NOTE FOR THE ATTENTION OF
MR BERND MARTENCZUK
LEGAL SERVICE

Subject: Case C-594/12 - Kärntner Landesregierung -
Request for a preliminary ruling - Your note of 31 January 2013 Ref.
ARES (2013) 123814

Thank you for the note of the Legal Service referred to above inviting DG JUSTICE to
comment on the references for a preliminary ruling submitted by the Kärntner
Landesregierung on the Data retention Directive 2006/24/EC as well as on Directive
95/46/EC, Regulation 45/2001 and Articles 7, 8, 11, 52 and 53 of the Charter of
Fundamental Rights of the European Union. We have taken note of the enclosure which
contains the Commission's observations in the case C-293/12 Digital Rights Ireland.

Our comments which I am pleased to transmit take the Commission's observations in the
case C-293/12 into account and are in line with them.

Paul NEMITZ

Enclosure: Comments of DG JUSTICE

Cc: Mr Paul Nemitz, Ms Sandra Kramer, Mr Manservisi (DG HOME), Mr
Nunes de Almeida (DG HOME/A3).
CONTRIBUTION BY DG JUSTICE TO THE LS
REFERENCE FOR A PRELIMINARY RULING FROM THE KÄRNTNER LANDESREGIERUNG
(AUSTRIA)
(CASE C-594/12)

I. Issues addressed in this reference for a preliminary ruling C-594/12


II. Pending reference before the CJEU addressing the same/similar issues, C-293/12, Digital Rights Ireland

The questions raised in both cases are not entirely the same, but they overlap.

Comparison of questions raised in C-594/12 and C-293/12

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<th>C-594/12</th>
<th>C-293/12</th>
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<td>1.) Are Articles 3 to 9 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 compatible with Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union?</td>
<td>1.) Is 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 incompatible with Article 5.4 TEU in that it is disproportionate and unnecessary or inappropriate to achieve the legitimate aims of:</td>
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<td>2.1.) 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 due regard must be given by the Verfassungsgerichtshof, must Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 be taken into account,</td>
<td>(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?</td>
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<td>2.) 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 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</td>
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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?

(v) Is Directive 2006/24/EC compatible with the right to Good Administration laid down in Article 41 of the Charter?

2.2.) 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?

3.) 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 2006/24/EC with the protections afforded by the Charter of Fundamental Rights, including Article 7 thereof (as informed by Article 8 of the ECHR)?

2.3.) In view of the fact that Directive 95/46/EC and Regulation (EC) 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?

2.4.) 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?

2.5.) 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 European Convention for the Protection of Human Rights and Fundamental Freedoms, 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?

The reading of the observations which the Commission's submitted to the CJEU in the case C-293/12 allows for the following conclusions as regards the responses already provided to the questions raised in C-594/12:

- **Question 1** has been responded to by the Commission when providing explanations to questions 2 ii), iii) and iv.

- **Questions 2.1. to 2.5.** still need to be answered.
III. LEGAL BACKGROUND

- European Convention for the Protection of Human Rights and Fundamental Freedoms

- Charter of Fundamental Rights of the European Union (2000/C 364/01)

- Explanations relating to the Charter of Fundamental Rights of 11 October 2000, CONVENT 49, originally prepared under the authority of the Praesidium of the Convention which drafted the Charter


- 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 L 281, 23.11.1995, p. 31-50)


Relevant provisions:

III.1 Convention for the Protection of Human Rights and Fundamental Freedoms

Article 8 – Right to respect for private and family life

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.


Article 7 - Respect for private and family life

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

Article 8 - Protection of personal data

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

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 52 - Scope and interpretation of rights and principles

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

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53 - Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

III.3 · Explanations relating to the Charter of Fundamental Rights

Article 7 - Respect for private and family life

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

Explanation
The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word "correspondence" has been replaced by "communications".

In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:

"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."

