

A Court of Justice of the European Union

**Digital Rights Ireland Ltd v Minister for Communications,
Marine and Natural Resources and others (Irish Human Rights
Commission intervening)**

B Proceedings brought by Kärntner Landesregierung and others

(Joined Cases C-293/12 and C-594/12)

EU:C:2013:845

EU:C:2014:238

C

2013 July 9;
Dec 12;
2014 April 8

President V Skouris,
Vice-President K Lenaerts,
Presidents of Chambers A Tizzano, R Silva de Lapuerta,
T von Danwitz, E Juhász, A Borg Barthet,
CG Fernlund, JL da Cruz Vilaça,
Judges A Rosas, G Arestis, J-C Bonichot,
A Arabadjiev, C Toader, C Vajda
Advocate General P Cruz Villalón

D

European Union — Parliament and Council Directive — Validity — Electronic communications — Directive obliging providers of publicly available electronic communications services or public communications networks to retain certain personal data — Whether Directive interfering with Charter rights to privacy and protection of personal data — Whether interference proportional and justified — Whether Directive valid — Parliament and Council Directive 2006/24/EC — Charter of Fundamental Rights of the European Union, arts 7, 8

E

The main objective of Parliament and Council Directive 2006/24/EC¹ was to harmonise member states' provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data which were generated or processed by them, in order to ensure that the data were available for the purpose of fighting serious crime, in compliance with the rights to privacy and the protection of personal data laid down, respectively, in articles 7 and 8 of the Charter of Fundamental Rights of the European Union². It (i) derogated from the system of protection of the right to privacy established by Parliament and Council Directive 95/46/EC and Parliament and Council Directive 2002/58/EC with regard to the processing of personal data in the electronic communications sector, (ii) required providers to retain data which made it possible to know the identity of the person with whom a subscriber or registered user had communicated and by what means and to identify the time of the communication and the place from which it had taken place, and (iii) made it possible to know the frequency of the communications of the subscriber or registered user with certain persons during a given period. In two joined cases, in which it was

F

G

¹ Parliament and Council Directive 2006/24/EC: see post, judgment, paras 12–16.

² Charter of Fundamental Rights of the European Union, art 7: "Everyone has the right to respect for his or her private and family life, home and communications."

Art 8: "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."

H

sought to annul measures which transposed into national law the requirements of Directive 2006/24, the Irish High Court and the Austrian Constitutional Court respectively referred to the Court of Justice of the European Union for a preliminary ruling the question, inter alia, whether Directive 2006/24 was valid in the light of, inter alia, articles 7 and 8 of the Charter.

On the references—

Held, that since Parliament and Council Directive 2006/24/EC covered, in a generalised manner, all persons and all means of electronic communication and all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting serious crime, it entailed an interference with the rights of practically the entire European population to, respectively, privacy under article 7 of the Charter of Fundamental Rights of the European Union, and the protection of personal data under article 8; that although the retention of data for the purpose of allowing the national authorities to have access to those data genuinely satisfied an objective of general interest, such an objective did not in itself justify the retention measures established by the Directive; that, since the Directive did not lay down clear and precise rules governing the extent of the interference with the rights enshrined in articles 7 and 8 of the Charter, it entailed a wide ranging and particularly serious interference with those rights in the European Union legal order, without such an interference being precisely limited to what was strictly necessary; that, since the Directive lacked sufficient safeguards to ensure (i) effective protection of the data retained against the risk of abuse and of unlawful access or use and (ii) its irreversible destruction at the end of the retention period, and since it did not require the data to be retained within the European Union and so did not ensure the control by an independent authority of compliance with the requirements of protection and security, the requirements of article 8 of the Charter were not met and, by adopting the Directive, the European Union legislature had exceeded the limits imposed by the principle of proportionality in the light of articles 7 and 8 of the Charter; and that, accordingly, the Directive was invalid (post, judgment, paras 34–36, 41, 44, 51, 56–58, 65–69, 71, operative part).

The following cases are referred to in the judgment:

Afton Chemical Ltd v Secretary of State for Transport (Case C-343/09)
EU:C:2010:419; [2010] ECR I-7027, ECJ

European Commission v Republic of Austria (Case C-614/10) EU:C:2012:631;
[2013] All ER (EC) 237, ECJ

Institut professionnel des agents immobiliers (IPI) v Englebert (Case C-473/12)
EU:C:2013:715; [2014] 2 CMLR 297, ECJ

Kadi v Council of the European Union (Joined Cases C-402/05P and C-415/05P)
EU:C:2008:461; [2009] AC 1225; [2009] 3 WLR 872; [2010] All ER (EC) 1105;
[2008] ECR I-6351, ECJ

Land Baden-Württemberg v Tsakouridis (Case C-145/09) EU:C:2010:708; [2013]
All ER (EC) 183; [2010] ECR I-11979, ECJ

Leander v Sweden (1987) 9 EHRR 433

Liberty v United Kingdom (2008) 48 EHRR 1

MK v France (Application No 19522/09) (unreported) given 18 April 2013, ECtHR

Nelson v Deutsche Luftthansa AG (Joined Cases C-581/10 and C-629/10)
EU:C:2012:657; [2013] 1 All ER (Comm) 385; [2013] All ER (EC) 603; [2013]
1 Lloyd's Rep 49, ECJ

Rechnungshof v Österreichischer Rundfunk (Joined Cases C-465/00, C-138/01 and
C-139/01) EU:C:2003:294; [2003] ECR I-4989, ECJ

Rotaru v Romania (2000) 8 BHRC 449, GC

Sv United Kingdom (2008) 48 EHRR 1169, GC

Schaible v Land Baden-Württemberg (Case C-101/12) EU:C:2013:661; 17 October
2013, ECJ

- A *Sky Österreich GmbH v Österreichischer Rundfunk* (Case C-283/11) EU:C:2013:28; [2013] All ER (EC) 633, ECJ
Stichting Al-Aqsa v Council of the European Union (Joined Cases C-539/10P and C-550/10P) EU:C:2012:711; 15 November 2012, ECJ
Volker und Markus Schecke GbR v Land Hessen (Joined Cases C-92/09 and C-93/09) EU:C:2010:662; [2012] All ER (EC) 127; [2010] ECR I-11063, ECJ
Weber and Saravia v Germany (2006) 46 EHRR SE47
- B The following additional cases are referred to in the Advocate General's opinion:
Agrana Zucker GmbH v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Case C-309/10) EU:C:2011:531; [2011] ECR I-7333, ECJ
Åklagaren v Åkerberg Fransson (Case C-617/10) EU:C:2013:105; [2013] STC 1905, ECJ
Aktas v Turkey (2003) 38 EHRR 333
- C *Altuğ Taner Akçam v Turkey* (Application No 27520/07) (unreported) given 25 October 2011, ECtHR
Amann v Switzerland (2000) 30 EHRR 843, GC
Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v Administración del Estado (Joined Cases C-468/10 and C-469/10) EU:C:2011:777; [2011] ECR I-12181, ECJ
Azienda Agricola Disarò Antonio v Cooperativa Milka 2000 Soc coop arl (Case C-34/08) EU:C:2009:304; [2009] ECR I-4023, ECJ
- D *Banif Plus Bank Zrt v Csaba Csipai* (Case C-472/11) EU:C:2013:88; [2013] 2 CMLR 1183, ECJ
Bonnier Audio AB v Perfect Communication Sweden AB (Case C-461/10) EU:C:2012:219; [2012] 2 CMLR 1175, ECJ
College van burgemeester en wethouders van Rotterdam v Rijkeboer (Case C-553/07) EU:C:2009:293; [2009] ECR I-3889, ECJ
- E *Commission of the European Communities v Hellenic Republic* (Case C-475/04) EU:C:2006:362; (unreported) 1 June 2006, ECJ
Commission of the European Communities v Kingdom of Belgium (Case C-376/04) EU:C:2005:265; (unreported) 28 April 2005, ECJ
Commission of the European Communities v Luxembourg (Case C-375/04) EU:C:2005:264; (unreported) 28 April 2005, ECJ
Deutsche Telekom AG v Bundesrepublik Deutschland (Case C-543/09) EU:C:2011:279; [2011] ECR I-3441, ECJ
- F *European Commission v Federal Republic of Germany* (Case C-518/07) EU:C:2010:125; [2010] ECR I-1885, ECJ
European Commission v Republic of Estonia (Case C-505/09P) EU:C:2012:179; 29 March 2012, ECJ
European Commission v Republic of Poland (Case C-504/09P) EU:C:2012:178; 29 March 2012, ECJ
- G *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council of the European Union* (Joined Cases C-120/06P and C-121/06P) EU:C:2008:476; [2008] ECR I-6513, ECJ
Huber v Germany (Case C-524/06) EU:C:2008:724; [2009] All ER (EC) 239; [2008] ECR I-9705, ECJ
Ireland (supported by Slovakia intervening) v European Parliament (supported by Spain intervening) (Case C-301/06) EU:C:2009:68; [2009] All ER (EC) 1181; [2009] ECR I-593, ECJ
- H *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-189/01) EU:C:2001:420; [2001] ECR I-5689, ECJ
LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH (Case C-557/07) EU:C:2009:107; [2009] ECR I-1227, ECJ

- Lindqvist, Criminal proceedings against* (Case C-101/01) EU:C:2003:596; [2004] QB 1014; [2004] 2 WLR 1385; [2004] All ER (EC) 561; [2003] ECR I-12971, ECJ A
- Mouvement Raëlien Suisse v Switzerland* (2012) 56 EHRR 482, GC
- Niemietz v Germany* (1992) 16 EHRR 97
- Pretty v United Kingdom* (2002) 35 EHRR 1
- Probst v mr nexnet GmbH* (Case C-119/12) EU:C:2012:748; [2013] CEC 913, ECJ
- Productores de Música de España (Promusicae) v Telefónica de España SAU* (Case C-275/06) EU:C:2008:54; [2008] All ER (EC) 809; [2008] ECR I-271, ECJ B
- R v Secretary of State for Health, Ex p British American Tobacco Investments Ltd* (Case C-491/01) EU:C:2002:741; [2003] All ER (EC) 604; [2002] ECR I-11453, ECJ
- R (ABNA Ltd) v Secretary of State for Health* (Joined Cases C-453/03, C-111/04, C-12/04 and C-194/04) EU:C:2005:741; [2005] ECR I-10423, ECJ
- R (Alliance for Natural Health and Nutri-Link Ltd) v Secretary of State for Health* (Joined Cases C-154/04 and C-155/04) EU:C:2005:449; [2005] ECR I-6451, ECJ C
- Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Case C-70/10) EU:C:2011:771; [2011] ECR I-11959, ECJ
- Silos e Mangimi Martini SpA v Ministero delle Finanze* (Case C-228/99) EU:C:2001:599; [2001] ECR I-8401, ECJ
- Sison v Council of the European Union* (Case C-266/05P) EU:C:2007:75; [2007] ECR I-1233, ECJ
- Société Arcelor Atlantique et Lorraine v Premier ministre, Ministre de l'Écologie et du Développement durable* (Case C-127/07) EU:C:2008:728; [2008] ECR I-9895, ECJ D
- Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne* (Case C-333/07) EU:C:2008:764; [2008] ECR I-10807, ECJ
- Tietosuojaalutuetettu v Satakunnan Markkinapörssi Oy* (Case C-73/07) EU:C:2008:727; [2010] All ER (EC) 213; [2008] ECR I-9831, ECJ
- United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (Case C-150/94) EU:C:1998:547; [1998] ECR I-7235, ECJ E
- Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) EU:C:2010:321; [2010] All ER (EC) 741; [2010] ECR I-4999, ECJ
- Wieman v Updegraff* (1952) 344 US 183
- Willem v France* (Application No 10883/05) (unreported) given 16 July 2009, ECtHR F
- Worten-Equipamentos para o Lar SA v Autoridade para as Condições de Trabalho (ACT)* (Case C-342/12) EU:C:2013:355; 30 May 2013; [2013] ICR D29, ECJ

Digital Rights Ireland v Communications Minister (Case C-293/12)

REFERENCE from the High Court, Ireland

In proceedings between the claimant, Digital Rights Ireland Ltd, and the defendants, the Minister for Communications, Marine and Natural Resources, the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána, Ireland, and the Attorney General, regarding the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications, in which proceedings the Irish Human Rights Commission intervened, the High Court, Ireland stayed the proceedings and referred to the Court of Justice of the European Union for a preliminary ruling questions, post, judgment, para 18, concerning the validity of Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic

A communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105, p 54).

The facts are stated, post, opinion, paras 10–12; judgment, para 17.

