TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

IN CASE C-140/20

BETWEEN:

G.D.

Plaintiff

-AND-

Commissioner of the Garda Síochána and Others

Defendants

Submitted pursuant to the second paragraph of Article 23 of the Protocol of the Statute of the Court of Justice, the Plaintiff, represented by Jonathan Dunphy & Co Solicitors, Adelphi Manor Building, Upper George's Street, Dun Laoghaire, Co Dublin, Ireland and by Remy Farrell SC, Ronan Kennedy SC and Kate McCormack, Barrister-at-Law, all of the Bar of Ireland, have the honour to submit the following joint written observations in C-140/20 pursuant to the request of this Honourable Court dated 30 April 2020:

WRITTEN OBSERVATIONS OF THE PLAINTIFF

INTRODUCTION

1. The questions referred raise a number of important and complicated questions of law. These observations deal with each of the questions raised in turn. However, it may be useful to observe at the outset that the domestic legal measure under consideration in this case, the *Communications (Retention of Data) Act, 2011* ("the 2011 Act") is practically indistinguishable from Directive 2006/24/EC in its scope and effect so far as the question of general retention is concerned. This is because the 2011 Act opted to implement the most expansive form of retention permissible under Directive 2006/24/EC.

2. Similarly it suffers from precisely the sort of defects anticipated by the CJEU in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238) as regards access safeguards. In reality the access safeguards in the 2011 Act are minimal and ineffective insofar as they amount to police authorisation of police access. As such the 2011 Act represents an extreme example of implementation of Directive 2006/24/EC in that it provides for the most invasive form of retention without any meaningful safeguards.

3. From that perspective it is somewhat surprising that there could really be any argument or debate as to whether or not the 2011 Act is valid having regard to the Charter. From that perspective it must be observed at the outset that one of the underlying themes in this case, and indeed in other recent references to the CJEU from other Member States[1], is the manner in which Member States and national courts accept and abide by the rulings of the CJEU. In that regard it is quite clear that the judgment in *Digital Rights Ireland* and subsequent cases has not been welcomed by the law enforcement agencies and governments in some Member States. Similarly, some national courts, including the referring court, would appear to question the previous rulings of the CJEU.

4. Such civilised disagreement and debate, even if made in robust and strident terms, is a healthy sign in any transnational institution – after all "*it is difference of opinion that makes horse races"*[2]. However, given the passage of time since the CJEU's judgment in *Digital Rights Ireland* and the fact that it has endorsed the approach taken in that case on a number of occasions since, the continued failure of Member States and national courts to accept the practical consequences of that ruling may give rise to concern.

[1] Specifically cases C-520/18, C-623/17, C-511/18 and C-512/18.
[2] Mark Twain – Pudd'nhead Wilson's Calendar, 1894.

QUESTION 1: IS GENERAL/UNIVERSAL DATA RETENTION PERMISSIBLE?

5. This question arises in circumstances where the Defendants argued before the national courts that the CJEU in *Digital Rights* did not decide that a general and indiscriminate retention regime simpliciter was contrary to the Charter. Rather they argued that the CJEU had considered that it was on the basis of a cumulative consideration of ***both*** the general and indiscriminate nature of the retention, along with the failure to make clear provision for access safeguards, that the Directive was struck down. The logical conclusion of such an argument would be that general and indiscriminate retention ***might*** be permissible if sufficient access safeguards were in place.

6. It is not clear how such an argument could be of any use to the Defendants in the present case given the absence of any meaningful access safeguards in the 2011 Act. Nonetheless, the more pertinent point is that the CJEU's judgment in *Digital Rights* quite clearly considered the deficiencies with regard to retention and access safeguards as two distinct problems[3].

7. An identical approach was adopted in *Tele2 Sverige and Watson and Others*, C-203/15 EU:C:2016:970. At para. 105 – 107, the CJEU concluded that the national legislation, insofar as it provided for general retention, exceeded the limits of what was strictly necessary. It did so without reference to any assessment of the scope or quality of applicable access safeguards. Significantly, at para. 108 – 109, the Court observed that the nature of access safeguards would be relevant to any assessment of whether or not a system of ***targeted*** retention would contravene the Charter. Notably the CJEU answered the questions posed by the referring court in respect of retention and access separately. As such there is simply no basis for arguing that access safeguards are to be considered on a cumulative basis along with general retention.

8. It may also be observed that this represents the commonly understood meaning and effect of those judgments. The government of Ireland sought a review of national legislation in light of judgments in *Digital Rights Ireland* and *Tele2/Watson* by former Chief Justice John Murray. He produced a report entitled *Review of the Law on the Retention of and Access to Communications Data*[4] which proceeded on the clear assumption that the

[3] See para. 65 and 66.
[4] See Appendix 1.

