



Legal Service

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**Note for the attention of Mr Claude MORAES**  
Chairman of the Committee on Civil Liberties, Justice and Home Affairs

*(c/o: Mr Antoine Cahen, Head of Unit)*

**Re: LIBE – Questions relating to the judgment of the Court of Justice of 8 April 2014 in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others* - Directive 2006/24/EC on data retention - Consequences of the judgment.**

On 29 October 2014, the Legal Service received your request for a legal opinion on nine questions relating to the consequences of the judgment of the Court of Justice (Grand Chamber), dated 8 April 2014, in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others*<sup>1</sup>. This judgment declared as "invalid" 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.<sup>2</sup>

In its opinion which you will find attached, the Legal Service has reached the following conclusions:

***General considerations***

“a) *The Court's reasoning in the DRI judgment is based on the provisions of the Charter, and in particular Articles 7, 8 and 52(1) thereof. Consequently, the Court's reasoning in this particular case can only apply to other cases also if the*

<sup>1</sup> EU:C:2014:238.

<sup>2</sup> OJ L 105, 13.4.2006, p. 54.

*Charter is applicable. In the case of other measures adopted by the EU legislature this will always be the case, but care must be taken in particular as regards other measures adopted by the Member States, given that Article 51(1) of the Charter provides that the Charter applies to the Member States "only when they are implementing Union law". It must therefore be established, as a preliminary consideration, whether or not Member States are implementing Union law.*

- b) *The Court has declared that, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, "depending on a number of factors", including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference. As in the DRI judgment, the EU legislature's discretion may then prove to be "reduced", in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right. If so, there will be a "strict" method of judicial review of that exercise of discretion. In such cases, a very careful review of the "justification" (including the necessity and proportionality) of any interference, under Article 52(1) of the Charter, will then be required.*
- c) *In order to fully respect the principle of proportionality, the EU legislature must ensure that an interference with fundamental rights is "precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary". If this is not the case, then the measure in question may be declared invalid by the Court as being contrary to the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter. In particular, the EU legislature must provide for "clear and precise rules" to limit the interference to what is "strictly necessary", notably through the inclusion in the EU legislative act of "minimum safeguards" and "sufficient guarantees".*
- d) *The DRI judgment presents a novel aspect in so far as the Court of Justice refers specifically to a particular body of the case-law of the European Court of Human Rights on the issue of "general programmes of surveillance". The Court of Justice has now effectively incorporated the same principles, stemming from this case-law of the European Court of Human Rights, into EU law in this same field. In view of the fact that the cited case-law of the European Court of Human Rights itself relates to a diverse category of surveillance measures (which is not at all limited to data retention issues), it is to be expected that the Court of Justice will, in future, also apply the same reasoning when assessing the validity, under the Charter, of other EU legislative acts in this same field of "general programmes of surveillance."*

#### *As regards Union law*

- e) *The DRI judgment itself concerns only the validity of the data retention Directive. It does not therefore have any direct consequences for the validity of any other EU act. Other existing EU acts benefit from a "presumption" of legality and so, formally, any other EU act will still remain valid, until such time as it is declared invalid following separate legal proceedings before the Court of Justice. The "presumption" of legality of EU acts can though be rebutted.*

- f) *The validity of other EU acts must be assessed on a case-by-case basis, in the light of the particular circumstances of each case. In particular, the specific wording of the provisions of each act must be assessed in each case, in view of the particular objectives of general interest to be attained and the justifications advanced for each measure.*
- g) *Other EU acts which also fall into the same category of "general programmes of surveillance" - as envisaged in the case-law of the European Court of Human Rights - will be subject to the same "strict" method of judicial review followed by the Court in the DRI judgment.*
- h) *All new and pending EU legislative proposals which concern the special context of "general programmes of surveillance" must clearly now take account of the reasoning of the Court of Justice in the DRI judgment. Great care must therefore be taken in such cases to ensure full respect for the Charter.*
- i) *The same considerations will apply also in the case of international agreements under negotiation, given that the EU legislature's discretion, in external relations, to conclude international agreements, under the Treaty and in accordance with the Charter, cannot be wider than the discretion, in internal matters, to adopt EU legislation applying within the EU legal order.*

***As regards Member States' law***

- j) *The DRI judgment is limited to declaring the invalidity of the data retention Directive, so it does not directly affect the validity of the national measures adopted to implement this Directive. Nevertheless it may produce indirect effects on Member States' laws.*
- k) *Firstly, Member States no longer have any obligation, but an option, to retain data in the electronic communications sector. They may therefore repeal their national legislation in this field.*
- l) *Secondly, if a Member State decides to maintain the rules on data retention, it has to be examined whether or not such rules are in conformity with the Charter, and fulfil the requirements set out by the Court of Justice in the DRI judgment, to the extent that these national rules fall within the scope of application of the Charter, as defined in its Article 51(1).*
- m) *Even if, following the DRI judgment, the data retention Directive is no longer applicable, national measures adopted to implement it now fall within the scope of Article 15(1) of the e-Privacy Directive and have to fulfil all the requirements laid down in this provision. As a result, these national rules are implementing Union law, which entails the applicability of the Charter. In this respect, the DRI judgment could, in principle, have indirect consequences as regards the national measures, given that the same general legal considerations based on the Charter could be invoked to challenge the validity of the national acts too.*

- n) *Following the DRI judgment, Member States run an even higher risk than before of having their legislation annulled by the national courts, in a similar way to what has already happened in a number of Member States.*
- o) *As regards other national measures requiring mass collection of personal data, storage and access of the data for law enforcement purposes, in case these measures fall within the scope of Union law, within the meaning of Article 51(1) of the Charter, national courts might be called upon to examine the compatibility of these measures with the fundamental rights' standards set out in the Charter as interpreted in the DRI judgment. It is possible, in such cases, that the national courts could make a request for a preliminary ruling to the European Court of Justice.*
- p) *If, on the other hand, the national measures in question are adopted in areas falling outside of the scope of Union law, national courts will rather refer to the fundamental rights' standards resulting from domestic constitutions, as well as from the European Convention of Human Rights, including the relevant case-law of the European Court of Human Rights.*
- q) *A situation where a Member State concludes a bilateral agreement with a third country "when they are implementing Union law", would seem to arise in only quite exceptional circumstances. As a result, bilateral agreements concluded by the Member States with third countries requiring mass collection of personal data and exchange of personal data for law enforcement purposes would presumably have been concluded in the exercise of the competence of the Member States. Consequently the Charter would not be applicable to such agreements and so the DRI judgment would not then have any particular consequences in this regard.*
- r) *If certain national legislation falls within the scope of Article 15(1) of the e-Privacy Directive or of Article 13(1) of Directive 95/46, such as, for example, legislation on data retention measures in the electronic communications sector, the Charter would be applicable to it, according to Article 51(1) thereof."*

The Legal Service remains at your disposal for any further information you may require.

*(signed)*

Freddy DREXLER  
The Jurisconsult

Annex