By decision of the President of the Court of 11 June 2013 the case was joined with Case C-594/12 for the purposes of the oral procedure and the judgment.

B The judge rapporteur was Judge von Danwitz.

Proceedings brought by Kärntner Landesregierung (Case C-594/12)

REFERENCE from the Verfassungsgerichtshof (Constitutional Court), Austria

C In separate applications brought (i) on 6 April 2012 by the Kärntner Landesregierung (Government of the Province of Carinthia), (ii) on 25 May 2012 by Michael Seitlinger, and (iii) on 15 June 2012 by Christof Tschohl and 11,129 others, regarding the compatibility of paragraph 102a of the Federal Constitutional Law (Bundes-Verfassungsgesetz) of paragraph 102a of the Telekommunikationsgesetz 2003, as inserted, the law transposing Parliament and Council Directive 2006/24/EC into Austrian national law, D the Verfassungsgerichtshof, Austria stayed the proceedings and referred to the Court of Justice of the European Union for preliminary ruling questions, post, judgment, para 21, as to whether Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105, p 54) was compatible with E the Charter of Fundamental Rights of the European Union in so far as it allowed the storing of many types of data in relation to an unlimited number of persons for a long time.

The facts are stated, post, opinion, paras 13–15; judgment, paras 19–20.

By decision of the President of the Court of 11 June 2013 the case was joined with Case C-293/12 for the purposes of the oral procedure and the judgment.

F The judge rapporteur was Judge von Danwitz.

Frank Callanan SC and Fergal Crehan (instructed by *McGarr Solicitors, Dublin*) for the claimant in the first case.

G Otto for the applicant Seitlinger in the second case.

E Scheucher for the applicants Tschohl and others in the second case.

G *Patrick Dillon Malone SC* (instructed by *Irish Human Rights Commission*) for the intervener in the first case.

Eugene Regan SC and *David Fennelly* (instructed by *Chief State Solicitor's Office*) for Ireland.

G Hesse and *G Kunnert*, agents, for the Austrian Government.

N Díaz Abad, agent, for the Spanish Government.

H *G de Bergues* and *D Colas* and by *B Beaupère-Manokha*, agents, for the French Government.

G Palmieri, agent, assisted by *A De Stefano* for the Italian Government.

B Majczyna and *M Szpunar*, agents, for the Polish Government.

L Inez Fernandes and *C Vieira Guerra*, agents, for the Portuguese Government.

Sarah Lee (instructed by *Treasury Solicitor*) for the United Kingdom Government. A

U Rösslein, *A Caiola* and *K Zejdová*, agents, for the European Parliament.

J Monteiro, *E Sitbon* and *I Šulce*, agents, for the Council of the European Union.

D Maidani, *B Martenczuk* and *M Wilderspin*, agents, for the European Commission. B

12 December 2013. **ADVOCATE GENERAL P CRUZ VILLALÓN** delivered the following opinion.

1 In the present cases, the court has before it two references for a preliminary ruling on the validity of Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105, p 54) offering it the opportunity to rule on the circumstances in which it is constitutionally possible for the European Union to impose a limitation on the exercise of fundamental rights within the specific meaning of article 52(1) of the Charter of Fundamental Rights of the European Union (“the Charter”), by means of a Directive and the national measures transposing it. It must be noted that the transposition of Directive 2006/24 has resulted in several actions for a declaration that a member state has failed to fulfil its obligations. The limitation at issue takes the form of an obligation imposed on economic operators to collect and retain, for a specified time, a considerable amount of data generated or processed in connection with electronic communications effected by citizens throughout the territory of the European Union, with the objective of ensuring that such data are available for the purpose of the investigation and prosecution of serious criminal activities and ensuring the proper functioning of the internal market. I propose to provide a three-part answer to that question. C
D
E

2 In the first part, I shall address the issue of the proportionality of Directive 2006/24 within the meaning of article 5(4) EU of the EU Treaty. In the second part, I shall ascertain whether the requirement, laid down in article 52(1) of the Charter, that any limitation on the exercise of fundamental rights must be “provided for by law” may be regarded as having been fulfilled. Finally, in the third part, I shall examine whether Directive 2006/24 observes the principle of proportionality, again within the meaning of article 52(1) of the Charter. F
G

3 However, before starting the examination of those three issues, I shall address a series of three questions which I consider essential for a proper understanding of the problems raised by the references for a preliminary ruling on validity from the High Court (Ireland) and the Verfassungsgerichtshof (Constitutional Court) (Austria). H

I—Legal context

A—European Union law

4 The main provisions of European Union law which are relevant to the examination of the questions referred to the court in the present cases are, in

A addition to the provisions of Directive 2006/24 whose validity is called into question in the two cases and those of the Charter, those of Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281, p 31)^{1*} and of Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L201, p 37)². Those Directives and their main provisions will be presented in the course of the following reasoning as and when required for the purposes of the discussion.

C B—*National law*

1. Irish law (Case C-293/12)

5 Article 29.4.6 of the Constitution of Ireland provides that no provision of the Constitution invalidates laws enacted, acts done or measures adopted by the state which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties, from having the force of law.

6 Part 7 of the Criminal Justice (Terrorist Offences) Act 2005, now repealed, included provisions on the retention of data relating to communications by telephone. It required providers of telephone communication services to retain traffic and location data for a period laid down by law, in order to prevent, detect, investigate and prosecute crime and to safeguard the security of the state. For those purposes the Criminal Justice (Terrorist Offences) Act 2005 allowed the competent authorities of the state, in particular the Commissioner of the Garda Síochána, to request the disclosure of such data by following a particular procedure and it established guarantees by means of a complaints procedure, presided over by an independent quasi-judicial body.

7 The Communications (Retention of Data) Act 2011, adopted in order to transpose Directive 2006/24, repealed Part 7 of the Criminal Justice (Terrorist Offences) Act 2005 and established a new data retention scheme.

G 2. Austrian law (Case C-594/12)

8 Paragraph 1 of the Federal Law on the protection of personal data, which has constitutional status, provides for a fundamental right to data protection.

9 Directive 2006/24 was transposed into Austrian law by a federal law introducing a new paragraph 102a into the Law on telecommunications of 2003, which imposes on providers of publicly available communications services the obligation to retain the data listed therein: see, with regard to the wording of that article, Annex I, point III.2.

* *Reporter's note.* The superior figures in the text refer to notes which can be found at the end of the opinion on pp 159–160.

II—The facts of the main proceedings

A

A—Case C-293/12 Digital Rights Ireland

10 The claimant in the main proceedings, Digital Rights Ireland Ltd (“DRI”), is a limited liability company whose statutes specify that its object is to promote and protect civil rights and human rights, in particular in the field of modern communication technologies.

11 DRI, which states that it is the owner of a mobile phone registered on 3 June 2006 which it has been using since that date, brought an action against two ministers of the Irish Government, the Minister for Communications, Marine and Natural Resources and the Minister for Justice, Equality and Law Reform, the Irish chief of police (the Commissioner of the Garda Síochána), Ireland, and the Attorney General of Ireland, submitting, in essence, that the Irish authorities have unlawfully processed, retained and exercised control over data related to its communications.

B

C

12 As a result, it is seeking, first, the annulment of several measures of domestic law that empower the Irish authorities to adopt measures requiring providers of telecommunications services to retain telecommunications data, taking the view that they are incompatible with the Irish Constitution and European Union law. Second, it is calling into question the validity of Directive 2006/24 in the light of the Charter and/or the European Convention for the Protection of Human Rights and Fundamental Freedoms and asked the national court to refer to the court several questions on the validity of that Directive.

D

B—Case C-594/12 Seitlinger and others

13 On 6 April 2012 the Kärntner Landesregierung, on the basis of article 140(1) of the Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz) (“the B-VG”), brought an action before the Verfassungsgerichtshof for the annulment of several provisions of the Telekommunikationsgesetz 2003 (“TKG 2003”), in particular paragraph 102a, as drafted following the transposition of Directive 2006/24 and which entered into force on 1 April 2012.

E

F

14 On 25 May 2012 Mr Michael Seitlinger brought an action before the Verfassungsgerichtshof on the basis of article 140(1) of the B-VG claiming that paragraph 102a of the TKG 2003 was unconstitutional in so far as it affected his rights. He considers that the latter provision, which imposes on his communication network operator the obligation to retain data without any reason, technical need or billing purpose and against his will, constitutes, *inter alia*, an infringement of article 8 of the Charter.

G

15 Finally, on 15 June 2012, a further action was brought before the Verfassungsgerichtshof on the basis of article 140 of the B-VG by 11,130 applicants claiming that the unconstitutionality of the obligation to retain data laid down by paragraph 102a of the TKG 2003 infringed their rights and, in particular, article 8 of the Charter.

H

*III—The questions referred and the procedure before the Court of Justice**A—Case C-293/12 Digital Rights Ireland*

16 In Case C-293/12, the High Court has referred the following questions to the court for a preliminary ruling:

A “1. Is the restriction on the rights of the [claimant in the main proceedings] 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)EU 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?

B “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 21FEU [of the FEU Treaty]? (ii) Is Directive 2006/24/EC compatible with the right to privacy laid down in article 7 of the Charter and article 8 [of the Human Rights Convention]? (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 [of the Human Rights Convention]? (v) Is Directive 2006/24/EC compatible with the right to good administration laid down in article 41 of the Charter?

C “3. To what extent do the Treaties—and specifically the principle of loyal co-operation laid down in article 4(3) of the EU Treaty—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, including article 7 thereof (as informed by article 8 of the [of the Human Rights Convention])?”

D
E *B—Case C-594/12 Seitlinger and others*

17 In Case C-594/12, the Verfassungsgerichtshof has referred the following questions to the court for a preliminary ruling:

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

F “Are articles 3 to 9 of Parliament and Council Directive 2006/24/EC 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 . . . ?

G “2. Concerning the interpretation of the Treaties:

H “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 Parliament and Council Directive 95/46/EC 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 and Parliament and Council Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [OJ 2001 L8, p 1] be taken into account, for the purposes of assessing the

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

“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?

“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? B

“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 in secondary law must be more narrowly circumscribed? C

“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 [of the Human Rights Convention], can assistance be derived from the case law of the European Court of Human Rights on article 8 of the [of the Human Rights Convention] for the purpose of interpreting article 8 of the Charter such as to influence the interpretation of that latter article?” D

C—Procedure before the Court of Justice E

18 Written observations have been submitted in Case C-293/12 by the Irish Human Rights Commission (“the IHRC”), Ireland, the French, Italian, Polish and United Kingdom Governments, the European Parliament, the Council of the European Union and the European Commission.

19 Written observations have been submitted in Case C-594/12 by Mr Seitlinger, Mr Tschohl, the Spanish, French, Austrian and Portuguese Governments, the Parliament, the Council and the commission. F

20 By decision of the President of the Court of 6 June 2013, the two cases were joined for the purposes of the oral procedure and the judgment.

21 With a view to the holding of a joint hearing in the two cases, the court, pursuant to article 61 of its Rules of Procedure, invited the parties wishing to appear to consult one another on their respective positions, to focus their pleadings on the compatibility of Directive 2006/24 with articles 7 and 8 of the Charter and to answer certain questions. It also invited the European Data Processing Supervisor (“the EDPS”) to provide information, pursuant to the second paragraph of article 24 of the Statute of the Court of Justice. G

22 DRI and the IHRC (Case C-293/12) and Mr Seitlinger and Mr Tschohl (Case C-594/12), as well as Ireland, the Spanish, Italian, Austrian and United Kingdom Governments, the Parliament, the Council, the commission and the EDPS, presented oral argument at the joint hearing in open court held on 9 July 2013. H

A *IV—Admissibility*

23 In their written observations in Case C-293/12, the Parliament, the Council and the commission argue, in essence, that the High Court has not sufficiently set out the reasons leading it to question the validity of Directive 2006/24, in particular in the light of article 21FEU of the FEU Treaty and articles 11 and 41 of the Charter. The vagueness of the request for a preliminary ruling from the High Court thereby noted cannot, however, lead the court to dismiss that request as inadmissible.

V—*Substance*

24 The separate requests for a preliminary ruling from the High Court in Case C-293/12 and the Verfassungsgerichtshof in Case C-594/12 raise four sets of issues.

25 The first set of issues, consisting of the first question in Case C-293/12, concerns the validity of Directive 2006/24 in the light of article 5(4)EU of the EU Treaty. The High Court asks very specifically whether Directive 2006/24 is, in general, proportionate within the meaning of article 5(4)EU, that is to say, whether it is necessary and appropriate to achieve the objectives which it pursues, which are to ensure that certain data are available for the purposes of investigation, detection and prosecution of serious crime and/or to ensure the proper functioning of the internal market.