CJEU had struck down the concept of general retention – see in particular his observations at p. 6 – 7 under the heading *Impact of Tele2*. Similar assumptions appear to have been made by the Irish legislature in light of its *Report on Pre-Legislative Scrutiny of the Communications (Retention of Data) Bill 2017* on 1st February 2018. It follows that any argument to the effect that general retention may be permissible if accompanied by stringent restrictions and safeguards runs directly contrary to the generally accepted position as understood by the Irish state. Similar assumptions have been made by the EU's own Fundamental Rights Agency[5].

9. It must be emphasized that any argument to the effect that the extent of restrictions and access safeguards might be taken into account in assessing whether a system of general retention is permissible is both radical and novel. In truth, it amounts to an attempt to contend that the judgments in *Digital Rights Ireland* and *Tele2/Watson* are wrong.

10. The referring court has emphasized that it is not possible to use that which has not been retained and suggests that the question of general retention should be viewed through the prism of the availability of other restrictions and safeguards. This analysis, however, ignores the argument that is central to the earlier judgments and opinions – namely that the very act of retention gives rise to the real risk of access and dissemination. In that regard the observations of Advocate General Saugmandsgaard Øe at para. 4 and para. 259in *Tele2/Watson* are of interest as they emphasize the existential threat posed by such systems of mass surveillance and retention. Such considerations are important as they beg the question as to whether or not the creation of such stores of systematically retained and organised data and metadata are, of themselves, desirable or permissible. In other words, do they, by their very existence, represent a threat that is incapable of being mitigated. In that regard it may be useful to recall the words of Homer: *the blade itself incites to deeds of violence*. When considered from this standpoint such databases cannot be regarded as being in any sense inert. On the contrary, their very existence calls for them to be used – and to be used as extensively as possible.

11. On a number of occasions it has been observed that the systematic collation of such metadata can be every bit as revealing as the content of the communications themselves. Given that a system of general retention of the content of communications would be

[5]See for example p. 162 of the FRA's 2017 Report.

considered to be grossly disproportionate it is not at all surprising that the CJEU has taken a similar view in relation to call data.

12. In that regard the observations of the referring court in relation to the obvious usefulness of such databases, whilst undoubtedly correct, reflect an inevitably utilitarian approach. The same observations might be made in respect of the product of any system of mass surveillance or retention of data or personal information – most obviously the general retention of the content of the communications. It is beyond argument that such systems would render the investigation of crime significantly easier. Indeed, the more pervasive and invasive such systems are the easier the investigation of crime becomes. This, however, is not the issue. The true issue is where the balance between the invasive effects of such systems and their undoubted utility in the investigation of crime lies. That issue has been decided (for some years now) in *Digital Rights Ireland* and elaborated on in *Tele2/Watson*. Those judgments clearly dealt with the question of whether a system of general retention *per se* was permissible under the Charter. The CJEU unambiguously held that it was not.

13. Thus, it is beyond doubt that the judgments in *Digital Rights Ireland* and *Tele2/Watson* establish that a system of general retention is impermissible *per se* whereas a system of targeted retention may be permissible if it contains adequate access safeguards. Reference is also made to the Opinions of Advocate General Campos Sánchez-Bordona in cases C-520/18, C-623/17, C-511/18 and C-512/18 which reaches the same conclusion.

QUESTION 2: IS IT RELEVANT THAT DATA IS RETAINED FOR OTHER PURPOSES – NAMELY COMMERCIAL PURPOSES AND NATIONAL SECURITY?

14. Three preliminary points must be made in relation to this question. Firstly, it proceeds on the assumption that it is necessary for the national court to carry out a proportionality assessment even though the system of retention in question is very clearly general and indiscriminate in nature. Given the conclusions of *Digital Rights Ireland* and *Tele2/Watson* it is not at all clear that any proportionality analysis arises.

15. Secondly, it must be observed that whilst some personal data might very well be retained for commercial purposes, such as billing of customers, it is impossible to conceive of a commercial justification for the retention of all of the data sets required to be retained by

Directive 2006/24/EC and the 2011 Act over an extended period of 2 years. This is particularly so as regards cell-site information that permits not only the location but the movements of a user of a mobile phone to be ascertained. As such it is not clear that there is a direct correlation between the scope of the data that was required to be retained under Directive 2006/24/EC and 2011 Act on the one hand and that retained by telecommunication providers for commercial purposes on the other.

