THE HIGH COURT

Record No.2006/3785P

Between :-

DIGITAL RIGHTS IRELAND LIMITED

Plaintiff

- and -

THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE COMMISSIONER FOR THE GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

Defendants

OUTLINE WRITTEN SUBMISSION IN SUPPORT OF

APPLICATION FOR LEAVE TO INTERVENE AS AMICUS CURIAE

A. Preliminary

1. This outline submission is made in support of the application of the Irish Human Rights Commission for leave to appear as *amicus curiae* in the within proceedings. The application is brought pursuant to section 8(h) of the Human Rights Commission Act 2000 which provides as follows:-

> **8.**—The functions of the Commission shall be—
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> (*h*) to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights of any person and to appear as such an *amicus curiae* on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion).

2. These proceedings concern the validity of acts and measures designed to ensure that telecommunications service providers retain data in respect of mobile phone, internet and e-mail communications of all persons who use such services, for access and use by State authorities, for a period of 3 years

(in the case of present domestic law) or for a period of up to 2 years (under Directive 2006/24/EC).

3. The Plaintiff is a private company limited by guarantee established for the specific purpose of defending civil and human rights in the context of modern communications technologies. The question of whether the Plaintiff has *locus standi* to challenge the validity of the relevant legislative provisions and the Directive either on its own behalf or on behalf of its members or otherwise on behalf of all persons affected by these measures is the first issue in the case.

4. The background and facts in support of the present application are set out in the Affidavit of Des Hogan sworn on the 8th November 2007 and in the Affidavits of Eamonn MacAodha sworn on the 11th December 2007 and on the 14th February 2008.

5. As appears therefrom the Commission believes that the substantive issues in this case raise questions of significance from a human rights perspective, and furthermore the Commission has formed the view that the preliminary issue on the Plaintiff's standing in itself raises important questions of principle which it would be interested to address, if so permitted, by way of *amicus curiae* in these proceedings.

B. The Commission as *Amicus Curiae*

6. The Commission's capacity to intervene derives from section 8(h) of the Human Rights Commission Act 2000 and, less directly, from its position as a notice party to the proceedings under section 6(1) of the European Convention on Human Rights Act 2003 and/or RSC Order 60A. As appears from these provisions, in appropriate cases raising questions of interpretation of rights under the Constitution and under international conventions to which Ireland is a party, the Commission's expertise[1] is available to the Court and

[1] Section 5(4) of the 2000 Act provides that a person shall not be appointed to be a member of the Commission unless it appears to the Government that the person is suitably qualified for such appointment by reason of his or her possessing such relevant experience, qualifications, training or expertise as, in the opinion of the Government, is or are appropriate, having regard, in particular, to the functions conferred on the Commission.

may be capable of informing judicial decisions impacting on the interpretation and protection of fundamental rights.[2]

7. The jurisdiction of this Court to invite or permit the Commission to participate as *amicus curiae* also derives from its inherent jurisdiction, cf. *HI v Minister for Justice Equality & Law Reform* [2003] 3 IR 197; *Doherty v South Dublin County Council & Others*, 31 October 2006; *O'Brien v Personal Injuries Assessment Board (No.1)* [2005] 3 All ER 328. It appears from these and other cases including comparative cases (omitting for present purposes the practice of the US courts) that the discretion of the Court is informed by the following general principles:-

    - The time and cost involved in the intervention should not be disproportionate to the assistance which it is anticipated will be derived from such intervention, *per* Kirby J in *Attorney General of the Commonwealth v Breckler* (1999) 163 ALR 576, 607; see also *Levy v Victoria* (1997) 189 CLR 579, 604-5.

    - In every case the proposed *amicus* must be non-partisan and impartial. Furthermore, in cases where it is likely that the interventions of the proposed *amicus* will have the effect of supporting the position of one party or side in the proceedings only, it may be that the role of *amicus* should properly be confined to argument before the appellate courts where the issues are legal in nature, see the observations of Macken J in *Doherty v South Dublin County Council & Others,* Supreme Court, 31 October 2006.