26 The second set of issues, which comprises the second question in Case C-293/12 and the first question in Case C-594/12, relates to the compatibility of several provisions of Directive 2006/24 with a number of provisions of the Charter, primarily article 7 on the right to privacy and article 8 on the right to the protection of personal data, and, more broadly, to the proportionality of the measures which it imposes, within the meaning of article 52(1) of the Charter. That question of validity is indisputably central to the problems raised by these cases.

27 The second question referred by the Verfassungsgerichtshof in Case C-594/12 raises a third set of issues, concerning the interpretation of the general provisions of the Charter governing its interpretation and application, in the present instance the interpretation and application of articles 52(3)(4)(7) and 53. More specifically, the Verfassungsgerichtshof raises, in essence, the question of the relationship between, on the one hand, article 8 of the Charter, enshrining the right to the protection of personal data, and, on the other hand, (i) the provisions of Directive 95/46 and Regulation No 45/2001, in connection with article 52(1)(3) of the Charter (questions 2.1, 2.2 and 2.3), (ii) the constitutional traditions of the member states (question 2.4), in connection with article 52(4) of the Charter, and (iii) the law of the Human Rights Convention, in particular article 8 thereof, in connection with article 52(3) of the Charter: question 2.5.

28 Finally, the third question of the High Court in Case C-293/12, which comprises the fourth and final set of issues, concerns the interpretation of article 4(3)EU and more specifically whether national courts are required, under the duty of sincere co-operation, to examine and assess the compatibility of national provisions transposing Directive 2006/24 with the provisions of the Charter, in particular article 7 thereof.

29 It should be noted at the outset that most of my discussion will focus on the first two sets of questions and that, in light of the answer to them

which will be provided, it will not be necessary to provide specific answers to the last two sets of questions. Before addressing those questions, it is necessary to begin, however, by making a number of preliminary comments.

A—Preliminary remarks

30 In order to be in a position to provide comprehensive answers on the various issues raised by the national courts, attention must be drawn to three elements which play a decisive part for the purpose of analysing the present cases, that is to say, first, the specific nature of Directive 2006/24 in functional terms, secondly, the classification of the interference with the fundamental rights at issue and, thirdly and finally, the impact on the present cases of the judgment in *Ireland (supported by Slovakia intervening) v European Parliament (supported by Spain intervening)* (Case C-301/06) [2009] ECR I-593; [2009] All ER (EC) 1181 by which the court dismissed the action for annulment of that Directive brought on the ground that it was adopted on an incorrect legal basis.

1. The “functional duality” of Directive 2006/24 and its relationship with Directive 95/46 and Directive 2002/58

31 It is necessary to begin by placing Directive 2006/24 in its context, outlining the legislative framework of which it forms part, which is primarily made up of Directive 95/46 and Directive 2002/58.

32 The object of Directive 95/46, which like Directive 2006/24 is based on article 114FEU, is to impose on member states the obligation to guarantee the right to privacy of individuals with respect to the processing of personal data relating to them (article 1(1)), with a view to allowing the free flow of such data between the member states: article 1(2). For that purpose, it establishes, inter alia, a set of rules determining the conditions under which the processing of personal data is lawful, laying down the rights of persons in relation to whom data are collected and processed, in particular the right to information (articles 10 and 11), the right of access (article 12), the right to object (article 14), and the right to a remedy (article 22), and guaranteeing the confidentiality and security of processing.

33 The system of protection established by Directive 95/46 is accompanied by exemptions and restrictions laid down in article 13. The rights and obligations which it provides for as regards data quality (article 6(1)), the transparency of processing (articles 10 and 11(1)), rights of access of individuals in relation to whom data are being processed (article 12), and the publicising of processing operations (article 21), may be the subject of legislative measures restricting their scope where this is necessary to safeguard, in particular, national security, defence, public security or the prevention, investigation, detection and prosecution of criminal offences.

34 Directive 2002/58, which repeals and replaces Parliament and Council Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L24, p 1) particularises and complements the system of protection of personal data established by Directive 95/46 by means of specific rules applicable to the electronic communications sector: article 1(1). It includes, in particular, rules requiring the member states to

A ensure, subject to certain exceptions, the confidentiality of not only the communications but also the traffic data of subscribers to and users of electronic communications services. Article 6 imposes on providers of communications services the obligation to erase or make anonymous the traffic data which they process and store relating to their subscribers and users.

B 35 It is of particular importance to the reasoning that follows that article 15(1) of Directive 2002/58 also provides, in the same terms as article 13(1) of Directive 95/46 to which it refers, that the member states *may* adopt legislative measures to restrict the scope of the rights and obligations provided for in the Directive as regards, inter alia, the confidentiality of communications (article 5) and the erasure of traffic data: article 6. Article 15(1) states that member states may, to that end, adopt, inter alia, legislative measures providing for the retention of data for a limited period on one of the grounds listed, in accordance with fundamental rights.

C 36 Directive 2006/24 in fact alters profoundly the law applicable to electronic communications data as it stood following the adoption of Directives 95/46 and 2002/58 (see, inter alia, recitals (1) to (6) in the Preamble to Directive 2006/24) by providing for the establishment by the member states of an obligation to collect and retain traffic and location data which falls within the scope of the restrictions on the right to the protection of personal data that are provided for in article 13(1) of Directive 95/46 and article 15(1) of Directive 2002/58.

D 37 Directive 2006/24 is characterised first of all by its objective of harmonisation, in this instance of the rules of member states on the retention of traffic and location data relating to electronic communications. However, in the light of the matter to be harmonised and the circumstances, that objective requires the simultaneous imposition, on member states which not having such legislation, of an obligation to collect and retain such data. It follows that Directive 2006/24 has a dual function which it is essential to take into consideration in order properly to address the problem raised by the present requests for a preliminary ruling.

E 38 The primary objective of Directive 2006/24 is to harmonise national rules which already impose on providers of publicly available electronic communications services or of public communications networks obligations to retain the traffic and location data which it determines, in order to ensure their availability “for the purpose of the investigation, detection and prosecution of serious crime, as defined by each member state in its national law”: see recital (21) in the Preamble to Directive 2006/24 and article 1(1). In so doing, Directive 2006/24 accordingly harmonises in part the rules adopted by certain member states on the basis of the option provided by article 15(1) of Directive 2002/58: see recitals (4) and (5) in the Preamble to Directive 2006/24.

F 39 Directive 2006/24 thus establishes a scheme derogating (article 3(1) of Directive 2006/24 states that the obligation to retain data laid down by that provision derogates from articles 5, 6 and 9 of Directive 2002/58) from the principles established by Directive 95/46 and Directive 2002/58. To be entirely accurate, it derogates from the derogating rules which are laid down by article 15(1) of Directive 2002/58 and govern the member states’ option of restricting, on the grounds provided for in article 13(1) of Directive 95/46,

the scope of the right to the protection of personal data and, more generally, of the right to privacy, in the specific context of the provision of electronic communications services or public communications networks.

40 Moreover, it is significant that article 11 of Directive 2006/24 inserts paragraph 1a into article 15 of Directive 2002/58, which states that paragraph 1 of article 15 is not to apply to data specifically required to be retained by Directive 2006/24.

41 As the court pointed out in *Ireland v European Parliament* [2009] ECR I-593, para 84, Directive 2006/24 is directed essentially at the activities of providers of electronic communications services, since it harmonises the national rules by means of provisions which are essentially limited to the retention of data, the categories of data to be retained, the periods of retention, and data protection, data security and data storage: see paras 80 and 81.

42 It is precisely because of that limited harmonising function, as will be seen below, that the court was able to rule, in *Ireland v European Parliament*, that Directive 2006/24 could be adopted on the basis of article 95EC of the EC Treaty. It was necessary, in pursuit of the objective of safeguarding the proper functioning of the internal market, to end the divergent development of the existing rules, while preventing divergent development in the future.

43 The harmonisation under Directive 2006/24 was, here, necessarily carried out on the basis of insertion of an obligation to collect and retain data imposed on providers of electronic communications services, at least with respect to the member states that had no legislation in that regard, an obligation which sets in particular the minimum and maximum periods for which the data must be retained.

44 It may, in that regard, be pointed out that the fact that a number of member states did not yet have legislation on data retention was specifically one of the key factors justifying the adoption of Directive 2006/24 on the basis of article 95EC. It was a question, in this instance, of preventing the divergences between the various national rules from growing; see *Ireland v European Parliament* [2009] ECR I-593, paras 64 and 70.

45 Accordingly, Directive 2006/24, within the context of its objective of harmonisation, imposes on member states the obligation either to make their existing system compatible with the provisions of Directive 2006/24 or to establish, in due course, the collection and retention scheme provided for by Directive 2006/24 and, in any event, the obligation to ensure compliance with the provisions of that Directive, in particular those governing the requirements and detailed rules for access to the retained data.

46 In summary, Directive 2006/24 is characterised by its functional duality. It is, on the one hand, an entirely traditional Directive which seeks to *harmonise* national laws that are disparate (recital (5) in the Preamble to Directive 2006/24 states that national laws “vary considerably”) or likely to become so, and was adopted in the interests of the functioning of the internal market and precisely calibrated for that purpose, as the court ruled in *Ireland v European Parliament*. However, it is also, on the other hand, a Directive which, even in its harmonising function, seeks to *establish* where appropriate, obligations—in particular data retention obligations—which constitute, as I shall show later, serious interference with the enjoyment of the fundamental rights guaranteed to European citizens by the Charter, in

A particular the right to privacy and the right to the protection of personal data.

47 Finally, although it is clear that the answers to the questions referred in the present cases must in particular take into account this “second function”, that is to say, what I would describe as the “creating” effect of the obligation that data be retained, that obligation’s specific effect of harmonising existing national rules in the field must not be disregarded.

B

2. The fundamental right essentially at issue and classification of the interference

48 It is necessary, secondly, to address at this stage the issue of classification of the interference with the exercise of fundamental rights which arises from the collection and retention of data under Directive 2006/24, once it has been accepted that the actual existence of that interference is not in dispute. First of all, I shall identify the fundamental right primarily affected by Directive 2006/24 and then I shall classify the interference with the exercise of that right which the Directive constitutes.

C

(a) The fundamental rights affected

D

(i) The various fundamental rights relied upon

49 The High Court, in Case C-293/12, and the Verfassungsgerichtshof, in Case C-594/12, ask the court to rule on the compatibility of Directive 2006/24 with various fundamental rights, first of all the right to privacy, as guaranteed by article 7 of the Charter, and the right to the protection of personal data, as guaranteed by article 8 of the Charter, but also the right to freedom of expression, as guaranteed by article 11 of the Charter.

E

50 The High Court also asks the court to rule on the compatibility of Directive 2006/24 with article 21FEU, on the right of movement and residence of European citizens, and with article 41 of the Charter, laying down the right to good administration.

51 In that connection, it is possible to begin by simplifying this issue.

F

52 First of all, it is true that it must not be overlooked that the vague feeling of surveillance which implementation of Directive 2006/24 may cause is capable of having a decisive influence on the exercise by European citizens of their freedom of expression and information and that an interference with the right guaranteed by article 11 of the Charter therefore could well also be found to exist³. It may be noted, however, that, quite apart from the fact that the court does not have sufficient material to enable it to give a ruling in that regard, that effect would be merely a collateral consequence of interference with the right to privacy, which is the subject matter of a very careful and detailed examination below.

G

53 In addition, the High Court does not provide the slightest explanation of its reasons for considering article 21FEU (right of residence and movement of European citizens) and article 41 of the Charter (right to good administration) relevant in assessing the validity of Directive 2006/24, or even the slightest indication of the impact which that Directive could have on the free movement of citizens or on the principle of good administration, contrary to the requirements now laid down in article 94 of the Rules of Procedure of the court. Accordingly, the court also has insufficient material to give any ruling in that regard.