16. Thirdly, the question would appear to be predicated on the assumption that retention for the purpose of national security does not fall within the ambit of Directive 2006/24/EC or the Charter. In that regard the Opinions of Advocate General Campos Sánchez-Bordona in cases C-520/18, C-623/17, C-511/18 and C-512/18 suggest that such an assumption may be unwarranted. It seems inevitable that the judgment of the CJEU in those cases is likely to resolve this question prior to the hearing of this reference.

QUESTION 3: WHAT FACTORS SHOULD BE TAKEN INTO ACCOUNT IN ASSESSING THE SUFFICIENCY OF INDEPENDENT PRIOR SCRUTINY? CAN ACCOUNT BE TAKEN OF *EX POST* JUDICIAL OR INDEPENDENT SCRUTINY?

17. The access safeguards provided for in the 2011 Act are absolutely minimal. All that is required is that the person making the request be a police officer not below the rank of Chief Superintendent and that he or she be satisfied that the data are required for the investigation of a serious offence. Given that the 2002 and 2006 Directives imposed an obligation of secrecy in respect of such data generally, it is difficult to conceive of how one might impose less stringent access requirements than those imposed by the 2011 Act.

18. One important feature of the right to protection of personal data under Article 8 of the Charter which is worth highlighting is the explicit requirement of control of access by an *independent* authority. The manner in which the right is formulated and expressed is striking. Not only does it express the essence of the right, it goes so far as to stipulate the nature of the controls that are necessary to guarantee that right. It must be obvious that to consider authorisation of a police request by another police officer as "*control by an independent authority*" is to render the concept of independence essentially meaningless.

19. In its judgment in *Digital Rights Ireland* the Court laid particular emphasis on the fact that Directive 2006/24/EC did not make any provision for a court or independent

administrative body to limit access[6]. The issue which arose for consideration in *Tele2/Watson* was whether or not the requirements identified by the CJEU in *Digital Rights Ireland* were mandatory or whether it might be permissible to consider such access safeguards on a cumulative basis i.e. – the *communicating vessels* approach as argued for by the German Government. The CJEU answered the question decisively and confirmed at para. 120 that the requirement for *ex ante* judicial or independent administrative authorisation was both clear and necessary.

20. Given the fact that the 2011 Act provides for police access authorised by police it is beyond any rational argument that it is impossible for it to comply with the clear requirements stipulated in *Tele2/Watson*. This is because such authorisation is manifestly not independent. It is also relevant that the reference in *Tele2/Watson* proceeded on the basis that the system then operating in the UK, which also involved police authorisation of police access and had slightly more elaborate access protections than the 2011 Act, was considered to be incompatible with the requirement to have *ex ante* court or independent authorisation. Unsurprisingly, there would appear to be a widely held view that an access regime for police mediated by police is simply not permissible.

21. It is also relevant that in the subsequent judgment of the UK Court of Appeal in *Secretary of State for the Home Department v Watson & Others* [2018] EWCA Civ 70 in granting declaratory relief that section 1 of the Data Retention and Investigatory Powers Act 2014 (which had already been repealed) was inconsistent with EU law, the Court of Appeal accepted that the judgment of the CJEU established, at the very least, that access to retained data should be dependent on a prior review by a court or an independent administrative body and not police authorisation of police access. Similarly, in a further subsequent judgment in *Liberty v SSHD*, [2018] EWHC 975 the UK accepted that Part 4 of the Investigatory Powers Act 2016 ("the IPA") was incompatible with EU law in the same two respects and therefore had to be amended. It was expressly conceded that access to retained data which was subject to police authorisation of police access was not subject to prior review by a court or an independent administrative body and accordingly, the defendants did not contest the making of a declaration that Part 4 of the IPA was inconsistent with EU law.

[6] See para. 59.

22. In circumstances where it is quite clear that the access safeguards in the 2011 Act which are in the nature of police authorisation of police access are incapable of complying with the requirements clearly set out in *Tele2/Watson* it is not apparent what more needs to be said about the criteria to be applied in assessing the sufficiency of independent authorisation. In truth, the safeguards provided by the 2011 Act cannot be described as independent in the first place. As such little further qualitative assessment is required.

23. Insofar as it may be necessary to provide any further elaboration or definition of the concept of *"an independent authority"* the CJEU's recent jurisprudence in relation to the concept of *"a judicial authority"* for the purpose of the European arrest warrant system provides a useful touchstone. In *Joined Cases OG &* PI C-508/18 and C-82/19 PPU EU:C:2019:456*,* the CJEU concluded that independence required that the judicial authority not be subject to direct or indirect control or instruction from the executive. It is beyond argument that under Irish law a police officer, of any rank, remains subject to direction from his or her superiors. In practical terms, this means that the person who decides on access requests under the 2011 Act is a police officer who is subject to direction from his or her superiors – i.e. other police officers who have an obvious and material interest in the investigation. To describe such a person as *"independent"* is to deprive that word of meaning.