    - The circumstances in which a Court might rely on an *amicus curiae* in a criminal case are probably limited to the raising of points of law in favour of a Defendant, for example where the Defendant is unrepresented, e.g., *Faulkner v R* [1905] 2 KB 76; and generally Halsbury's *Laws of England* (3rd ed, 1955) 401, note (c).

[2] In this regard, one of the Commission's statutory functions, under section 8(1)(a) of the 2000 Act, is 'to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights.'

- More generally, the role of *amicus curiae* may be particularly appropriate at appellate level in cases with a public law dimension, *per* Keane CJ in *HI v Minister for Justice Equality & Law Reform* [2003] 3 IR 197. However, and as appears from the survey of English practice contained in the judgment of Finnegan P (as he then was) in *O'Brien v PIAB (No.1)* [2005] 3 IR 328, 334, there are a number of circumstances in which the appointment of *amicus curiae* at first instance may also be particularly appropriate.

- The proposed *amicus curiae* must have a *bona fide* interest in the matter and the legal capacity to advise the court on the legal principles or questions of fact arising, *O'Brien v Personal Injuries Assessment Board (No.1)* [2005] 3 IR 328;*In Re Northern Ireland Human Rights Commission* [2002] NI 236.

- The interests of the *amicus* should suggest a capacity to provide assistance from a specialised viewpoint in the public interest, see *Attorney General of the Commonwealth v Breckler* (1999) 163 ALR 576.

- The Court should also consider whether there is a public law element to the proceedings and the number of people who would be affected by the decision in the proceedings, *O'Brien v Personal Injuries Assessment Board (No.1)* [2005] 3 IR 328.

- It may often be sufficient that the *amicus curiae* is granted leave to file written submissions, e.g., *FCT v Scully* [2000] 201 CLR 148; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] 4 All ER 897,902. The usual practice of Irish Courts to date has been to grant the Commission leave to intervene in the first instance by way of written submissions and to consider the appropriateness of oral submissions, as needs be, in the light of the issues raised in the course of the trial of the matter.

- Where the intervention would only serve to widen the *lis* between the parties or introduce a new cause of action, the intervention should not

be allowed, e.g., *Re Clark et al and the Attorney General of Canada* (1978) 81 D.L.R. (3d) 33 (Ont. H.C.).

- An *amicus curiae* can file no pleadings or motions in the cause and cannot prosecute an appeal, *US Tobacco Company v Minister for Consumer Affairs & Others* (1988) 83 ALR 79.

- Other factors of relevance to the general test include the adequacy of representation of the parties; the issues that the proposed *amicus* seeks to raise; the potential delay; the potential inconvenience or prejudice to the parties; whether the decision of the court will have a widespread impact; whether the point of law in issue is constitutional or of exceptional public importance; and whether the admission of *amicus* submissions would risk turning the court into a political arena.[3]

8. As appears from the affidavits filed herein on behalf of the Commission, the Commission's interest in this case derives from its programme of work and specifically from its active consideration since 2003 of developments in the law and procedure relating to data protection and data retention. In relation to the question of standing, the Commission's interest is in the scope of the right of access to Court to challenge laws of general application impacting upon the enjoyment of fundamental rights.

9. In the present case, the Commission believes that it will be in a position to assist the Court in a manner consistent with the principles underlying the *amicus curiae* jurisdiction of this Honourable Court. If permitted to appear, and consistent with its developing practice, the Commission would not propose to address the Court at large on the issues but would focus instead upon points of general principle or specific arguments that have not been raised or canvassed by the parties or upon which the Court may otherwise wish to be assisted.

10. The Commission will also endeavour not to duplicate the arguments of the parties or to make submissions on matters of fact that may be in dispute as between the parties. Furthermore, the Commission will make every effort to be as brief as

[3] Cf. the analysis of the comparative authorities by O'Brien, *The Courts Make a New Friend? Amicus Curiae Jurisdiction in Ireland* (2004) 7 *Trinity College LR* 5-28.

possible in any oral submission so as not to add to the costs of the parties by prolonging the days of hearing.