H

54 It is therefore primarily the compatibility of Directive 2006/24 with articles 7 and 8 of the Charter that should, in principle, be examined. A

(ii) The combination of the right to privacy and the right to protection of personal data

55 Article 8 of the Charter enshrines the right to the protection of personal data as a right which is distinct from the right to privacy. Although data protection seeks to ensure respect for privacy, it is, in particular, subject to an autonomous regime, primarily determined by Directive 95/46, Directive 2002/58, Regulation No 45/2001 and Directive 2006/24 and, in the field of police and judicial co-operation in criminal matters, by Council Framework Decision of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters 2008/977/JHA (OJ 2008 L350, p 60). B

56 Directive 2006/24 significantly affects the right to the protection of personal data, since article 5 imposes on member states the obligation to ensure the retention of data which allow or may allow identification of a person, be he the source or the destination of a communication, and of his position in space and time, whether by reference to his telephone number in respect of telephony or to his identification number or any another information specific to him such as an IP address in respect of Internet services see points 74–80 of my opinion in *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Case C-70/10) [2011] ECR I-11959. C

57 Article 1(2) of Directive 2006/24 indeed expressly states that the Directive is to apply, inter alia, to data necessary to identify subscribers to or registered users of publicly available electronic communications services or public communications networks. Those data thus fall within the category of data whose disclosure is subject to the express authorisation of each individual, in respect of which he has a “right to informational self-determination”. D

58 Directive 2006/24 appears at first sight to be an interference with the right to the protection of personal data, clearly falling within the scope of the provisions of article 8(2)(3) of the Charter. Indeed, Directive 2006/24 states that not only Directive 95/46 and Directive 2002/58 (recital 15) in the Preamble) but also the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981 (recital (20) in the Preamble) are fully applicable to the data retained in accordance with its provisions. E

59 However, it is not the processing of the data retained, whether in terms of the manner in which the data are collected by the providers of electronic communications services or the manner in which they are used by the competent authorities authorised by the member states, which requires the utmost vigilance, but the actual collection and retention of the data at issue, as well as the data’s impact on the right to privacy, for reasons which I shall now explain. F

60 First of all, the fact that Directive 2006/24 may satisfy fully the requirements of article 8(2)(3) of the Charter and be considered not to be incompatible with article 8 of the Charter in no way means that it is fully compatible with the requirements resulting from the right to privacy guaranteed by article 7 of the Charter. G

A 61 Since the “private sphere” forms the core of the “personal sphere”, it cannot be ruled out that legislation limiting the right to the protection of personal data in compliance with article 8 of the Charter may nevertheless be regarded as constituting a disproportionate interference with article 7 of the Charter.

B 62 It is true that the right to the protection of personal data is based on the fundamental right of respect for private life (see point 51 of the opinion of Advocate General Kokott in *Productores de Música de España (Promusicae) v Telefónica de España SAU* (Case C-275/06) [2008] ECR I-271; [2008] All ER (EC) 809), with the result that, as the court has had the opportunity to point out⁴, articles 7 and 8 of the Charter are so closely linked⁵ that they may be regarded as establishing a “right to respect for private life with regard to the processing of personal data”: *Volker und Markus Schecke GbR v Land Hessen* (Joined Cases C-92/09 and C-93/09) [2010] ECR I-11063; [2012] All ER (EC) 127, para 52.

C 63 However, this cannot apply systematically. The link which unites those two rights depends, in essence, on the nature of the data at issue, even if they are always personal, that is to say, relate to the person, to the individual.

D 64 There are data that are personal as such, that is to say, in that they individually identify a person, such as data which, in the past, could appear on a safe-conduct, by way of example. Such data frequently have a certain permanence and are frequently somewhat neutral too. They are personal but no more than that and, in general, it could be said that they are those for which the structure and guarantees of article 8 of the Charter are best suited.

E 65 There are, however, data which are in a sense more than personal. These are data which, qualitatively, relate essentially to private life, to the confidentiality of private life, including intimacy. In such cases, the issue raised by personal data commences, so to speak, further “upstream”. The issue which arises in such cases is not yet that of the guarantees relating to data processing but, at an earlier stage, that of the data as such, that is to say, the fact that it has been possible to record the circumstances of a person’s private life in the form of data, data which can consequently be subject to information processing.

F 66 It is in that sense that it is possible to argue that, when such data are involved, they raise an issue which essentially precedes that of their processing, relating primarily to the privacy guaranteed by article 7 of the Charter and only secondarily to the guarantees concerning the processing of personal data referred to in article 8 of the Charter.

G 67 As is clear from the foregoing reasoning, which places the fundamental rights forming the combination constituted by the right to privacy (article 7 of the Charter) and the right to the protection of personal data (article 8 of the Charter) in their correct positions, it is necessary to assess the validity of Directive 2006/24 primarily from the perspective of interference with the right to privacy.

H (b) A particularly serious interference with the right to privacy

68 First of all, there is hardly any doubt that Directive 2006/24 itself constitutes an “interference” with the right to privacy⁶. This is in fact established by the Directive, which defines itself as an “instrument on data retention” constituting a “[necessary measure] that complies with the

requirements of article 8 of the [Human Rights Convention]” (see recital (9) in the Preamble to Directive 2006/24) and article 7 of the Charter. The court, moreover, uses that term in relation to the Directive: see *Ireland v European Parliament* [2009] ECR I-593, para 57, and, below, my reasoning in relation thereto.

69 The European Court of Human Rights has for its part repeatedly held that the storing by a public authority of data relating to the private life of an individual amounts to an interference with the right to respect for his private life guaranteed by article 8.1 of the Human Rights Convention (see, inter alia, *Leander v Sweden* (1987) 9 EHRR 433) and that the use made of them has no bearing on that finding: see, inter alia, *Amann v Switzerland* (2000) 30 EHRR 843.

70 The issue here is to attempt to classify that interference. In that regard, and as I shall demonstrate in more detail below, it is possible to argue that Directive 2006/24 constitutes a *particularly serious* interference with the right to privacy.

71 It is true that Directive 2006/24 excludes from its scope, in a manner which is as express as it is insistent (recital (13) and articles 1(2) and 5(2)), the content of telephone or electronic communications, the information communicated itself.

72 However, the fact remains that the collection and, above all, the retention⁷, in huge databases, of the large quantities of data generated or processed in connection with most of the everyday electronic communications of citizens of the Union⁸ constitute a serious interference with the privacy of those individuals, even if they only establish the conditions allowing retrospective scrutiny of their personal and professional activities. The collection of such data establishes the conditions for surveillance which, although carried out only retrospectively when the data are used, none the less constitutes a permanent threat throughout the data retention period to the right of citizens of the Union to confidentiality in their private lives. The vague feeling of surveillance created raises very acutely the question of the data retention period.

73 In that regard, it is first of all necessary to take into account the fact that the effects of that interference are multiplied by the importance acquired in modern societies by electronic means of communication, whether digital mobile networks or the Internet, and their massive and intensive use by a very significant proportion of European citizens in all areas of their private or professional activities. With regard to taking account of the multiplier effect of modern information technologies and particularly the Internet: see, in particular, *Mouvement Raëlien Suisse v Switzerland* (2012) 56 EHRR 482, para 54 et seq; *Aktaş v Turkey* (2003) 38 EHRR 333, para 28; and *Willem v France* (Application No 10883/05) given 16 July 2009, paras 36 and 38.

74 The data in question, it must be emphasised once again, are not personal data in the traditional sense of the term, relating to specific information concerning the identity of individuals, but “special” personal data, the use of which may make it possible to create a both faithful and exhaustive map of a large portion of a person’s conduct strictly forming part of his private life, or even a complete and accurate picture of his private identity.

A 75 The intensity of that interference is exacerbated by factors which increase the risk that, notwithstanding the obligations imposed by Directive 2006/24 both on the member states themselves and on providers of electronic communications services, the retained data might be used for unlawful purposes which are potentially detrimental to privacy or, more broadly, fraudulent or even malicious.

B 76 Indeed, the data are not retained by the public authorities themselves, or even under their direct control, but by the providers of electronic communications services themselves (see article 3(1) of Directive 2006/24, which defines the retention obligation), on which most of the obligations guaranteeing data protection and security are imposed.

C 77 It is true that Directive 2006/24 requires (see article 8 of Directive 2006/24, entitled “Storage requirements for retained data”) the member states to ensure that data are retained in accordance with that Directive. It is interesting to note though that it is required to carry this out only in such a way that those data and any other necessary information relating to them “can be transmitted on request to the competent authorities without undue delay”. Directive 2006/24 provides, moreover, that the member states must ensure that providers of electronic communications services observe minimum principles concerning the protection and security of the data retained.

D 78 However, no provision of Directive 2006/24 lays down the requirement for those service providers themselves to store the data to be retained in the territory of a member state, under the jurisdiction of a member state, a fact which considerably increases the risk that such data may be accessible or disclosed in infringement of that legislation.

E 79 That “outsourcing” of data retention admittedly allows the retained data to be distanced from the public authorities of the member states and thus to be placed beyond their direct grip and any control, but by that very fact it simultaneously increases the risk of use which is incompatible with the requirements resulting from the right to privacy.

F 80 Directive 2006/24 therefore constitutes, as is clear from the foregoing reasoning, a particularly serious interference with the right to privacy and it is in the light of the requirements resulting from that fundamental right that its validity, and in particular its proportionality, must primarily be examined.

3. The significance of *Ireland v European Parliament* [2009] ECR I-593, in assessing the validity of Directive 2006/24

G 81 Having reached this stage of the preliminary reasoning, the effect of *Ireland v European Parliament* on the two requests for a preliminary ruling on the validity of Directive 2006/24 remains to be considered.

H 82 In that case, a direct action was brought before the court seeking annulment of Directive 2006/24 in which it was exclusively argued that the Directive was adopted on an incorrect legal basis. Accordingly, the court expressly stated, in para 57 of its judgment, that “the action brought by Ireland relate[d] solely to the choice of legal basis and not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy contained in Directive 2006/24”.

83 However, since the requests for a preliminary ruling in the two cases raise the issue of the proportionality of the provisions of Directive 2006/24,

within the meaning of article 5(4)EU (first question in Case C-293/12), on the one hand, and within the meaning of article 52(1) of the Charter (second question in Case C-293/12 and first question in Case C-594/12), on the other hand, it is possible to interpret the reservation thus expressed by the court in two ways, which may prove to be complementary.

84 The first possible interpretation, the interpretation which ultimately applies in any event, is that the court, bound by the very specific claims for annulment made by Ireland, was not called on to examine the compatibility of Directive 2006/24 with the fundamental rights guaranteed by the Charter, primarily the right to privacy guaranteed by article 7 of the Charter. The court itself sought to point this out in para 57 of its judgment: accordingly, it had no need to consider that question as to the Directive's compatibility in the light of the requirements contained in article 52(1) of the Charter, in particular those relating to quality of the law and proportionality.

85 The second meaning which it is possible to attribute to that reservation, which it is much more difficult to explore, would be to consider that, notwithstanding the validation of the legal basis of Directive 2006/24 by *Ireland v European Parliament*, the court did not examine the proportionality, within the meaning of article 5(4)EU, of that Directive, that is to say, examine it in relation to the interference with fundamental rights, as the High Court is requesting formally in its first question in Case C-293/12. This would, in essence, involve examining whether, taking into account its legal basis, the interference with the right to privacy constituted by Directive 2006/24 retains a reasonable relationship of proportionality, for the purposes of that provision, with the objectives which it pursues.

86 I shall begin by identifying the issues deriving from the principle of proportionality within the meaning of article 5(4)EU, which requires, as noted, an exploration of the possibilities opened up by that second possible interpretation of para 57 of the judgment in *Ireland v European Parliament*. I shall then, on the basis of the first—non-problematic—interpretation of that paragraph, examine what lies at the heart of the questions raised by the two national courts, relating to the conditions governing limits on the exercise of fundamental rights.

B—The proportionality, within the meaning of article 5(4)EU, of the adoption of Directive 2006/24 (first question in Case C-293/12)

87 By its first question in Case C-293/12, the High Court asks the court whether, in the light of article 5(4)EU, Directive 2006/24 is proportionate to the objectives which it pursues, be it the objective of ensuring that the data retained are available for the purpose of the detection and prosecution of serious crime or that of ensuring the proper functioning of the internal market or both of them.

88 An answer to that question is required only in so far as it can be accepted that in *Ireland v European Parliament* [2009] ECR I-593 the court ruled only on the validity of the choice of article 95EC as the legal basis for Directive 2006/24, while leaving untouched the question of the proportionality of that Directive itself in the light of the objectives which it may seek to achieve pursuant to that legal basis. The following reasoning must therefore be understood as being dependent on an interpretation of *Ireland v European Parliament* which might, the less, be open to debate.

A 89 In as much as the request for a preliminary ruling from the High Court raises both the issue of the proportionality of Directive 2006/24, the European Union measure itself, within the meaning of article 5(4)EU, and that of the proportionality of the limitations on the exercise of fundamental rights within the meaning of article 52(1) of the Charter, it must be borne in mind that the reviews carried out under those two provisions are different in nature. Proportionality within the meaning of article 5(4)EU is, in conjunction with the principle of subsidiarity, a general principle governing action of the European Union and setting a framework for the adoption of all measures by the institutions. It is more specifically intended to channel action by the European Union with due respect for member state competence. Proportionality within the meaning of article 52(1) of the Charter is a requirement for the legitimacy of any limitation on the exercise of fundamental rights. Although the reviews carried out under the two provisions may follow the same course, they are not conducted with the same stringency.