24. The second part of the question similarly does not seem to arise. It is quite clear from *Tele2/Watson* that what is required is independent *ex ante* authorisation. As a matter of principle *ex post* independent judicial scrutiny cannot remedy a deficiency in the *ex ante* authorisation process. This is for the obvious reason that *ex post* judicial scrutiny will only arise in a very small number of cases. For example where, as in the present case, it is argued that the judicial scrutiny brought to bear as a result of a criminal trial is sufficient, it is clear that this will mean that it is only in respect of the tiny number of cases that proceed to a contested trial where issues of access will be considered on an *ex post facto* basis. Logically this would mean that the overwhelming majority of access requests will be the subject of no judicial or independent oversight of any sort. Moreover, *ex post* judicial scrutiny is not actually a safeguard against access – rather it proceeds on the basis that access is presumptively granted with a view to some form of limited remediation after the fact. In simple terms it can be said that *ex ante* authorisation operates to prevent a breach of rights in the first place whereas *ex post* scrutiny simply

has the effect of detecting a small amount of breaches that have already taken place. As such the difference is akin to the difference between universal vaccination and limited antibody testing.

25. The approach suggested in Question 3 would have the effect of depriving the requirement that an access request *"be subject to a prior review carried out either by a court or by an independent administrative body"* of any meaning. The Court has been quite clear in terms of the requirements for access safeguards.

QUESTION 4: IS A NATIONAL COURT OBLIGED TO GRANT A DECLARATION OF INCONSISTENCY WHERE IT CONSIDERS THE RETENTION IS BOTH ESSENTIAL AND STRICTLY NECESSARY?

26. This question raises fundamental issues in relation to the obligation of national courts to abide by and accept prior determinations of the CJEU. As observed above, the CJEU has already determined that Directive 2006/24/EC was inconsistent on the basis that it amounted to general and indiscriminate retention. In posing the question in the manner it has the referring court essentially invites the CJEU to revisit and overturn those earlier determinations. The question is framed by reference to the national court's consideration of evidence concerning the necessity of general retention.

27. Such an approach fails to acknowledge that this issue was effectively already determined in *Tele2/Watson*. In that case, Advocate General Saugmandsgaard Øe suggested (at para. 154 of his Opinion EU:C:2016:572) that it would be "*for the referring courts, which are in a privileged position to evaluate their respective national regimes, to verify compliance with that requirement*". He reiterated such a view at para. 207 – 209 and 211. At para. 215 and 216 he repeated the suggestion and noted that it had been advocated for by, *inter alia*, the Irish government. At para. 261 – 262 he elaborated on what he considered to be the nature of the exercise the national courts would undertake. The Advocate General then went on to immediately state his proposed answer to the questions referred at para. 263. This was in the nature of a series of principles that would inform the exercise of a national court considering whether or not a given regime was permissible or not. Of particular interest is the third of the principles that he proposed:

> *- the obligation must be strictly necessary in the fight against serious crime, which means that no other measure or combination of measures could be as*

effective in the fight against serious crime while at the same time interfering to a lesser extent with the rights enshrined in Directive 2002/58 and Articles 7 and 8 of the Charter of Fundamental Rights

28. Rather than answering the question that had been posed as to whether general data retention was permissible, the Advocate General considered that each system would have to be assessed in the round, including an assessment of access safeguards, and a specific inquiry made by the national courts as to whether other measures might be as effective.

29. The CJEU, however, took a very different approach in *Tele2/Watson*. It was perfectly content to conduct its own assessment of the national legislation on precisely the same basis that it had assessed Directive 2006/24/EC in *Digital Rights*[7]. The CJEU made it perfectly clear what it considered to be permissible and what it did not. Conspicuously, it made it clear beyond argument that retention that was general and indiscriminate was not proportionate whereas a retention regime that was targeted *might* well be proportionate[8]. Whilst one might very well see that there is a role for the national courts in making a first instance assessment in relation to what *might* be permissible in the context of a form of *non-general retention*, it is difficult to see how they could have any role in determining what has clearly already been found not to be permissible – namely general and indiscriminate retention.

30. In that regard it is highly relevant that the CJEU appeared to draw a distinction between the role of national courts in the context of general and indiscriminate retention on the one hand and access safeguards on the other. In respect of the latter it contemplated that the national courts would have a role in determining the question of proportionality:

> *124. It is the task of the referring courts to determine whether and to what extent the national legislation at issue in the main proceedings satisfies the requirements stemming from Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, as set out in paragraphs 115 to 123 of this judgment, with respect to both the access of the competent national authorities to the retained data and the protection and level of security of that data.*

[7] See its conclusions at para. 105 – 108.
[8] Its observations at para. 108 are unambiguous in that regard.