11. In the submission of the Commission the participation of the Commission would be more effective if permitted to address the Court by way of oral as well as written submission, as appropriate and subject to such directions as the Court may make in order to meet the general concern that any intervention should be proportionate to the assistance to be expected.

C. The Preliminary Issue

12. In the view of the Commission, it is appropriate in cases such as the present that raise a number of rights based constitutional grounds of challenge to measures of general application that the Commission be granted leave at an early stage in order that it may have a full understanding of the issues and of the proceedings as they develop. In the present case, the Defendants have applied to have the question of the Plaintiff's *locus standi* tried separately by way of preliminary issue. Furthermore, this issue is the first and possibly determinative issue in the case. In this regard, the Commission at its casework committee stage and at its plenary consideration of this case took careful note of the pleas in relation to standing in the Defence and of the possibility of a preliminary issue being tried and determined in favour of the Defendants, yet nonetheless the Commission considered and believes that it is appropriate to apply for leave at this stage of the proceedings.

13. In particular, in the present case the Commission believes that the questions of standing at issue between the parties may raise questions of general importance from a human rights perspective relating to the capacity of entities other than individuals to have access to the Courts for the purposes of defending or vindicating rights enjoyed by individuals or by those entities.

14. As has been stated by the Supreme Court of Canada, a court's ability to consider standing at the outset ‘depends on the nature of the issues raised and on whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary

stage of the nature of the interest asserted.' [4] The question of standing involves a decision about whether to decide, based upon an assessment of the Plaintiff's stake in the outcome of the judicial process.

15. Questions of standing involve striking a balance between principles of judicial efficiency and access to justice. Three major concerns are typically identified: the proper allocation of judicial resources; the prevention of vexatious suits brought at the behest of mere 'busybodies'; and the particular requirements of the adversary system. The first category includes such concerns as fears about a multiplicity of suits, otherwise known as the 'floodgates' argument. Within the second category, courts have employed standing restrictions to ensure that issues are fully canvassed by promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones. Under the latter category are subsumed such matters as the 'justiciability' of the issue before the courts, whether the full dimensions of the issue can be expected to be aired before the court and limits on the exercise of judicial power.

16. While these matters are classically questions of policy, and not of entitlement or of right, in the submission of the Commission they are also informed by the general consideration that decisions on standing should not impair the right of access to court as it derives from the Constitution and from Articles 6 and 13 of the European Convention on Human Rights.[5] Furthermore, the particular constitutional concern to ensure that citizens can challenge the validity of laws affecting them has an impact on the rules of standing as they apply in a constitutional as opposed to an administrative law context.[6]

17. In this last connection, the Commission wishes to emphasise the wider constitutional dimension of rules on standing, as opposed to the narrower conception of these rules as being designed to curtail vexatious or abstract claims and to control the docket of the Court. This wider dimension is reflected in the distinction already apparent in the different approach to standing in Irish public law depending on whether the plaintiff's challenge raises constitutional as opposed to

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[4] *Minister of Finance of Canada et al. v. Finlay* (1986), 33 D.L.R. (4th) 321 (S.C.C.) *per* Le Dain J., for the Supreme Court at p. 328. See also *Prince Edward Island Nurses Union v. Prince Edward Island* (1995), 30 Admin. L.R. (2d) 145

[5] See generally Reid, *A Practitioner's Guide to the European Convention on Human Rights* (3rd ed, 2007), 87

[6] See generally Hogan & Whyte, Kelly: The Irish Constitution (4th ed, 2003) 807-832.

purely administrative law grounds of challenge.[7] For example, the approach of the Courts to standing in administrative law challenges such as *Lancefort v An Bord Pleanala (No.2)* [1999] 2 IR 270 is clearly different from the established approach to constitutional challenges identified by Henchy J in *Cahill v Sutton* [1980] IR 269.