B
C
D 90 That having been made clear, it should be recalled that, in an area of shared competence, such as that of the internal market (see article 4(2)(a) FEU), it is for the European Union legislature to determine the measures which it considers necessary to achieve the intended objectives, while observing the principles of subsidiarity and proportionality enshrined in article 5EU: see *European Commission v Republic of Poland* (Case C-504/09P) EU:C:2012:178; 29 March 2012, para 79, and *European Commission v Republic of Estonia* (Case C-505/09P) EU:C:2012:179; 29 March 2012, para 81.

E 91 In the present instance, in accordance with article 5 of the Protocol on the application of the principles of subsidiarity and proportionality, the commission provided a statement of reasons for the adoption of Directive 2006/24 in the light of the principle of proportionality, as is clear from its proposal of 21 September 2005 on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58 (COM(2005) 438 final).

F 92 The question raised by the High Court is, however, not whether the commission, in this instance, fulfilled its obligations, but whether Directive 2006/24 itself complies with the requirements of article 5(4)EU.

G 93 According to the settled case law of the court, an act of the European Union may be regarded as proportionate only provided that the measures which it implements are appropriate for attaining the objectives pursued and do not go beyond what is necessary to achieve those objectives: see, inter alia, *R (ABNA Ltd) v Secretary of State for Health* (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04) [2005] ECR I-10423, para 68; *Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-4999; [2010] All ER (EC) 741, para 51; and *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063, para 74.

H 94 The question referred by the High Court raises in that regard a very particular difficulty. The issue which arises is, here, that of whether the proportionality, within the meaning of article 5(4)EU, of the measures adopted by Directive 2006/24 must be assessed in the light of the two objectives which it states that it pursues, that is to say, harmonising national rules in order to ensure the proper functioning of the internal market and

ensuring the availability of data for the purposes of the prevention of crime, or, on the contrary, in the light of the only objective directly related to the legal basis on which it was adopted. A

95 In that regard, it is necessary to draw a distinction between its predominant objective, namely the functioning of the internal market, and the ultimate ends which it pursues, which may be described in various ways but which are not in any event predominant. More specifically, it is necessary, in the first place, to examine the proportionality of Directive 2006/24—in so far as it imposes on providers of electronic communications services obligations to collect and retain data and make them available which create a new legal position—in relation to the needs for harmonisation of those obligations. B

96 In that regard, it must be remembered, first of all, that the intensity of the judicial review which the court carries out concerning the appropriateness of a measure adopted by the European Union legislature is directly linked to the discretion available to the latter: see, in particular, *Azienda Agricola Disarò Antonio v Cooperativa Milka 2000 Soc coop arl* (Case C-34/08) [2009] ECR I-4023, paras 76–83. The court has repeatedly held that, in areas in which its action involves choices of a political, economic or social nature and requiring complex assessments and evaluations, such as in the areas of the common agricultural policy (the *Azienda* case, para 76 and the case law cited) or the common commercial policy (see, in particular, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (Case C-150/94) [1998] ECR I-7235) the European Union legislature has broad discretion⁹ and the powers of review of the court are therefore limited. It is not for the court to determine whether the measure adopted was the only one or the best one possible, but to determine that it is based on objective factors (the *Vodafone* case, para 53) and is not manifestly inappropriate in relation to the objective pursued: see, inter alia, *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-189/01) [2001] ECR I-5689, paras 82 and 83; *R v Secretary of State for Health, Ex p British American Tobacco Investments Ltd* (Case C-491/01) [2002] ECR I-11453; [2003] All ER (EC) 604, para 123; *R (Alliance for Natural Health and Nutri-Link Ltd) v Secretary of State for Health* (Joined Cases C-154/04 and C-155/04) [2005] ECR I-6451, para 52; and *Agrana Zucker GmbH v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* (Case C-309/10) [2011] ECR I-7333, para 84. C D E F

97 It is, in that regard, not disputed that Directive 2006/24 constitutes an appropriate means of achieving the first, formal, objective which it pursues, namely ensuring the proper functioning of the internal market. It is undoubtedly finely adjusted to preclude present and future legal and technical differences (recital (6) in the Preamble to Directive 2006/24) between national rules that impose obligations on providers of electronic communications services to retain data. G

98 It may also be accepted, having regard to the discretion of the institutions, that the harmonisation achieved by Directive 2006/24 was actually necessary for the purpose of reducing legal and technical differences between the requirements imposed on providers of electronic communications services concerning the types of data to be retained and the periods and conditions of retention: see recital (6) in the Preamble to H

A Directive 2006/24; see also the Evaluation Report on the Data Retention Directive (Directive 2006/24/EC) of 18 April 2011, delivered by the commission to the European Parliament and to the Council (COM(2011) 225 final), point 3.2.

99 Finally, it remains to be examined whether Directive 2006/24 may be regarded as proportionate in the strict sense.

B 100 Having reached this final stage of the examination of the proportionality of Directive 2006/24 within the meaning of article 5(4)EU, it must be stated that the intensity of the intervention in the area of regulation of fundamental rights, constituted by the interference with the right to privacy which, through the implementation of Directive 2006/24, is imposed on the member states, is manifestly disproportionate to the objective relating to the need to ensure the functioning of the internal market which the Directive predominantly pursues (*Ireland v European Parliament* [2009] ECR I-593, para 85) and which justified its adoption on the basis of article 95EC. The impact which Directive 2006/24, by virtue of its “creating” effect, has on the member states’ powers to regulate and guarantee the content of fundamental rights cannot, in that regard, be underestimated.

D 101 Directive 2006/24, as I have shown above, imposed an obligation to collect and retain data on providers of electronic communications services which, derogating from the principles laid down by Directive 95/46 and Directive 2002/58, constitutes a serious interference with the right to privacy, in particular, while leaving to the member states the task of actually guaranteeing respect for fundamental rights.

E 102 The serious interference with the right to privacy which, as a consequence of the “creating” effect of Directive 2006/24, the member states are meant to incorporate into their own legal systems thus appears to be disproportionate to the need solely to ensure the functioning of the internal market, even if that collection and retention must also be considered an appropriate and even necessary means of achieving the ultimate objective pursued by the Directive of ensuring that the data are available for the purpose of the investigation and prosecution of serious crime. In summary, Directive 2006/24 would fail the proportionality test for the very reasons which justified its legal basis. The reasons for its legitimacy in terms of its legal basis would, paradoxically, be the reasons for its illegitimacy in terms of proportionality.

F 103 Nevertheless, the issue is not so simple, since it is necessary to take into account that a “predominant” objective is not the same as an “exclusive” objective, even if that predominant objective played a decisive role in identifying the correct legal basis. It is necessary, from that point of view, to acknowledge that, in the context of examining the proportionality of Directive 2006/24 within the meaning of article 5(4)EU, there is actually room for taking into account the ultimate objective of preventing serious crime pursued by it. From this viewpoint, it might readily be accepted that Directive 2006/24, as an act of the European Union and taking care to leave aside the examination of proportionality within the meaning of article 52(1) of the Charter, could, applying the test of proportionality in the precise sense of article 5(4)EU, be found to be appropriate, necessary and even proportionate in the strict sense.

104 The issue which ultimately arises is whether the problems of proportionality in the strict sense which an act of the European Union occasions in relation to the predominant objective which it pursues can be remedied by taking into consideration a “background” objective. That issue is all the more difficult to resolve since it arises in a context in which the legal basis of the measure in question has been validated specifically by reference to its predominant objective.

105 However, since Directive 2006/24 must still, as a measure limiting the exercise of fundamental rights, be subject to an examination of proportionality under article 52(1) of the Charter, I take the view that it is not necessary definitively to settle that matter in the present cases.

C—The requirements under article 52(1) of the Charter (second question in Case C-293/12 and first question in Case C-594/12)

106 As I have already pointed out above, Directive 2006/24, which harmonises the rules adopted by the member states in the context of an option provided for in article 15(1) of Directive 2002/58, establishes a regime that partially derogates from the principles which are laid down by Directive 2002/58 and Directive 95/46 and guarantee the right to the protection of personal data and, more broadly, the right to privacy.

107 More generally, the interference with the right to privacy constituted by Directive 2006/24 is permissible only to the extent that it complies with the conditions laid down by article 52(1) of the Charter, that is to say, if it is “provided for by law” and, more specifically, it meets the quality of law requirements, it respects the essence of the right to privacy and it is proportionate, that is to say, is necessary and genuinely meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

1. The quality of the law

108 It is, in this instance, hardly worth pointing out that, since the collection and retention of data for the purpose of making them available are provided for by Directive 2006/24, the interference with the right to privacy which the Directive constitutes must be regarded as being formally provided for by law, within the meaning of article 52(1) of the Charter.

109 That said, the court’s concept of the requirement of being “provided for by law” must, having regard to article 52(3) of the Charter, be close to that adopted by the Court of Human Rights, that is to say, it must go beyond a purely formal requirement and cover also the lack of precision of the law (“quality of the law”), to express it in the simplest terms possible: see, in that regard, points 88–100 of my opinion in the *Scarlet Extended* case [2011] ECR I-11959.

110 It is true that such an examination could equally be placed in the context of a detailed analysis of the proportionality of the limitation. However, in order to remain faithful to the approach of the case law of the Court of Human Rights, should other reasons not suffice, I consider that the first option must be preferred.

111 When applying a more than formal interpretation of the requirement that any limitation must be provided for by law, the question which arises is whether the limitations on the exercise of fundamental rights

A which Directive 2006/24 contains are accompanied by the necessary degree of detail that is required to be displayed by the guarantees with which such limitations must be coupled.

112 Article 4 of Directive 2006/24 provides that it is for the member states to adopt measures to ensure that data retained are provided only to the competent national authorities in specific cases and in accordance with national law. The second sentence states:

B

“The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each member state in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the Human Rights Convention as interpreted by the European Court of Human Rights.”

C

113 The difficulty which Directive 2006/24 raises, I would again like to repeat, is that it is a Directive which seeks only to impose an obligation on the providers of electronic communications services to collect and retain traffic and location data for electronic communications, not to lay down the safeguards which must govern access to the retained data and their use. As stated above, Directive 2006/24 leaves this matter, in a general way, to the member states.

D

114 Thus presented, the issue which arises is nothing other than whether the requirement that any limitation on fundamental rights must be “provided for by law” may be fulfilled by such a general referral, even if accompanied by express mention of the rights guaranteed by Directive 95/46 and Directive 2002/58.

E

115 It is necessary in that regard, first of all, to explain that a situation in which the European Union restricts itself to adopting legislation harmonising provisions invariably adopted by the majority of the member states is not comparable to a situation in which the European Union decides, additionally, to make such legislation applicable generally.

F

116 In the first case, the European Union can proceed as it did with Directive 2002/58, that is to say, essentially leave to the national legislatures the task of ensuring that the legislation adopted on their own initiative and entailing a limitation on fundamental rights contains all the guarantees necessary to ensure that the limitations and their application (“access”) comply with all the quality of law requirements and the principle of proportionality.

G

117 In the second case, on the other hand, where the limitation on fundamental rights stems from the legislation of the European Union itself and is therefore attributable to it, the European Union legislature’s share of the responsibility is quite different. In the case of Directives, it is clear that it will be for the member states to set out in detail the guarantees necessary to regulate the limitation on fundamental rights in an instance such as the present one. However, the European Union legislature must also play a leading role in defining those guarantees. It is from that perspective that it is necessary to examine compliance with the quality of the law requirement.