31. The absence of a similar observation in relation to general and indiscriminate retention is pointed. The CJEU has clearly mandated a very different approach to the two issues. In hearing evidence of and purporting to decide on the question of the necessity of general retention, the referring court has sought to question the predicate basis for the findings of the CJEU in both *Digital Rights Ireland* and *Tele2/Watson*. This is not generally permissible.

32. It may also be observed that different cases may well yield different results depending on the evidence called and arguments made. This is not to say that it is open to litigants to seek to endlessly reargue the same points on the basis of different evidence. It is also of some relevance that Ireland was a party in *Digital Rights Ireland* in which Directive 2006/24/EC was struck down. One might well ask why evidence of necessity of general retention was not called in that case? Or why the argument unsuccessfully made by Ireland in *Tele2/Watson* is being repeated once more in the present case. There is a significant element of *l'esprit de l'escalier* in the question referred and the position adopted by the Defendants.

33. In his Opinion in Case C-520/18 EU:C:2020:7 Advocate General Campos Sánchez-Bordona observed[9] that many of the Member States, by their observations, invited the CJEU to reconsider its rulings in *Digital Rights Ireland* and *Tele2/Watson*. As of the time of writing of these observations, the CJEU has yet to give judgment in that case or the related cases – C-623/17, C-511/18 and C-512/18. As such it is sufficient to state that at this point the CJEU has stood over its findings in *Digital Rights Ireland* in the subsequent cases of *Tele2/Watson* and Case C-207/16 EU:C:2018:788 *Ministerio Fiscal*. A point must come whereby it is no longer appropriate or permissible for national courts to continue to question or second guess well established decisions from the CJEU.

QUESTIONS 5 & 6: IS A NATIONAL COURT ENTITLED TO LIMIT THE TEMPORAL EFFECT OF A DECLARATION OF INCONSISTENCY?

34. The starting point for any analysis in relation to these questions is the fact that insofar as the issue of general retention is concerned the terms of the 2011 Act follow precisely the outer limits of Directive 2006/24/EC. In essence the 2011 Act is a maximalist implementation of the expansive form of general retention permitted under the Directive

[9] See para. 69 – 71.

– all categories of data without exception or differentiation are subject to the maximum retention for a period of 2 years. Similarly, in relation to access safeguards the 2011 Act utterly fails to make any provision for prior review by a court or an independent administrative body.

35. It follows that the logic underpinning the judgment in *Digital Rights Ireland* must apply with equal measure to the 2011 Act. There is simply no room for any nuance or distinction between Directive 2006/24/EC and the 2011 Act to be made. Moreover, the 2011 Act explicitly cites Directive 2006/24/EC as the basis for the scheme of retention and access it sets out. Again, it must follow that any retention and access that occurred under the 2011 Act was carried out pursuant to the Directive and contrary to the Charter. In the context of the present case this is not to be regarded as a plea or argument – rather it is an incontrovertible historic fact.

36. The Directive was struck down because it failed to take account of the various Charter rights discussed in *Digital Rights Ireland*. These rights are not free-standing rights such as exist, for example, under the European Convention on Human Rights – rather they are engaged pursuant to the provisions of Article 51 in the context of Member States implementation of EU law. As such the 2011 Act is simply the concrete expression of the Directive and is subject to precisely the same criticisms and defects that applied to the Directive.

37. In Question 6 the referring court unambiguously asks whether it is entitled to restrict the temporal effect of the ruling in *Digital Rights Ireland*. This question must clearly be answered in the negative.

38. Article 264 grants jurisdiction to the CJEU to determine issues of retrospectivity and prospective effect where it declares an act of Union law to be void:

> *If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.*
>
> *However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.*

39. In his Opinion in *Digital Rights Ireland* Advocate General Cruz Villalón gave explicit consideration[10] to the possibility of invoking Article 264. However, when it delivered its ruling on 8th April, 2014 the CJEU very pointedly chose not to invoke the provisions of Article 264 in relation to limiting the effect of the declaration in *Digital Rights Ireland*. This was not an oversight by the CJEU or a failure to advert to the possibility. It is difficult to understand how the national courts can effectively countermand the CJEU's approach. This is particularly so when the divergent approaches that national courts in different Member States take in relation to such matters are considered[11]. The importance of a unified and consistent approach across the EU was also discussed in *Société des produits de maïs, C-112/83, ECLI:EU:C:1985:86*:

> *Secondly, it must be emphasized that the Court's power to impose temporal limits on the effects of a declaration that a legislative act is invalid, in the context of preliminary rulings under indent (b) of the first paragraph of Article 177, is justified by the interpretation of Article 174 of the Treaty having regard to the necessary consistency between the preliminary ruling procedure and the action for annulment provided for in Articles 173, 174 and 176 of the Treaty, which are two mechanisms provided by the Treaty for reviewing the legality of acts of the Community institutions. The possibility of imposing temporal limits on the effects of the invalidity of a Community regulation, whether under Article 173 or Article 177, is a power conferred on the Court by the Treaty in the interest of the uniform application of Community law throughout the Community. In the particular case of the judgment of 15 October 1980, referred to by the Tribunal, the use of the possibility provided for in the second paragraph of Article 174 was based on reasons of legal certainty more fully explained in paragraph 52 of that judgment.*

40. The general position as regards temporal effect of judgments has been recently summarised by the CJEU in the case of *Torsten Hein* Case C-385/17 EU:C:2018:1018 delivered on 13th December 2018. At para. 56 – 58 of its judgment the Court made it quite clear that whilst it is entitled to restrict the retrospective effect of a judgment it is a jurisdiction which, firstly, is only exercised on an exceptional basis and, secondly, must

[10] See para. 157 – 158.
[11] See the Opinion of Advocate General Stix-Hackl in *Banca Popolare di Cremona* Case C-475/03 EU:C:2005:183 – in particular para. 134 and footnote 85.

be exercised explicitly. It must follow that it is not permissible for national courts to infer or presume such a restriction where it is not patent from the judgment itself. This must be so even where a national court considers that it would have been desirable for the CJEU to have invoked its power to restrict the temporal effect of the ruling.

41. This is further underlined by the judgment in the case of *Wienand Meilicke* Case C-292/04 EU:C:2007:132, where it was said[12] that a restriction on the temporal effect of a judgment can only be imposed in the judgment itself – and not later in a subsequent case.

42. It is clear that the principle of legal certainty is of fundamental importance to any consideration of the issue at hand, particularly when it is considered that the ECJ has a transnational role. Were the issue of retrospectivity to be left to be determined by the national courts in individual Member States then this would obviously and immediately result in a differential application over time across the EU. Such a result would be the very antithesis of the basis of EU law itself.

43. The request by the referring court to have the issue considered in the context of domestic rules and considerations must be considered from that perspective. In effect the referring court is asking whether it is permissible to introduce a temporal limitation as regards the effect of a ruling under Article 267 at the domestic level in circumstances where the CJEU has decided not to do so at the transnational level. The posing of such a question casts in doubt the very purpose of Article 264.

44. If it were permissible for national courts to apply temporal restrictions as they saw fit, then this would inevitably mean that the rights purportedly protected by the Charter would be protected in some jurisdictions but not in others. In essence, it would undermine the universal and autonomous nature of Charter rights.

45. It is also important to understand what it is the Plaintiff seeks to achieve in the proceedings before the national court. In the course of his criminal trial the prosecution gave evidence of the Plaintiff's call data records (including cell site analysis) over a period from October, 2011 to August, 2012. The purpose of this evidence was to show a clear and detailed picture of all of his movements, associations and communications over that period in order to attribute a second mobile phone to him. This second mobile phone

[12] See para. 35 – 37.

was implicated in the commission of the offence and the evidence showed that its movements were innately interlinked with those of the Plaintiff's phone. At his trial the Plaintiff pointed to the judgment of the CJEU in *Digital Rights Ireland* and argued that his Charter rights had been breached for precisely the same reasons identified in that judgment. The court of trial refused to entertain the argument on the grounds that the Plaintiff had not, at that point, obtained a declaration from the national courts to the effect that the 2011 Act was inconsistent with EU law even though it was cast in precisely the same terms as the Directive. It was for that reason that the Plaintiff brought these proceedings seeking such a declaration.

46. It is important to understand that obtaining a declaration that the 2011 Act is inconsistent with the Charter from the national courts is no more than an initial step that would allow the Plaintiff to simply raise an argument about the admissibility of the evidence in question in the criminal proceedings. It would by no means necessarily result in the exclusion of that evidence. This is clear by reason of the decision of the Irish Supreme Court in *DPP v. JC* [2017] 1 IR 417 where it was said that the exclusion of evidence is a matter of discretion for the court of trial. As such the entire purpose of these proceedings is to obtain relief that will then simply allow an argument in the related criminal proceedings to be made.