18. So too, in the context of the European Convention on Human Rights, it is established that where a substantive Convention right is in issue, procedural restrictions on access to court must not restrict or reduce the right of access to court in such a way or to such an extent that the very essence of the right is impaired. In addition, a limitation will not be compatible with Article 6 if it does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved (the so-called *Ashingdane Principles*), see for example *Camenzind v Switzerland* (1997) 28 EHRR 458. It is true that, in the specific case of challenges to laws or measures of general application, neither Article 13 nor any other provision of the Convention requires Contracting States to provide a remedy in domestic law allowing for the validity of laws to be challenged by reference to Convention rights, see *James v UK* (1984) 8 EHRR 123. Nonetheless, where such a procedural entitlement exists, as under the Irish and European procedural laws here at issue, the interpretation of standing requirements must take due account of the weight of the Convention rights at issue.[8] Within the European framework, it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for breach of Community law and ensures the right to effective access to the courts pursuant to Article 6 of the Convention.[9]

19. The wider constitutional dimension to standing is well described by Judge Cooke in the following extract from a learned paper delivered by him, extra judicially, in October 2005:-

> ….Community jurisprudence over a fairly short period reflects the development which has taken place over a far longer period in many national legal systems,

[7] Ibid.
[8] In this regard, remedies sought under the European Convention on Human Rights Act 2003 are subject to the ordinary rules of standing in Irish law. Unlike the position in the UK the plaintiff is not required to demonstrate that he or she is a 'victim' of a breach of his or her rights within the meaning of Article 34 of the Convention, for discussion see Clayton & Tomlinson, *The Law of Human Rights* (2000 and second annual updating supplement, 2003) paras. 3.84 to 3.87 and 22.14 to 22.49.
[9] *Posti v Finland* (2003) 37 EHRR 6; *Alatulkkila v Finland* (2006) 43 EHRR 34; *Bosphorous Hava Yollara Ve v Ireland*, ECHR, judgment of 30 June 2005.

especially in the common law countries. The debates have been similar. The progress has been one from a restrictive approach which protects the primacy of legislation and the efficiency of administration, towards a flexible and pragmatic one which seeks to give greater emphasis to protecting the rights of individual without jeopardising legal certainty. The fundamental issue in the debate is how a democratic society based upon the rule of law can best strike the balance between two potentially opposing interests, namely that of safeguarding the protection of the rights of the individual citizen against the oppressive exercise of administrative power, on the one hand, and securing, on the other, the efficient and effective exercise of executive authority on behalf of elected representatives.

How far can any system go in allowing the widest possible opportunities for the testing of the validity of laws, administrative decisions and delegated rule-making powers without jeopardising the efficient exercise of executive functions created by genuinely democratic institutions? The more concerned any system is with ensuring the effectiveness of executive power and the supremacy of enacted legislation, the more restrictive will be the conditions imposed upon Judicial Review of the decision-making process or the exercise of delegated legislative powers. At the other end of the spectrum is what the average parliamentarian would regard as "the appalling vista" of the *actio popularis* where any citizen or group of citizens can challenge the validity of a regulation or an administrative decision, whether or not the particular measure has any actual impact upon their own circumstances.

One learned commentator[10] has recently pointed to the fact that in the Member States, with only rare exceptions, laws cannot be challenged by private parties. In some, including, I understand, Germany, the same is true of regulations. From this, he suggest that it is not essential to a State based on the rule of law that individuals be permitted to challenge measures of abstract character and general application. In the European Community especially, such a right would have serious consequences for sound administration because regulations are very often the result of difficult compromises on majority or qualified votes and private litigants will frequently have ulterior motives for attacking legislation.

The need for a balanced solution to this social and constitutional problem becomes more acute as society itself becomes more complex and bureaucratic. We depend increasingly on public authorities and agencies to intervene in almost every aspect of social and economic life to provide all manner of the services. Their decisions often require a technical expertise few of us understand. The functions we delegate to them often require the exercise of powers which have the potential for far-reaching effects on private individuals. The greater the opportunities for oppressive intervention in the affairs of individuals, the more important it is for society to have an acceptable system for policing the lawful use of these powers. It is precisely because the former "common market" of the Rome Treaty is successfully moving to the "ever closer union" so as to become a social and political entity in its own right that these constitutional issues assume greater significance and why for lawyers they are a subject of constant interest. The degree to which the solution at any time leans towards the restrictive approach or the liberal one is also, I think, a measure of the self confidence of the system and of the constitutional maturity of the society the system serves. The jurisprudence of the European Court very clearly recognises the extent to which the community finds itself bound up in this important social question. Indeed, community jurisprudence has boasted from the very outset the adoption of a progressive and liberal approach to the problem. In the *Plaumann*[11] decision of 1963 in which the Court of Justice first addressed the question as to how the

[10] José Carlos Moitinho de Almeida, Le Recours en annulation des particulas: nouvelles réflexions sur l'expression'la concernent…individuellement", Festschrift für Ulrich Everling [1995], p. 849-874.