H

118 In other words, the transition from an optional regime, such as that capable of being established on the basis of article 15 of Directive 2002/58, to a regime prescribing a deadline, such as that laid down by Directive 2006/24, should have been accompanied by a simultaneous development as

regards guarantees and therefore have led the European Union legislature to regulate in outline the very broad authority conferred on the member states with regard to access to the data and their use, by the adoption of specifications in the form of principles. A

119 It should be pointed out first of all in that regard that both Directive 95/46 and Directive 2002/58 state that the measures limiting guaranteed rights which the member states are allowed to adopt must be legislative in nature: see recital (54) in the Preamble to Directive 95/46 and article 13(1)(2), as well as article 15(1) of Directive 2002/58. However, Directive 2006/24 refers only marginally to that formal requirement¹⁰, thereby weakening the level of the guarantees laid down by the Directives from which it derogates. (It must be recalled here that, as the court has pointed out, it is apparent in particular from recital (10) in the Preamble to, and from article 1 of Directive 95/46, that the latter seeks also not to weaken the protection guaranteed by the existing national rules, but on the contrary to ensure, in the European Union, a high level of protection of fundamental rights and freedoms with respect to the processing of personal data: *European Commission v Federal Republic of Germany* (Case C-518/07) [2010] ECR I-1885, para 22. B C

120 The European Union legislature cannot, when adopting an act imposing obligations which constitute serious interference with the fundamental rights of citizens of the Union, entirely leave to the member states the task of defining the guarantees capable of justifying that interference. It cannot content itself either with assigning the task of defining and establishing those guarantees to the competent legislative and/or administrative authorities of the member states called upon, where appropriate, to adopt national measures implementing such an act or with relying entirely on the judicial authorities responsible for reviewing its practical application. It must, if it is not to render the provisions of article 51(1) of the Charter meaningless, fully assume its share of responsibility by defining at the very least the principles which must govern the definition, establishment, application and review of observance of those guarantees. D E

121 It has been stated and repeated that Directive 2006/24, as indicated in article 4 thereof, regulates neither *access* to the data collected and retained nor their use, and indeed it could not in the light of the division of areas of competence between the member states and the European Union: see point 122 et seq of the opinion of Advocate General Bot in *Ireland v European Parliament* [2009] ECR I-593; see also the first indent of article 3(2) of Directive 95/46, and Framework Decision 2008/977. However, the issue which now arises is precisely that of whether the European Union *may* lay down a measure such as the obligation to collect and retain, over the long term, the data at issue without at the same time regulating it with guarantees on the conditions to which access and use of those data are to be subject, at least in the form of principles. It is this very regulation of the conditions for access and use of the collected and stored data which makes it possible to assess the scope of what that interference entails in practical terms and which may, therefore, determine whether or not the interference is constitutionally acceptable. F G H

122 There is, in fact, an intimate relationship between the specific configuration of the obligation to collect and retain data and the

A circumstances in which those data are, where appropriate, made available to the competent national authorities and used by them. It must even be considered that, without knowing how that access and use may take place, it is not really possible to reach an informed judgment on the interference resulting from the collection and retention at issue.

B 123 While taking into consideration the fact that the legal basis of Directive 2006/24 was that of ensuring the proper functioning of the internal market and that all the detailed rules for access to the data and their use could not be included in its provisions, the “creating” effect of the obligation that data be collected and retained which it contains meant that it should have been accompanied by a series of guarantees in the form of principles, as a necessary and essential addition. To that end, the general referral to the member states is insufficient and cannot be remedied by the system of protection laid down by Directive 95/46 (see the first indent of article 3(2) of Directive 95/46) or by Framework Decision 2008/977 (article 1(2) of Framework Decision 2008/977 and recitals (7) and (9) in the Preamble) since they are not applicable.

C 124 Even accepting the division suggested by Advocate General Bot in his opinion in *Ireland v European Parliament*, and while sharing his view that it was, at that time at least, difficult to incorporate guarantees regarding access to the data retained, there was nothing to prevent the European Union legislature, in defining the obligation to collect and retain data, from accompanying that obligation with a series of guarantees at least in the form of principles, to be developed by the member states, that were intended to regulate use of the data and, thereby, to define the exact extent and complete profile of the interference which that obligation entails.

D 125 Accordingly, and without intending the following list to be exhaustive, it was for the European Union legislature to define the fundamental principles which were to govern the determination of the minimum guarantees for access to the data collected and retained and their use, including those which follow.

E 126 The European Union legislature, in light of the intensity of the interference, should have provided a more precise description than “serious crime” (recital (21) in the Preamble to and article 1(1) of Directive 2006/24) as an indication of the criminal activities which are capable of justifying access of the competent national authorities to the data collected and retained.

F 127 It should have guided the member states’ regulation of authorisation to access the data collected and retained, by limiting access, if not solely to judicial authorities, at least to independent authorities, or, failing that, by making any request for access subject to review by the judicial authorities or independent authorities and it should have required a case-by-case examination of requests for access in order to limit the data provided to what is strictly necessary.

G 128 Similarly, it could have been expected to lay down the principle that member states may provide for exceptions preventing access to retained data in certain exceptional circumstances or may prescribe more stringent requirements for access in situations in which access may infringe fundamental rights guaranteed by the Charter, as in the context of the right to medical confidentiality.

129 The European Union legislature should have established the principle that the authorities authorised to access the data are required, first, to erase them once their usefulness has been exhausted and, second, to notify the persons concerned of that access, at least retrospectively, after the elimination of any risk that such notification might undermine the effectiveness of the measures justifying the use of those data. A

130 The need for the various guarantees in the non-exhaustive list above is confirmed by the fact that the European Union legislature itself, after the adoption of Directive 2006/24, adopted Framework Decision 2008/977, which guarantees the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, and provided for guarantees of that very kind, albeit in the context of data transmitted between member states. Framework Decision 2008/977 in fact excludes from its scope those data which are not exchanged between member states, as is clear in particular from recital (9) in its Preamble; see also article 1(2) of Framework Decision 2008/977 and recital (7) in the Preamble thereto. B
C

131 In conclusion, Directive 2006/24 is as a whole incompatible with article 52(1) of the Charter, since the limitations on the exercise of fundamental rights which that Directive contains because of the obligation to retain data which it imposes are not accompanied by the necessary principles for governing the guarantees needed to regulate access to the data and their use. D

132 It is also to be noted in that regard that the fact that member states have frequently, on their own initiative and on the basis of requirements specific to their own legal systems, established the guarantees which Directive 2006/24 does not itself endeavour to outline¹¹ is admittedly a factor to be taken into account, as will be shown below, but this clearly cannot absolve the European Union legislature. E

2. Proportionality within the meaning of article 52(1) of the Charter

133 Article 52(1) of the Charter requires not only that any limitation on the exercise of fundamental rights be “provided for by law”, but also that it be strictly subject to the principle of proportionality. That requirement of proportionality, as already pointed out, acquires, in the context of the Charter, a particular force, which it does not have under article 5(4)EU. Indeed, what is postulated here is not proportionality as a general principle of action by the European Union but, much more specifically, proportionality as a condition for any limitation on fundamental rights. F

134 In this context, the pursuit by the institutions of the European Union of the stated objective of Directive 2006/24, that is to say, to ensure that the data retained are available for the purpose of the prosecution of serious crime, is permissible only if it is compatible with, inter alia, the right to privacy: see the *Volker* case [2010] ECR I-11063, para 76. G

135 However, it must be noted here that, having regard to the requirements examined above, dictating that the “law” regulate with sufficient guarantees, at least in the form of principles, access to the data collected and retained by providers of electronic communications services and their use, the proportionality of the actual retention of data imposed by Directive 2006/24 no longer requires, with one exception, a particularly detailed examination beyond that which follows. H

A 136 Directive 2006/24 pursues a perfectly legitimate objective, that is to say, that of ensuring that the data collected and retained are available for the purpose of the investigation, detection and prosecution of serious crime, and may be regarded, given the limited powers of review that the court may exercise in that regard, as appropriate and even, subject to the guarantees with which it should be coupled, as necessary for achieving that ultimate objective. Recital (9) in the Preamble to Directive 2006/24 states in that regard that the Directive constitutes “a necessary and effective investigative tool for law enforcement in several member states, and in particular concerning serious matters such as organised crime and terrorism”: see the Evaluation Report on Directive 2006/24. It is those guarantees which, in particular, may justify the, certainly very long, list of categories of data to be retained, laid down in article 5 of Directive 2006/24.

B
C 137 It is true that the fact that it may be possible to escape the application of Directive 2006/24 by using certain methods of communication is undoubtedly such as to limit considerably the actual effectiveness of the system of collection of traffic and location data which it imposes, in particular in relation to organised crime and terrorism. Nevertheless, that fact does not make it possible to regard the collection and retention of data as per se totally inappropriate for achieving the objectives pursued. Nor can it enable the court to conclude that the collection and retention of data relating to everyday electronic communications are manifestly and entirely devoid of any purpose.

D
E 138 It is important, however, from the perspective of the necessity of the measure, to emphasise here the significance of the provisions of article 14 of Directive 2006/24, which imposes on the commission the obligation to prepare a report on the Directive’s implementation, based in particular on the statistics to be compiled by the member states under article 10 thereof, and to propose on that basis any necessary amendments, in particular with regard to the list of categories of data to be collected and retained and the period of retention.

F 139 To that effect, and since Directive 2006/24 contains no provision which provides for the lapsing of the Directive (“sunset clause”), it is the duty of the legislature of the European Union to conduct a periodic reassessment of the circumstances that justify the serious limitation on the exercise of the right to privacy contained in the Directive, thereby enabling it to examine whether those circumstances continue to be present and consequently to adapt or even repeal that limitation.

G 140 That having been made clear, the exception which I have just referred to concerns the proportionality of article 6 of Directive 2006/24, which determines the period of retention of the data collected.

H 141 Article 6 of Directive 2006/24 lays down one of the basic elements of data retention as harmonised or, as the case may be, established by that Directive, that is to say, its temporal scope. All data retained must in principle be destroyed in due course and it cannot be otherwise. However, in contrast to the principle laid down by Directive 2002/58, article 6(1) of which provides for the traffic data processed and stored to be erased or made anonymous as soon as they are no longer needed for the purpose of the transmission of a communication (see more generally recitals (22), (23), (26), (27) and (28) in the Preamble), the obligation to ensure the destruction of those data applies not almost immediately, but only after a certain period

of time. The member states are required to ensure that the data collected are retained for a period which may under no circumstances be less than six months and which, subject to the derogation provided for in article 12 of Directive 2006/24, cannot be more than two years, the national legislatures being responsible for actually determining that period.

142 Through that provision, the data retention under examination acquires a dimension of temporal continuity which plays a decisive role in the classification of the interference with the right to privacy contained in Directive 2006/24 as serious, in particular in contrast to the interference that would result from subsequent retention (“data preservation”), which is known as “quick freeze”. The idea that the data in question must remain accumulated for a period of time is one of the key aspects of a measure intended to make the public authorities better able to respond to certain forms of serious crime. The question is, however, whether the provisions of article 6 of Directive 2006/24, laying down a minimum period of six months and a maximum period of two years, adequately comply with the requirements of the principle of proportionality.

143 In that connection, once it may be regarded as established that the measure is in itself legitimate and appropriate, it remains to be ascertained whether it is necessary and, specifically, whether a measure less disruptive to the enjoyment of the fundamental rights at issue would allow the objective pursued to be attained. From that point of view, I would clarify that it is not sufficient merely to take the view that the member states bear sole responsibility for any determination of a retention period of two years. From the moment when Directive 2006/24, in its function as a harmonising measure, establishes the upper limit for data retention at two years, that provision must itself be subject to a review of its proportionality. It is, in that regard, hardly necessary to point out that the question is not whether, from the point of view of the prevention of serious criminal activities, a longer retention and availability period is preferable to a shorter period, but whether, in the context of an examination of its proportionality, there is a specific need for it.

144 It should, in that regard, be pointed out in the first place that an accumulation of data at indeterminate locations in cyberspace such as the accumulation at issue, which always concerns actual and particular persons, tends, whatever its duration, to be perceived as an anomaly. In principle, such a state of “retention” of data relating to the private lives of individuals, even if it remains just that, should never exist and, where it does, should exist only having regard to other requirements of society. Such a situation can only be exceptional and therefore cannot extend in time beyond the period necessary.

145 The period of retention which may be considered permissible in light of the principle of proportionality cannot be determined without according some discretion to the legislature. Nevertheless, this does mean that all review of proportionality, albeit difficult, is to be precluded in that respect.

146 In that regard, I think that it may be helpful to point out that a human being lives out his existence over a period which is by definition limited where the past, his own history and in the final analysis his memory, and the present, the more or less immediate lived experience, the awareness of what he is in the process of living through, converge. Although it is

A difficult to define, a line, which is certainly different for each person, separates the past from the present. What appears unquestionable is the possibility of distinguishing between the perception of present time and the perception of the past. In each of those perceptions, an individual's awareness of his own life, his "private life" particularly, as a "recorded" life may play a part. Further, there is a difference according to whether that "recorded life" is the one which is perceived as his present or the one which is experienced as his own history.

B 147 I am of the view that those considerations can be applied to the analysis of the proportionality of article 6 of Directive 2006/24. If the principle of retaining all that personal documentation for a certain period of time is considered lawful, it remains to ask whether it is inevitable, that is to say, necessary, for it to be imposed on individuals over a period which covers not only "the present time" but also "historical time".

