, detection and prosecution of serious crime".

50. As the right to privacy is not an absolute right, this is a legitimate objective falling within the scope of Article 8(2) of the ECHR which recognises that interference by a public authority with a person's right to privacy may be justified, inter alia, as necessary in the interest of national security, public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.

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15 In case Amann v Switzerland, application no. 27798/95, judgment of 16 February 2000, the ECtHR specified, in paragraph 69 of its judgment, that "...the storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding ...". See also case Malone v U.K., application no. 8691/79, judgment of 2 August 1984, paragraph 84.
51. Parliament considers that the Directive is an **appropriate measure** to achieve this objective by harmonising the data retention requirements imposed on electronic communication providers.

52. The legislature took the view that the "*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 organized crime and terrorism*" (Recital 9) and that the importance of traffic and location data for the investigation, detection and prosecution of criminal offences was "*demonstrated by research and the practical experience of several Member States*" (Recital 11).

53. This view was confirmed by the Commission's Evaluation Report on the Directive. According to the information provided by the Member States to the Commission, the retained data proved "*valuable, and in some cases indispensable, for preventing and combating crime, including the protection of victims and the acquittal of the innocent in criminal proceedings*".  

54. Parliament further considers that the Directive represents a **necessary measure**, in so far as there are no equally effective and less invasive alternatives available to achieve its objectives.

55. In particular, the detection of crime could not be equally achieved by surveillance measures or the so-called quick freeze of data (data preservation), since those measures presuppose that that the crime had already been detected or the potential perpetrator of crime identified. In comparison with the preservation of data, data retention, ensuring the availability of historical data, guarantees the ability to establish evidence trails prior

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It is further stated that the retained data proved useful in contacting witnesses who otherwise would not have been identified, providing evidence of, or leads in establishing complicity in a crime or in clearing persons suspected of a crime avoiding more intrusive methods such as surveillance or a house search. In some cases, the consultation of the data is the only way to launch a criminal investigation. Even though it is difficult to isolate the impact of retained data on the success of criminal investigation and prosecution, it is obvious that it is an important part of it.
to the data preservation order, allows investigations where a target is unknown and allows for evidence to be gathered on movements of victims or of witnesses to a crime.\textsuperscript{17}

56. Finally, Parliament takes the view that, balanced with its objectives, the Directive does not interfere with the right to privacy to a degree that is disproportionate and not in respect of the essence of this fundamental right.

57. As already mentioned above, the Directive seeks to limit the interference in all respects to a minimum. In particular, solely those data which are closely linked to the exercise of the commercial activity of the service providers are concerned by the Directive. Only specifically determined categories of traffic telecommunication data are retained and the content of the communication is not included.\textsuperscript{18} The period of the retention is restricted to a period of not less than six months and not more than two years. Moreover, the retention of the data is foreseen for the restrictively determined purpose of the fight against "serious crime".

58. In Parliament's view, the Directive does therefore strike a fair balance between the fight against crime and the protection of privacy and does not infringe the latter.

b) \textbf{The right to the protection of personal data laid down in Article 8 of the Charter}

59. According to Article 8(1) of the Charter "[everyone] has the right to the protection of personal data concerning him or her". Paragraph 2 of this Article states that data "must be processed fairly for specified purpose and on the basis of the consent of the person concerned or some other legitimate basis laid down by law".

\textsuperscript{17} Report from the Commission to the Council and the European Parliament; Evaluation report on the data Retention Directive (cited above), point 3.3.

\textsuperscript{18} Article 1(2), last sentence, states that Directive 2006/24/EC shall not be applicable to the content of electronic communication, including information consulted using an electronic communications network. This rule is reiterated by Article 5(2) which provides explicitly that "[no] data revealing the content of the communication may be retained pursuant to this Directive".
60. As indicated above, Parliament does not contest that the Directive might interfere with the right to privacy and the same is valid for the right to the protection of personal data.

61. However, as in the case of the right to privacy and for essentially the same reasons, Parliament considers that such interference is justified and in conformity with Article 52(1) of the Charter.

62. Moreover, it has to be recalled in this context that the Directive is part of the legal framework on data protection which also comprises Directives 95/46/EC and 2002/58/EC. Those Directives fully apply to data retained under Directive 2006/24/EC, therefore the data have to be processed in conformity with them (Recital 15 of the Directive). In the light of this, the decision of the legislature not to provide a complete set of data protection rules and safeguards in the Directive is justified.

c) The right to freedom of expression laid down in Article 11 of the Charter and Article 10 ECHR

63. On the basis of the order of reference, it is not clear on which grounds the referring court has doubts about the compatibility of Directive 2006/24/EC with the right to freedom of expression.

64. Parliament does not consider that data retention as provided for by the Directive represents a hindrance to the free exchange of opinion, in particular as the Directive does not touch upon the content of communication. Should it be considered that there is such an interference, it would be justified in accordance with Article 10(2) ECHR, according to which the freedom of expression can be restricted where it is necessary in the interests of, among others, national security, public safety, or for the prevention of crime.

65. In this respect, Parliament refers to its reasoning above with regard to the justification of the interference with the right to privacy.
d) **Compatibility of the Directive with other fundamental rights**

66. Given the lack of information on the arguments raised by the Plaintiff in the proceedings before the national court, Parliament does not see in which sense the validity of the Directive could be questioned in the light of the right of citizens to move and reside freely within the territory of Member States laid down in Article 21 TFEU or the right to good administration laid down in Article 41 of the Charter.

**F. CONCLUSIONS**

The European Parliament proposes to the Court to conclude as follows:

- the examination of the questions raised does not disclose any factor such as to affect the validity of Directive 2006/24/EC.

(signed)  

(signed)  

(Agents of the European Parliament)