[11] *Plaumann & T Co v Commission*, Case 25/62 [1963] E.C.R. 95.

concept of "direct and individual concern" was to be interpreted, it is very confidently asserted that the broadest possible construction was to be adopted. Twenty-three years later in the 1986 decision of the Court of Justice in *Les Verts*[12], you will find a very emphatic assertion made as to the central role of Judicial Review in the Community Legal system as a comprehensive protection, by law, of the rights of the individual citizen of the Community in the face of the complex legislative and judicial structure which the Treaty had laid down. Given the very clear statement of the judicial function in the Community Legal system which it contains, paragraph 23 of the judgment is worth quoting in full:

> "The European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against the implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national Courts and can cause the latter to request the Court of Justice for a preliminary ruling."

Membership of the Union involves radical transfer of regulatory competence to the organs of the Community from the Member States. What the European Court is saying in this judgment is that the far-reaching effects of this hand-over of power to the institutions is balanced by the guarantee that the legal order of the Treaty will protect the individual against the excessive and oppressive exercise of that power in a manner which is incompatible with the explicit provisions of the Treaty or, moreover, incompatible with superior rules of law and of fundamental human rights which the European Court will imply into the legal Order of the Community for the purpose.

20. Strictly speaking, standing is both conceptually and factually distinct from the question of whether the right in question can be invoked by the Plaintiff. For example, in the present case, the standing of the Plaintiff is separate from the question of whether as a corporation it can invoke a right of privacy and, if so, what consequences such an entitlement has for the application of the test of proportionality.[13] Nonetheless, in the present case, being a challenge which has

[12] *Les Verts v Parliament*, Case 294/83 [1986] E.C.R. 1339.

[13] The entitlement of legal persons to freedom of interference with correspondence, for example, may be more easy to invoke than privacy in the personal sense, cf. *Bruggemann and Scheuten v Germany* (1978) 10 DR 100; *Open Door Counselling and Dublin Well Woman v Ireland*(1992) 15 EHRR 244; *R v Broadcasting Standards Commission, ex parte BBC* , The Times, 12 April 2000; *Investigating Directorate v Hyundai Motor Distributors* (2000) 10 BCLR 1079 (Constitutional Court SA). As to the wide entitlement of legal persons to invoke Convention rights, see *Sunday Times v UK* [1979] 2 EHRR 245; *McElduff and others v UK*

been advanced by the Plaintiff for itself as well as in a representative capacity, there may be good reason for considering these questions together.[14]

21. The wider factual context may also be important for assessing some of the central arguments on standing, in particular:-

    - as to whether these laws by reason of the manner in which they apply are likely to be challenged by individuals,

    - as to whether their nature and effect is such that the legal issues are likely to come more sharply into focus if challenged in a concrete case where the data has in fact been accessed by the authorities for a particular purpose,

    - or as to whether, conversely, the legal issues are fully joined in an *a priori* challenge to the general manner in which these laws impact upon privacy rights and bring about a chilling effect on rights of expression, as alleged.