C 148 In that regard, and with full awareness of the subjectivity which this entails, it may be considered that a retention period for personal data "which is measured in months" is to be clearly distinguished from a period "which is measured in years". The first period would correspond to that falling within what is perceived as present life and the second to that falling within life perceived as memory. The interference with the right to privacy is, from that perspective, different in each case and the necessity of both types of interference must be capable of being justified.

D 149 Although the necessity of the interference in the dimension of present time seems to be sufficiently justified, I have found no justification for an interference extending to historical time. Expressed more directly, and without denying that there are criminal activities which are prepared well in advance, I have not found, in the various views defending the proportionality of article 6 of Directive 2006/24, any sufficient justification for not limiting the data retention period to be established by the member states to less than one year. In other words, and with all the caution that this aspect of the review of proportionality always requires, no argument was able to convince me of the need to extend data retention beyond one year.

E 150 Finally, it must also be pointed out that Directive 2006/24 itself provides an additional argument in the form of the system it contains for extending the maximum period of data retention. Article 12 of that Directive allows member states facing particular circumstances, which in this instance are not defined, to extend the maximum retention period established under article 6 thereof. However, such an extension is possible only for a limited period, the grounds for introducing it must be stated and it must be notified to the commission, which has a period of six months to reach a decision on the planned measures, that is to say, to determine whether they are a means of arbitrary discrimination or a disguised restriction of trade between member states and whether they constitute an obstacle to the functioning of the internal market.

F 151 Even though the commission may, in accordance with article 12(2) of Directive 2006/24, reject those measures only on limited grounds, the existence of that system of extension supports my view that the determination, by article 6 of that Directive, of a maximum data retention period of up to two years in the absence of exceptional circumstances is not necessary and that it must be regarded as incompatible with the requirements under articles 7 and 52(1) of the Charter.

152 It follows that article 6 of Directive 2006/24 is incompatible with articles 7 and 52(1) of the Charter in so far as it requires member states to ensure that the data specified in article 5 of that Directive are retained for a period of up to two years.

D—The third question in Case C-293/12

153 In view of the answers given to the two first sets of questions from the national courts, concerning the validity of Directive 2006/24, it does not seem necessary to provide an answer to the third question referred by the High Court in Case C-293/12, concerning the requirements to examine and assess national measures implementing a Directive in the light of the protections afforded by the Charter to which the national courts are subject. Nevertheless, and so far as is relevant, it seems to me that, as was stated by all the parties which submitted observations in this regard, that question clearly requires, having regard to the provisions and in the context of article 51(1) of the Charter, an answer in the affirmative: see, inter alia, *Land Baden-Württemberg v Tsakouridis* (Case C-145/09) [2010] ECR I-11979; [2013] All ER (EC) 183, paras 50–52; *Banif Plus Bank Zrt v Csaba Csipai* (Case C-472/11) [2013] 2 CMLR 1183, para 29; and *Åklagaren v Åckerberg Fransson* (Case C-617/10) [2013] STC 1905, paras 21 and 25–30.

VI—The temporal effects of the finding of invalidity

154 Having regard to the conclusions to which I am led by the foregoing reasoning, it remains for me to examine the temporal consequences of the declaration of invalidity of Directive 2006/24.

155 It must be recalled that, when the court rules, in proceedings under article 267FEU, that a measure adopted by the European Union institutions is invalid, its decision has the legal effect of requiring them to take the necessary measures to remedy that illegality, as the obligation laid down in article 266FEU in the case of a judgment annulling a measure applies in such a situation by analogy: see, inter alia, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council of the European Union* (Joined Cases C-120/06P and C-121/06P) [2008] ECR I-6513, para 123.

156 However, where it is justified by overriding considerations of legal certainty, the second para of article 264FEU, which is applicable by analogy to a reference under article 267FEU for a preliminary ruling on the validity of a measure of the European Union, confers on the court a discretion to decide, in each particular case, which specific effects of the relevant measure must be regarded as definitive: see, inter alia, *Silos e Mangimi Martini SpA v Ministero delle Finanze* (Case C-228/99) [2001] ECR I-8401, para 35, and *Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne* (Case C-333/07) [2008] ECR I-10807, para 121.

157 In cases in which the finding that an act of the European Union is invalid is based on an infringement of fundamental rights, the various interests involved must be very carefully weighed up. In the present instance, the relevance and even urgency of the ultimate objectives of the limitation on fundamental rights at issue are, on the one hand, not in doubt. The findings of invalidity, on the other hand, are of a very particular nature. First, Directive 2006/24 is invalid as a result of the absence of sufficient regulation of the guarantees governing access to the data collected and retained and

A their use (quality of the law), an absence which nevertheless may have been corrected in the implementing measures adopted by the member states. Secondly, the member states have, in general, as is apparent from the information provided to the court, exercised their powers with moderation with respect to the maximum period of data retention.

B 158 It is appropriate, in those circumstances, to suspend the effects of the finding that Directive 2006/24 is invalid pending adoption by the European Union legislature of the measures necessary to remedy the invalidity found to exist, but such measures must be adopted within a reasonable period.

VII—Conclusion

C 159 In light of the foregoing considerations, I propose that the court should answer the questions referred by the High Court in Case C-293/12 and the Verfassungsgerichtshof in Case C-594/12 as follows:

D (1) Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is as a whole incompatible with article 52(1) of the Charter of Fundamental Rights of the European Union, since the limitations on the exercise of fundamental rights which that Directive contains because of the obligation to retain data which it imposes are not accompanied by the necessary principles for governing the guarantees needed to regulate access to the data and their use.

E (2) Article 6 of Directive 2006/24 is incompatible with articles 7 and 52(1) of the Charter of Fundamental Rights of the European Union in that it requires member states to ensure that the data specified in article 5 of that Directive are retained for a period whose upper limit is set at two years.

Notes

F 1. With regard to the litigation generated by the transposition of that Directive, see *European Commission v Federal Republic of Germany* (Case C-518/07) [2010] ECR I-1885 and *European Commission v Republic of Austria* (Case C-614/10) [2013] All ER (EC) 237; see also, more generally, *Rechnungshof v Österreichischer Rundfunk* (Joined Cases C-465/00, C-138/01 and C-139/01) [2003] ECR I-4989; *Criminal Proceedings against Lindqvist* (Case C-101/01) [2004] QB 1014; [2003] ECR I-12971; *Huber v Germany* (Case C-524/06) [2008] ECR I-9705; [2009] All ER (EC) 239; *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi Oy* (Case C-73/07) [2008] ECR I-9831; [2010] All ER (EC) 213; *College van burgemeester en wethouders van Rotterdam v Rijkeboer* (Case C-553/07) [2009] ECR I-3889; *Volker und Markus Schecke GbR v Land Hessen* (Joined Cases C-92/09 and C-93/09) [2010] ECR I-11063; *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Case C-70/10) [2011] ECR I-11959; *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v Administración del Estado* (Joined Cases C-468/10 and C-469/10) [2011] ECR I-12181; and *Worten-Equipamentos para o Lar SA v Autoridade para as Condições de Trabalho (ACT)* (Case C-342/12) EU:C:2013:355; [2013] ICR D29.

H 2. With regard to the litigation generated by the transposition of that Directive, see the judgments in *Commission of the European Communities v Luxembourg* (Case C-375/04) EU:C:2005:264; (unreported) 28 April 2005, *Commission of the European Communities v Kingdom of Belgium* (Case C-376/04) EU:C:2005:265; (unreported) 28 April 2005 and *Commission of the European Communities v*

Hellenic Republic (Case C-475/04) (unreported) 1 June 2006; see also, more generally, *Productores de Música de España (Promusicae) v Telefónica de España SAU* (Case C-275/06) [2008] ECR I-271; the order in *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* (Case C-557/07) [2009] ECR I-1227; *Deutsche Telekom AG v Bundesrepublik Deutschland* (Case C-543/09) [2011] ECR I-3441; the *Scarlet* case; *Bonnier Audio AB v Perfect Communication Sweden AB* (Case C-461/10) [2012] 2 CMLR 1175 and *Probst v mr nexnet GmbH* (Case C-119/12) [2013] CEC 913.

3. In accordance with the “chilling effect” doctrine: see *Wieman v Updegraff* (1952) 344 US 183 and *Altuğ Taner Akçam v Turkey* (Application No 27520/07) (unreported) given 25 October 2011.

4. This connection is also expressly established in the explanations on the Charter; see Explanation on article 8—Protection of personal data, which states that article 8 of the Charter is, inter alia, based on article 8 of the Human Rights Convention, guaranteeing the right to privacy.

5. That link means in particular that the case law of the European Court of Human Rights on the interpretation of article 8 of the Human Rights Convention (“right to respect for private and family life”) that relates to the protection of personal data retains, in accordance with article 52(3) of the Charter, all its relevance for the purpose of interpretation of article 8 of the Charter.

6. The European Court of Human Rights has repeatedly held that it is “not possible or necessary to attempt an exhaustive definition of the notion of ‘private life’”: see, inter alia, *Niemietz v Germany* (1992) 16 EHRR 97. It is, in any event, a “broad” concept: see *Pretty v United Kingdom* (2002) 35 EHRR 1.

7. Concerning the interference resulting merely from the retention of information, which was, moreover, collected prior to the entry into force of the Human Rights Convention, see *Rotaru v Romania* (2000) 8 BHRC 449.

8. Recital (13) in the Preamble to Directive 2006/24 states that the retention obligation is concerned only with “data which are accessible”, which means that, for data relating to Internet e-mail and Internet telephony, it may apply “only in respect of data from the providers’ or the network providers’ own services”.

9. See, inter alia *Sison v Council of the European Union* (Case C-266/05P) [2007] ECR I-1233, paras 32–34; *Société Arcelor Atlantique et Lorraine v Premier ministre, Ministre de l’Écologie et du Développement durable* (Case C-127/07) [2008] ECR I-9895, para 57; and *Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-4999, para 52.

10. The sole reference made by Directive 2006/24 to that requirement is contained in recital (17), which states that it is essential that member states adopt *legislative measures* to ensure that data retained are provided to the competent national authorities only in accordance with national legislation in full respect of the fundamental rights of the persons concerned. However, this point is not contained in the corresponding provisions of article 4 of Directive 2006/24.

11. It must, in that regard, be pointed out that the transposition of Directive 2006/24 in the various member states has not been without difficulties and continues to cause difficulties of various kinds.

8 April 2014. **THE COURT (Grand Chamber)** delivered the following judgment.

1 These requests for a preliminary ruling concern the validity of Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105, p 54).

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

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

Legal context

Parliament and Council Directive 95/46/EC

D 4 The object of Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281, p 31), according to article 1(1) thereof, is to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with regard to the processing of personal data.

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

E “Member states shall provide that the controller must implement appropriate technical and organi[s]ational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.”

Parliament and Council Directive 2002/58/EC

G 6 The aim of Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Parliament and Council Directive 2009/136/EC of 25 November 2009 (OJ 2009 L337, p 11), according to article 1(1) thereof, is to harmonise the provisions of the member states required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and to confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the European Union. According to article 1(2), the provisions of that Directive particularise and complement Directive 95/46 for the purposes mentioned in article 1(1).

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

“1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented. B

“1a. Without prejudice to Directive 95/46/EC, the measures referred to in para 1 shall at least:—ensure that personal data can be accessed only by authorised personnel for legally authorised purposes,—protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure, and,—ensure the implementation of a security policy with respect to the processing of personal data, C

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

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

8 As regards the confidentiality of the communications and of the traffic data, article 5(1)(3) of that Directive provides:

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

“3. Member states shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the G

H

A provider of an information society service explicitly requested by the subscriber or user to provide the service.”

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

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

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

C “Member states may adopt legislative measures to restrict the scope of the rights and obligations provided for in article 5, article 6, article 8(1), (2), (3) and (4), and article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (ie state security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in article 13(1) of Directive 95/46/EC. To this end, member states may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in article 6(1) and (2) of the Treaty on European Union.”

Parliament and Council Directive 2006/24

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

G 12 Recital (4) in the Preamble to Directive 2006/24 states:

H “Article 15(1) of Directive 2002/58/EC sets out the conditions under which member states may restrict the scope of the rights and obligations provided for in article 5, article 6, article 8(1), (2), (3) and (4), and article 9 of that Directive. Any such restrictions must be necessary, appropriate and proportionate within a democratic society for specific public order purposes, ie to safeguard national security (ie state security), defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications systems.”

13 According to the first sentence of recital (5) in the Preamble to Directive 2006/24, “several member states have adopted legislation providing for the retention of data by service providers for the prevention, investigation, detection, and prosecution of criminal offences”.