47. A further important feature of the Plaintiff's case is that he has not sought to annul the 2011 Act nor has he sought to stop its continued operation. On the contrary, the Plaintiff has sought the most minimal relief necessary to permit him to raise an admissibility argument in related criminal proceedings – namely a declaration as to breach of his Charter rights. On any view of the 2011 Act its operation must have involved a breach of Charter rights. From that perspective the focus of the Plaintiff's case is extremely narrow – it is solely directed towards discrete and identifiable events in the past as opposed to what occurs in the future. It was for that reason that the Plaintiff, in the context of the domestic proceedings, agreed to a stay being placed on the declaration granted by the High Court at first instance – this has had the practical effect of ensuring that the system put in place by the 2011 Act has been permitted to continue to operate even though the domestic courts have, at first instance, found it to be invalid as regards EU law.

48. Similarly, the Plaintiff would not raise any objection to a practical solution of the sort proposed by Advocate General Campos Sánchez-Bordona in his Opinion in Case C-520/18 at para. 144 – 154 to the effect that the provisions of the 2011 Act might be operated on an ongoing basis until new measures could be adopted. It should be observed, however, that it is not at all clear that the Irish state seeks such a solution – after all the Irish legislature and government has taken no further steps since 2017 to put in place a new legal framework. In that regard the *Report on Pre-Legislative Scrutiny of the Communications (Retention of Data) Bill 2017 on 1st February 2018* related to a 2017 Bill that was brought before the Irish legislature but which has not been progressed since. As such it is not clear that Ireland needs further time to put in place a new regulatory regime so much as it simply needs to come to terms with the obvious consequences of *Digital Rights Ireland* and subsequent cases.

49. Before the national courts the Plaintiff made it clear that there is no objection to deferring the future effect of any judgment that has the effect of annulling the 2011 Act – in domestic legal parlance this would be described as a deferred declaration of invalidity. Although it is a relatively novel concept in Irish constitutional law it has been invoked on a number of occasions in recent years. However, the deferral of annulment is not the same as prospective-only effect. The fact that the annulment of a domestic statutory scheme is deferred to permit an orderly transition does not mean that the very actions taken under same which lead to the declaration of invalidity somehow become something other than contraventions of the relevant Charter rights. Rather a deferred declaration of this sort is properly regarded as nothing more than a practical solution to what would otherwise be an immediate and acute problem.

50. It most certainly does not mean that the finding no longer operates retrospectively. In that regard the deferring of an annulment cannot alter the character of the contraventions which occurred in the past. This can only be done by means of the CJEU deciding itself to limit the retrospective effect of a declaration of invalidity. In that regard the terms of Question 6 elide the distinction between retrospectivity on the one hand and practical solutions such as deferring annulment on the other.

51. What was argued for by the Defendants and what is proposed by Question 6, however, is truly radical when its consequences are considered. In effect, it seeks to permit national courts to deprive a litigant from obtaining any relief of any sort from the national courts

arising from a ruling of the CJEU – even though the CJEU has pointedly not sought to restrict the effects of its ruling. This goes much further than what was proposed by the Advocate General in *Case C-520/18*. In the scenario he posits there is still a clear acknowledgment that the system of retention and access operated at a national level contravened (and continues to contravene) Charter rights. The solution he proposes is to permit that contravention to continue for the shortest period of time possible in order to prevent a chaotic result from an instantaneous annulment of a pre-existing complex regulatory framework. This does not alter the fact that Charter rights have been infringed which may, or may not, have specific consequences in other parts of the domestic legal order.

52. What the Defendants contend for here and what is proposed in Question 6 is that the historic operation of the 2011 Act, which on any view contravened the relevant Charter rights, would essentially be expunged from history. In other words, past contraventions would be treated as non-contraventions. There is simply no precedent for such a step. Indeed, it may be observed that even in cases where the CJEU did limit the temporal effect of its rulings it invariably did so as regards third parties only – i.e. those who had not brought the case resulting in the ruling. The Plaintiff is unaware of any case where the CJEU have deprived a litigant who brings a successful challenge of any meaningful relief. In the present case the Defendants are essentially contending that the Plaintiff, whose Charter rights were unarguably breached, should be disentitled from the most modest relief arising from same – namely, a simple declaration to that effect.