22. The Supreme Court has recognised the wisdom in this context of the cautionary words of Lord Evershed M.R. in *Windsor Refrigeration Company Ltd. v. Branch Nominees Ltd.* [1961] Ch 375 to the effect that, in deciding whether to try a preliminary issue separately from the merits of the case, the shortest cut may turn out to be the longest way around, see *BTF v DPP* [2005] IESC.[15] In that case, in respect of the preliminary issue of delay, the Court emphasised that a broad approach was required and held that it was not possible to resolve the preliminary issue without reference to the facts, as yet not found. Similarly, in respect of the question of standing, in its recent ruling in *Irish Penal Reform Trust and Others v Governor of Mountjoy Prison & Others*, ex tempore judgment of Murray CJ delivered on the 2nd April 2008, the Supreme Court held that the

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[1999] 27 EHRR 249; *Pine Valley Development v Ireland (1992)* 14 EHRR 319, at para 42, and *Open Door and Dublin Well Woman* (1993) 15 EHRR 244

[14] As stated by the Supreme Court of Canada in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62: - "Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."

[15] Also approved by Kenny J in *Tara Exploration and Development Company and Tara Mines Ltd. v. The Minister for Industry and Commerce* [1975] IR 242

question of *locus standi* could not be wholly separated from the issues of the justiciability of all or at least some of the matters in issue and in turn upon the merits of the claims. The nature and substance of the claims was capable of affecting a decision on either standing or justiciability, the latter going to the jurisdiction of the Courts. Accordingly, the issue could not be determined in isolation as a preliminary issue.

23. In the present case, it appears that the question of the Plaintiff's *locus standi* as well as the question of whether it may claim to be a victim of a violation of its rights are matters in respect of which wider evidence is required.

24. In the submission of the Commission, the EU dimension to the present case may have a significant bearing on the question of standing. In particular, there is a body of recent case law from the European Court of Justice, based upon the principle of judicial protection and in turn upon the rights of access to court and to an effective remedy under Articles 6 and 13 ECHR, that requires national courts to adopt an approach to questions of standing which avoids making it 'virtually impossible' or 'excessively difficult' or which impedes or makes 'unduly difficult' the capacity of a litigant to challenge EU measures of general application under Article 234 EC, see *Van Schijndel v SPF* [1995] ECR I-4705 para 17; *Amministrazione delle Finanze v San Giorgio* [1983] ECR 3595 para 14; Opinion of AG Jacobs in *Denkavit International* [1996] ECR I-2827.

25. The Court's evolving case-law on the principle of effective protection of rights derived from Community law in national courts was first expressed in 1986, in the case *Johnston*.[16] Its implications have only gradually been clarified in the Court's case-law.[17] It is now clear from the judgments in *Factortame*[18] and *Verholen*[19] that the principle of effective judicial protection may require national courts to review all national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings, even where they might otherwise be unable to do so under national law.[20] The principle of effectiveness is therefore more far reaching than the principle of equivalence, according to which

[16] *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651, PP 18-19
[17] Opinion of AG Jacobs in *UPA*, at para.97
[18] Case C-213/89 *Factortame I* [1990] ECR I-2433, at 19-22
[19] Joined Cases C-87/90, C-88/90 and C-89/90, *Verholen*, [1991] ECR I-3757, at 23-24
[20] See Brealey & Hoskins, *Remedies in EC Law* (2nd ed, 1998) 107-114

procedural limitations and restrictions on the exercise of Community law rights should be no greater than those imposed on equivalent domestic law rights, see generally Craig & De Burca, *EU Law* (4th Ed, 2008), 320-325 and 325-328; Schermers & Waelbroeck, *Judicial Protection in the European Union* (6th ed, 2001), 252-253.

26. The principle of effective judicial protection as it applies to standing in preliminary references is a corollary of the narrow standing rules applicable to direct actions for annulment under Article 230 EC. The Article 234 reference procedure, and the role of national courts therein, has a central role in ensuring that EU laws and regulations are capable of being tested in the Community Courts. The judgment of the Court in Case C-432/05, *Unibet (London) Ltd & Unibet (Int'l) Ltd v Justitiekanslern*, delivered on the 13th March 2007, contains the following summary of the relevant principles:-

> It is noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protecion of Human Rights and Fundamental Freedoms (Case 222/84 *Johnston*[1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission v Austria* [2001] ECR I-92185, paragraph 45; Case C-50/00 P *Union de Pequenos Agrcultores v Council* [2002] ECR I-6677, paragraph 39; and Case C- 467/01 *Eribrand* [2003] ECR I-6471, paragraph 61) and which has also been reaffirmed by Article 4 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 354, p.1
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> Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe,* [1976] ECR 1989 paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 12; Case 106/77 *Simmenthal* [1978 ECR 629, paragraphs 21 and 22; Case C-213/89 *Factortame and Others* [[1990] ECR I-2433, paragraph 19; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12).
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> It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, inter alia, *Rewe*, paragraph 5; *Comet*, paragraph 13; *Peterbroeck*, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49).
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> Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law (Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44).