14 Recitals (7) to (11) in the Preamble to Directive 2006/24 read:

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

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

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

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

“(11) Given the importance of traffic and location data for the investigation, detection, and prosecution of criminal offences, as demonstrated by research and the practical experience of several member states, there is a need to ensure at European level that data that are generated or processed, in the course of the supply of communications services, by providers of publicly available electronic communications services or of a public communications network are retained for a certain period, subject to the conditions provided for in this Directive.”

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

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

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

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

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

“Article 1

“Subject matter and scope

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

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

“Article 2

“Definitions

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

H “2. For the purpose of this Directive: (a) ‘data’ means traffic data and location data and the related data necessary to identify the subscriber or user; (b) ‘user’ means any legal entity or natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to that service;

(c) ‘telephone service’ means calls (including voice, voicemail and conference and data calls), supplementary services (including call forwarding and call transfer) and messaging and multi-media services (including short message services, enhanced media services and multi-media services); (d) ‘user ID’ means a unique identifier allocated to persons when they subscribe to or register with an Internet access service or Internet communications service; (e) ‘cell ID’ means the identity of the cell from which a mobile telephony call originated or in which it terminated; (f) ‘unsuccessful call attempt’ means a communication where a telephone call has been successfully connected but not answered or there has been a network management intervention.

A

B

“Article 3

“Obligation to retain data

C

“1. By way of derogation from articles 5, 6 and 9 of Directive 2002/58/EC, member states shall adopt measures to ensure that the data specified in article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.

D

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

E

“Article 4

“Access to data

F

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

G

“Article 5

“Categories of data to be retained

H

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

“(a) data necessary to trace and identify the source of a communication: (1) concerning fixed network telephony and mobile

A telephony: (i) the calling telephone number; (ii) the name and address of the subscriber or registered user; (2) concerning Internet access, Internet e-mail and Internet telephony: (i) the user ID(s) allocated; (ii) the user ID and telephone number allocated to any communication entering the public telephone network; (iii) the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;

B “(b) data necessary to identify the destination of a communication: (1) concerning fixed network telephony and mobile telephony: (i) the number(s) dialled (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed; (ii) the name(s) and address(es) of the subscriber(s) or registered user(s); (2) concerning Internet e-mail and Internet telephony: (i) the user ID or telephone number of the intended recipient(s) of an Internet telephony call; (ii) the name(s) and address(es) of the subscriber(s) or registered user(s) and user ID of the intended recipient of the communication;

C “(c) data necessary to identify the date, time and duration of a communication: (1) concerning fixed network telephony and mobile telephony, the date and time of the start and end of the communication; (2) concerning Internet access, Internet e-mail and Internet telephony: (i) the date and time of the log-in and log-off of the Internet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user; (ii) the date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service, based on a certain time zone;

D “(d) data necessary to identify the type of communication: (1) concerning fixed network telephony and mobile telephony: the telephone service used; (2) concerning Internet e-mail and Internet telephony: the Internet service used;

E “(e) data necessary to identify users’ communication equipment or what purports to be their equipment: (1) concerning fixed network telephony, the calling and called telephone numbers; (2) concerning mobile telephony: (i) the calling and called telephone numbers; (ii) the International Mobile Subscriber Identity (IMSI) of the calling party; (iii) the International Mobile Equipment Identity (IMEI) of the calling party; (iv) the IMSI of the called party; (v) the IMEI of the called party;

F (vi) in the case of pre-paid anonymous services, the date and time of the initial activation of the service and the location label (Cell ID) from which the service was activated; (3) concerning Internet access, Internet e-mail and Internet telephony: (i) the calling telephone number for dial-up access; (ii) the digital subscriber line (DSL) or other end point of the originator of the communication; (f) data necessary to identify the location of mobile communication equipment: (1) the location label (Cell ID) at the start of the communication; (2) data identifying the geographic location of cells by reference to their location labels (Cell ID) during the period for which communications data are retained.

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

“Article 6

A

“Periods of retention

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

“Article 7

B

“Data protection and data security

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

C

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

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

D

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

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

E

*“Article 8**“Storage requirements for retained data*

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

F

*“Article 9**“Supervisory authority*

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

G

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

*“Article 11**“Amendment of Directive 2002/58/EC*

H

“The following paragraph shall be inserted in article 15 of Directive 2002/58/EC: ‘1a. Paragraph 1 shall not apply to data specifically required by [Directive 2006/24/EC] to be retained for the purposes referred to in article 1(1) of that Directive.’ ”

A “Article 13
“Remedies, liability and penalties

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

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

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

Case C-293/12

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

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

F “1. Is the restriction on the rights of the [claimant] 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)]EU 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?
G and/or b) Ensuring the proper functioning of the internal market of the European Union?

H “2. Specifically, (i) Is Directive 2006/24 compatible with the right of citizens to move and reside freely within the territory of the member states laid down in article 21FEU [of the FEU Treaty]? (ii) Is Directive 2006/24 compatible with the right to privacy laid down in article 7 of the [Charter of Fundamental Rights of the European Union (‘the Charter’)] and article 8 [of the Human Rights Convention]? (iii) Is Directive 2006/24 compatible with the right to the protection of personal data laid down in article 8 of the Charter? (iv) Is Directive 2006/24 compatible with the right to freedom of expression laid down in article 11 of the Charter and article 10 [of the Human Rights Convention]? (v) Is Directive 2006/24

compatible with the right to good administration laid down in article 41 A
of the Charter?

“3. To what extent do the Treaties—and specifically the principle of
loyal co-operation laid down in [article 4(3)EU] —require a national
court to inquire into, and assess, the compatibility of the national
implementing measures for [Directive 2006/24] with the protections
afforded by the [Charter], including article 7 thereof (as informed by B
article 8 of the [of the Human Rights Convention])?”

Case C-594/12

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

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

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

“1. Concerning the validity of acts of institutions of the European G
Union: Are articles 3 to 9 of [Directive 2006/24] compatible with articles
7, 8 and 11 of the [Charter]?”

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

- A purposes of assessing the permissibility of interference, as being of equal standing to the conditions under article 8(2) and article 52(1) of the Charter? (b) What is the relationship between “Union law”, as referred to in the final sentence of article 52(3) of the Charter, and the Directives in the field of the law on data protection? (c) In view of the fact that [Directive 95/46] and Regulation . . . No 45/2001 contain conditions and
- B restrictions with a view to safeguarding the fundamental right to data protection under the Charter, must amendments resulting from subsequent secondary law be taken into account for the purpose of interpreting article 8 of the Charter? (d) Having regard to article 52(4) of the Charter, does it follow from the principle of the preservation of higher levels of protection in article 53 of the Charter that the limits applicable under the Charter in relation to permissible restrictions must be more
- C narrowly circumscribed by secondary law? (e) Having regard to article 52(3) of the Charter, the fifth paragraph in the Preamble thereto and the explanations in relation to article 7 of the Charter, according to which the rights guaranteed in that article correspond to those guaranteed by article 8 of the [Human Rights Convention], can assistance be derived from the case law of the European Court of Human Rights for the
- D purpose of interpreting article 8 of the Charter such as to influence the interpretation of that latter article?”

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

E *Consideration of the questions referred*

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

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

- 24 It follows from article 1 and recitals (4), (5), (7) to (11), (21) and (22) of Directive 2006/24 that the main objective of that Directive is to harmonise member states’ provisions concerning the retention, by providers
- G of publicly available electronic communications services or of public communications networks, of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in articles 7 and 8 of the Charter.

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

personal data under article 8 of the Charter and respect for freedom of expression under article 11 of the Charter. A

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

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

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

29 The retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, directly and specifically affects private life and, consequently, the rights guaranteed by article 7 of the Charter. Furthermore, such a retention of data also falls under article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, therefore, necessarily has to satisfy the data protection requirements arising from that article: *Volker und Markus Schecke GbR v Land Hessen* (Joined Cases C-92/09 and C-93/09) [2010] ECR I-11063; [2012] All ER (EC) 127, para 47. F G

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

31 In the light of the foregoing considerations, it is appropriate, for the purposes of answering the second question, parts (b) to (d), in Case

- A C-293/12 and the first question in Case C-594/12, to examine the validity of the Directive in the light of articles 7 and 8 of the Charter.

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

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

- 33 To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way: see, to that effect, *Rechnungshof v Österreichischer Rundfunk* (Joined Cases C-465/00, C-138/01 and C-139/01) [2003] ECR I-4989, para 75.

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

- 35 Furthermore, the access of the competent national authorities to the data constitutes a further interference with that fundamental right: see, as regards article 8 of the Human Rights Convention, *Leander v Sweden* (1987) 9 EHRR 433, para 48; *Rotaru v Romania* (2000) 8 BHRC 449, para 46 and *Weber v Germany* (2006) 46 EHRR SE47, para 79. Accordingly, articles 4 and 8 of Directive 2006/24 laying down rules relating to the access of the competent national authorities to the data also constitute an interference with the rights guaranteed by article 7 of the Charter.

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

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

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

A

38 Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

B

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

C

40 Nor is that retention of data such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in article 8 of the Charter, because article 7 of Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks. According to those principles, member states are to ensure that appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data.

D

E

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

F

42 It is apparent from the case law of the court that the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest: see *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225; [2008] ECR I-6351, para 363 and *Stichting Al-Aqsa v Council of the European Union* (Joined Cases C-539/10P and C-550/10P) EU:C:2012:711; 15 November 2012, para 130. The same is true of the fight against serious crime in order to ensure public security: see *Land Baden-Württemberg v Tsakouridis* (Case C-145/09) [2010] ECR I-11979; [2013] All ER (EC) 183, paras 46 and 47. Furthermore, it should be noted, in this respect, that article 6 of the Charter lays down the right of any person not only to liberty, but also to security.

G

H

43 In this respect, it is apparent from recital (7) in the Preamble to Directive 2006/24 that, because of the significant growth in the possibilities

A afforded by electronic communications, the Justice and Home Affairs Council of 19 December 2002 concluded that data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime.

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

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

C 46 In that regard, according to the settled case law of the court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives: see *Afton Chemical Ltd v Secretary of State for Transport* (Case C-343/09) [2010] ECR I-7027, para 45; the *Volker* case [2010] ECR I-11063, para 74; *Nelson v Deutsche Lufthansa AG* (Joined Cases C-581/10 and C-629/10) [2013] 1 All ER (Comm) 385, para 71; *Sky Österreich GmbH v Österreichischer Rundfunk* (Case C-283/11) [2013] All ER (EC) 633, para 50; and *Schaible v Land Baden-Württemberg* (Case C-101/12) EU:C:2013:661; 17 October 2013, para 29.

D 47 With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference: see, by analogy, as regards article 8 of the Human Rights Convention, *S v United Kingdom* (2008) 48 EHRR 1169, para 102.

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

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

G 50 That assessment cannot be called into question by the fact relied on in particular by Mr Tschohl and Mr Seitlinger and by the Portuguese Government in their written observations submitted to the court that there are several methods of electronic communication which do not fall within the scope of Directive 2006/24 or which allow anonymous communication. Whilst, admittedly, that fact is such as to limit the ability of the data retention measure to attain the objective pursued, it is not, however, such as

to make that measure inappropriate, as the Advocate General has pointed out in para 137 of his opinion above. A

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

52 So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the court's settled case law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary: *Institut professionnel des agents immobiliers (IPI) v Englebert* (Case C-473/12) [2014] 2 CMLR 297, para 39 and the case law cited. C

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

54 Consequently, the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data: see, by analogy, as regards article 8 of the Human Rights Convention, *Liberty v United Kingdom* (2008) 48 EHRR 1; *Rotaru's case* 8 BHRC 449, paras 57–59, and *S v United Kingdom* (2008) 48 EHRR 1169, para 99. E

55 The need for such safeguards is all the greater where, as laid down in Directive 2006/24, personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data: see, by analogy, as regards article 8 of the Human Rights Convention, *S v United Kingdom*, para 103, and *MK v France* (Application No 19522/09) (unreported) 18 April 2013, para 35. F

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

57 In this respect, it must be noted, first, that Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation,

A limitation or exception being made in the light of the objective of fighting against serious crime.

58 Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.

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

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

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

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

prosecutions. Nor does it lay down a specific obligation on member states designed to establish such limits. A

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

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

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

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

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

68 In the second place, it should be added that that Directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paras, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data: see *European Commission v Republic of Austria* (Case C-614/10) [2013] All ER (EC) 237, para 37. F

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

70 In those circumstances, there is no need to examine the validity of Directive 2006/24 in the light of article 111 of the Charter.

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

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

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

Costs

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

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

E Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid.

GERALDINE FAINER, Barrister

F

G

H