53. The position adopted by the Defendants and proposed by Question 6 is not only radical and unprecedented, it is essentially ahistorical in that it seeks to ignore past contraventions of Charter rights for no reason other than that it is more convenient for the Defendants to do so. In that regard it is a position that is not just unprincipled – it is potentially dangerous and far reaching. Not only is such a position a reversal of the generally accepted principle of *ubi ius ibi remedium*, more pertinently, it would have the entirely obvious effect of disincentivising the assertion of Charter rights by way of litigation before national courts. The elucidation and vindication of fundamental rights is most obviously and traditionally achieved by way of individuals and organisations asserting rights by way of litigation. If the present case establishes an entitlement on the part of the national courts to effectively ignore past breaches even though they manifestly

arise by reason of the judgments of the CJEU then it rather begs the question as to whether there will ever be a purpose to such litigation other than in the context of purely prospective relief. In a very real sense such an approach would render the Charter a sterile document rather than a living document.

54. The position contended for by the Defendants and arising from Question 6 leads to some extraordinary consequences. The most obvious of these is that the litigant who successfully mounts a challenge on the basis of a breach of Charter rights is not entitled to a declaration that his rights have (i.e. in the past) been breached even when that is the logical predicate basis for the action.

PROPOSED ANSWERS TO THE QUESTIONS REFERRED

55. In light of the foregoing it is proposed that the following answers be given to the questions asked by the referring Court:

> ***Question 1: Is a general/universal data retention regime – even subject to stringent restrictions on retention and access – per se contrary to the provisions of Article 15 of Directive 2002/58/EC, as interpreted in light of the Charter?***
>
> *Yes. General retention is impermissible per se.*
>
> ***Question 2: In considering whether to grant a declaration of inconsistency of a national measure implemented pursuant to Directive 2006/24/EC, and making provision for a general data retention regime (subject to the necessary stringent controls on retention and/or in relation to access), and in particular in assessing the proportionality of any such regime, is a national court entitled to have regard to the fact that data may be retained lawfully by service providers for their own commercial purposes, and may be required to be retained for reasons of national security excluded from the provisions of Directive 2002/58/EC?***
>
> *No. The fact that data is retained by service providers for commercial purposes or other agencies for national security purposes is not relevant. In any event general retention is impermissible per se.*

Question 3: In assessing, in the context of determining the compatibility with European Union law and in particular with Charter Rights of a national measure for access to retained data, what criteria should a national court apply in considering whether any such access regime provides the required independent prior scrutiny as determined by the Court of Justice in its case law? In that context can a national court, in making such an assessment, have any regard to the existence of ex post judicial or independent scrutiny?

Access must be subject to a prior review carried out either by a court or by an independent administrative body. An independent body is one which is not exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive. The fact of ex post judicial or independent scrutiny is not a substitute for ex ante authorisation.

Question 4: In any event, is a national court obliged to declare the inconsistency of a national measure with the provisions of Article 15 of the Directive 2002/58/EC, if the national measure makes provision for a general data retention regime for the purpose of combating serious crime, and where the national court has concluded, on all the evidence available, that such retention is both essential and strictly necessary to the achievement of the objective of combating serious crime?

A national court is not entitled to dispute a core conclusion already made by the CJEU by conducting its own analysis. The CJEU has determined that general data retention for the purpose of combating serious crime is impermissible as regards the Charter.

Question 5: If a national court is obliged to conclude that a national measure is inconsistent with the provisions of Article 15 of Directive 2002/58/EC, as interpreted in the light of the Charter, is it entitled to limit the temporal effect of any such declaration, if satisfied that a failure to do so would lead to "resultant chaos and damage to the public interest" (in line with the approach taken, for example, in R (National Council for Civil Liberties) v Secretary of State for Home Department and Secretary of State for Foreign Affairs [2018] EWHC 975, at para. 46)?

The national court is not entitled to limit the temporal effect of a declaration of invalidity in circumstances where the CJEU has opted not to. However, a national court may provisionally maintain the operation of an otherwise invalid scheme in domestic law for such period of time as is strictly necessary in order to mitigate or replace that scheme with one which is not invalid.

Question 6: May a national court invited to declare the inconsistency of national legislation with Article 15 of the Directive 2002/58/EC, and/or to disapply this legislation, and/or to declare that the application of such legislation had breached the rights of an individual, either in the context of proceedings commenced in order to facilitate an argument in respect of the admissibility of evidence in criminal proceedings or otherwise, be permitted to refuse such relief in respect of data retained pursuant to the national provision enacted pursuant to the obligation under Article 288 TFEU to faithfully introduce into national law the provisions of a directive, or to limit any such declaration to the period after the declaration of invalidity of the Directive 2006/24/EC issued by the CJEU on the 8th day of April, 2014?

No. The jurisdiction to limit the temporal effect of any declaration of invalidity is solely within the gift of the CJEU.

ANNEXES

(i) *Review of the Law on the Retention of and Access to Communications Data;*

(ii) *Report on Pre-Legislative Scrutiny of the Communications (Retention of Data) Bill 2017 on 1st February 2018;*