> It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraph 16; and *Factortame*, paragraphs 19 to 23).
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> Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, inter alia, Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24, and *Safalero*, paragraph 50). It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (*Unión de Pequeños Agricultores* v *Council*, paragraph 41).
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> In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).
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> Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant state, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law.

27. The European Court of Justice has been concerned to emphasise in this regard that the Treaty has established a complete system of legal remedies to ensure judicial review of the legality of acts of the institutions. Individuals who have no capacity to bring an action for annulment should in appropriate cases be permitted to avail of the preliminary reference procedure.[21] It therefore falls upon the Member States to complete the circle, by providing a system of legal remedies and procedures at domestic level that ensures respect for the right to

[21] The advantage of the procedure set out in Article 234 is that the conditions for standing are less strict then in annulment proceedings. There are many examples in the case law of the Court where preliminary references from national courts have allowed individuals and undertakings to obtain a ruling on the validity of EC regulations and decisions that they could not possibly have challenged by means of direct action before the ECJ (or CFI), owing to their lack of *locus standi*, See for instance case 101/76, *Koniklijke Scholten Honig v. Council and Commission* [1977] ECR-797 and case 125/77, *Koninklijke Scholten-Honig NV and others v. HoofdproduktschaapvoorAkkerbouwprodukten*[1978] ECR-1991, case 97/85, *Deutsche Lebensmittelwerke v. Commission* [1985] ECR-1331 and joint cases 133-136/85 *Walter Rau Lebensmittelwerke and others v Bundesanstalt für landwirtschaftliche Marktordnung,* [1987] ECR-2289*.* The regulations concerned were general market regulations, and actions by non-privileged applicants would most probably have been declared inadmissible. These regulations infringed the general principles of law or Treaty provisions, or reflected the situations where the Community institutions have exceeded their powers.

effective judicial protection. As appears from the above passage, this requires at minimum that domestic rules on standing should not impede or make it practically impossible or excessively difficult to invoke the preliminary reference procedure. According to the Court:-

> " …each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."[22]

Thus, a balancing exercise is required as between the effectiveness of Community law and respect for the legal autonomy of national legal systems and procedures.[23]

28. Where fundamental rights are in issue, in cases falling within the scope of Community law[24] the decision on standing may have the consequence that the challenge to the measure's validity is pursued before the Community Courts rather than, indirectly, before the European Court of Human Rights. According to the European Court of Justice:-

> '[I]t must be stated that the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power to grant interim relief and, where appropriate, to make a reference for a preliminary ruling, as explained in paragraph 85 of the order under appeal, constitutes the very essence of the Community system of judicial protection. Alongside the possibility, for those who comply with the conditions of admissibility laid down in the Treaty, of challenging a Community measure by bringing an action for annulment before the Community judicature, individuals have access to the legal remedies available in the Member States in order to assert their rights under Community law and the preliminary reference procedure enables effective cooperation to be established for that purpose between the national courts and the Court of Justice'.[25]

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[22] *Van Schijndel v SPF* [1995] ECR I-4705 para 19

[23] See Brealey & Hoskins, *Remedies in EC Law* (2nd ed, 1998) 111-114.

[24] The European Court of Justice has no power to provide an interpretation of fundamental rights in cases which fall outside the scope of Community law, e.g., *Perfili* [1996] ECR I-161 para 20; *Kremzow v Austria* [1997] ECR I-2629 paras 14-19.

[25] Cases C-300/99 *Area Cova and others v.Council* [2001] ECR I-983 and C-301/99 *Area Cova and others v. Council and Commission* [2001] ECR I-1005

29. In the light of these principles, it seems that there may be a particular danger, if the preliminary issue on standing is tried in isolation, that the Court will be unduly hampered in assessing whether an Article 234 reference is appropriate or necessary.