Article 8 - Protection of personal data

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

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

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

Explanation

This Article is based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. The right to protection of personal data is to be exercised under the conditions laid down in the above Directive, and may be limited under the conditions set out by Article 52 of the Charter.


Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

IV. LEGAL ANALYSIS

IV.1 Question 2.1

'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 due regard must be given by the Verfassungsgerichtshof, must Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 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?'

Observations:

Pursuant to Article 6 (1) of the TEU the rights set out in the Charter of Fundamental Rights shall have the 'same legal value as the Treaties'. The 'Explanations relating to the Charter of Fundamental Rights' (2007/C 303/02), originally prepared under the authority of the Praesidium of the Convention which drafted the Charter, state the following with regard to Article 8 of the Charter: "This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC ...[...]. Reference is also made to Regulation (EC) No 45/2001......The abovementioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data."

This means that the Charter of Fundamental Rights has the same legal standing as other instruments of primary law and prevails over secondary legislation such as Directive 95/46 and Regulation 45/2001. Consequently Directive 95/46 and Regulation 45/2001 must be interpreted in conformity with the Charter (Articles 8 (2) and 52(1)).

On the other hand, both the Directive and the Regulation facilitate the interpretation of the Charter since they allow one to draw conclusions as to the legislator's intentions with regard to the rights enshrined in the Charter and, in particular, on how one is to "exercise" such rights.
Nevertheless, it should be noted that the legislator is free - in accordance with the principles defined by the Charter - to deviate from its general data protection regime as enshrined in Directive 95/46 and Regulation 45/2001 through legal instruments which regulate a policy that requires a more specific or modified data protection regime. The reasons for this might be the specific aim pursued (for e.g., the fight against terrorism). Such instruments may contain specific data protection requirements (leges speciales) concerning the exercise of the right to the protection of personal data which may deviate from Directive 95/46 and Regulation 45/2001. This demonstrates that the value of taking into account the general data protection instruments has its limits in assessing the permissibility of interference in cases where special data protection regimes are applicable.

It is DG JUST's opinion that it would go counter to the understanding of the principles of the hierarchy of norms and of legislative discretion to imply that (by virtue of their mention in the explanations relating to the Charter) the conditions set out in secondary legislation shall be understood to have the same constitutional standing as the articles of the Charter themselves, thereby effectively curtailing all subsequent legislation which departs from them and effectively rendering null and void any such subsequent legislation.

**IV.2 Question 2.2.**

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?

**Observations:**

Article 52 (3) of the Charter allows the EU legislator to enhance the protection of fundamental rights in secondary legislation, *inter alia* in the field of data protection. In the context of the Union's directives in the field of data protection, this means that nothing in the Charter shall prevent such directives from providing more extensive protection than that provided by the Conventions. Regarding this point we refer to our observations above concerning question 2.1 and to the Commission's observations submitted to the CJEU in Case C-293/12 under iii) para. 43.

**IV.3 Question 2.3**

In view of the fact that Directive 95/46/EC and Regulation (EC) 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?

**Observations**

We refer to our answer to Question 2.1 by way of answer to this question. By way of clarification, DG JUSTICE points out that it is rather the contrary mechanism which should operate, i.e. secondary legislation on data protection/retention should be interpreted, and its validity tested, in the light of Article 8 of the Charter.
**IV.4 Question 2.4**

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?

**Observations**

We refer to the Opinion of Advocate General Bot in Case C-399/11\(^1\), paragraph 88 et seq. to reply to the question relating to the interplay between Article 52(4) and 53 of the Charter.

**IV.5 Question 2.5**

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 European Convention for the Protection of Human Rights and Fundamental Freedoms, 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?

**Observations**

DG JUSTICE points out that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, as is the case for Article 7, the meaning and the scope of the guaranteed rights are determined not only by the text of the ECHR and the Protocols to it but also by the case-law of the European Court of Human Rights. This rule of interpretation is clearly stated in the official explanations of the Charter.

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\(^1\) The CJEU issued its ruling in this case on 26.2.2013 essentially confirming the AG's Opinion.