30. Finally, in relation to the European dimension of this case, the Commission wishes to draw to the attention of this Court the consideration that if the Commission is not allowed to intervene in the domestic proceedings in this case it will not be in a position to seek to do so at a later stage in Luxembourg. This is because, in contrast to the position in direct actions,[26] parties who have not intervened before the national court cannot do so following an Article 234 reference before the European Court of Justice and are not entitled to submit any documents or submissions to the Court, see for example *Costa ENEL Case* [1964] ECR 614, 615; and generally Schermers & Waelbroeck, *Judicial Protection in the European Union* (6th ed, 2001), 723-724; European Court Procedure (Sweet & Maxwell, Looseleaf November 2005), paras 31.116 and 31.137.

31. By contrast, interested parties who intervene before the national court have the same rights before the European Court of Justice as the parties: both in written and oral procedures they are invited to state how in their opinion the questions should be answered. So in Case C-192/99, *The Queen v. Kaur* [2001] ECR I-1237, the English High Court permitted the NGO 'Justice' to intervene as an interested party and thereafter in the course of the preliminary reference the European Court of Justice permitted it to participate as an interested party in

[26] Intervention before the European Court of Justice in direct challenges is governed by Article 37 of its Statute and by Article 93 of the European Court of Justice's Rules of Procedure. These provisions require that any person seeking to intervene directly before the European Court of Justice must support the form of order sought by one of the parties. This provision has been interpreted to mean that the intervener must support the conclusions of one party or the other. For example, where an intervener or a proposed intervener has failed to state expressly that it wishes to support the conclusions of any one party, the Court may still accept the intervention but in doing so will determine from the application as a whole whether it manifests an intention to support one parties conclusions, see Case 305/86, *Neotype Techmash Rexport GMBH .v. The Commission* [1990] I ECR 2945; and see generally Plender (Ed), *European Courts Practice and Precedents* (1997) Ch. 23; Brealey & Hoskins, *Remedies in EU Law* (2nd ed, 1998),483-484 and 564-565. It follows that a direct application to intervene before the European Court of Justice by way of *amicus curiae*, consistent with the statutory role of the Human Rights Commission as a neutral party, would not be possible in Article 230 direct challenges.

relation to those issues and in a manner consistent with its stated intention and role when applying to intervene before the domestic Court.[27]

32. It follows also from the above rule that no other human rights commission or equivalent body from any other country in Europe would be in a position to intervene before the European Court of Justice in the event of a preliminary reference in this case. In circumstances where the present case is the sole challenge to the data retention laws adopted at European level and where those laws have been the subject of significant legal debate, interest and concern amongst human rights lawyers and organisations, the Commission believes that this consideration should weigh in favour of its participation as *amicus curiae* in this case.

D. Conclusion and Prayer

33. While this is entirely a matter for the Court, the Commission for its part is interested to appear as *amicus curiae* at this stage of the proceedings notwithstanding the possibility that the proceedings may be heard and determined on the question of standing alone.

34. In the premises, the Commission seeks leave to intervene by way of *amicus curiae* in the within proceedings subject to such directions as to the time and mode of its intervention as this Honourable Court shall deem just or appropriate.

Patrick Dillon-Malone

1st July 2008

[27] Whether or not a person is a 'party' to the main proceedings is a matter to be determined by the national court, Case 9/74 *Casagrande v. Landeshauptstadt Munchen* [1974] E.C.R. 773, p. 775, [1974] 2 C.M.L.R. 432. It appears that the European Court of Justice to date has invariably respected the discretion of the national court as regards whether a person should be regarded as a party, see Anderson & Demetriou, *References to the European Court* (2002), p.248; also Plender (Ed), *European Courts Practice and Procedure* (1997) 766. An exception would arise only where it is clear that the party to the Article 234 reference could clearly have directly challenged the Community measure under Article 230 EC, see Case C-188/92, *TWD Textilwerke Degendorf v Bundesminister fur Wirrtschaft* [1994] I-ECR 833.