IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-293/12

DIGITAL RIGHTS IRELAND LIMITED

Plaintiff

V

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

AND

THE IRISH HUMAN RIGHTS COMMISSION

Amicus Curiae

WRITTEN OBSERVATIONS OF THE IRISH HUMAN RIGHTS COMMISSION

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Preliminary

1. The Irish Human Rights Commission ('IHRC') is Ireland's National Human Rights Institution.[1] Established pursuant to the Human Rights Commission Acts 2000 and 2001, the IHRC has a statutory remit to promote and protect the human rights of all persons in the State. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State with regard to human rights standards deriving from the Irish Constitution and the international treaties to which Ireland is a party.[2] Those international treaties include the European Convention on Human Rights and Fundamental Freedoms ('ECHR') and the Charter of Fundamental Rights of the European Union ('CFR').

2. The IHRC is mandated under section 8(h) of the Human Rights Commission Act 2000 to apply to the High Court or the Supreme Court of Ireland for liberty to appear as *amicus curiae* in proceedings before those courts involving or concerned with the human rights of any person, and to appear as *amicus curiae* on foot of such liberty being granted. In the present case, the IHRC applied to and was granted leave by the High Court to be joined as *amicus curiae* at an early stage of the proceedings, by Order made on the 1st July 2008.

3. In its capacity as *amicus curiae* the IHRC made submissions to the High Court in relation to the requirement for a preliminary reference pursuant to Article 267 TFEU in the present case. The IHRC also assisted the national court in formulating the questions to be addressed to this Court.

4. In accordance with the rules and practice of the Court of Justice of the European Union,

[1] The independence, competence and functions of the IHRC are consistent with the 'Paris Principles', see UN General Assembly Resolution 48/134, *National institutions for the promotion and protection of human rights*, 1993. These extend to its authority to promote and protect human rights at the national level as an independent agency, its independence guaranteed by law, its pluralism, including in membership, and its broad mandate extending to all fundamental rights based on universal human rights standards.
[2] Section 8(a) of the Human Rights Commission Act 2000.

the IHRC continues to be a party, as *amicus curiae*, in the present preliminary reference proceedings before this Court. For the reasons indicated below, the present written observations are directed primarily towards the last of the three questions referred to the Court, although the IHRC will remain ready to answer any particular questions by way of oral intervention at the hearing of this preliminary reference, for the assistance of this Court, as appropriate.

Focus of Present Observations

5. The first two questions under reference relate to the validity of Directive 2006/24/EC, by reference to the fundamental rights provisions of European Union law deriving from the ECHR and the CFR. By the third question the Court is asked to give direction to the national court in relation to the application of the CFR in the domestic proceedings.

6. The IHRC does not propose to address in terms questions concerning the interpretation of Article 21 TFEU or, in any detail, the question of the validity of Directive 2006/24/EC on any of the grounds referred to in Questions 1 and 2 of the questions under reference. Instead, it is proposed to focus on Question 3, which raises and seeks guidance on what the IHRC believes to be an important aspect, which would benefit from elucidation by this Court, of the jurisdiction of the Irish Courts to protect and vindicate fundamental rights in a European Union law context.

IHRC Position on Questions 1 and 2

7. In circumstances where the IHRC believes that the provisions of Directive 2006/24/EC are very likely capable of being interpreted in a manner that complies with fundamental rights as protected by the Community legal order, and therefore, in all likelihood, that the Directive does not directly conflict with either Article 8 ECHR or Articles 7 and 15 CFR, or the equivalent guarantees in respect of the right to communicate, the IHRC does not propose to address in terms the arguments of the parties in that regard.

8. By way of general observation and assistance, the IHRC submits that the established case law of this Court on the interpretation of legislation which seeks to achieve a balance as between competing rights, and in particular the considerations of proportionality, effectiveness and equivalence that inevitably come into play in the framing and operation of such legislation, point against a conclusion that Directive 2006/24/EC directly conflicts, on its face, with either the right to privacy or the right to communicate protected by Union law.[3] This conclusion is strongly supported by the presumption of validity of secondary EU law, and the corresponding obligation and principle of interpretation that Directives must be interpreted in a manner consistent with the treaties and with respect for fundamental principles of EU law including those deriving from the Charter and the Convention, see for example Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof* 20 May 2003; Case C-101/01 *Lindqvist* 6 November 2003; Joined Cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*; *M E. and Others v Refugee Applications Commissioner and Another* [2011] ECR-I-0000 at paragraph 77; Case C-275/06 *Promusicae* [2008] ECR I-271; Case C-400/10 PPU, *McB*, [2010] ECR I-0000 paragraphs 51-52.

9. The IHRC points out in this last connection that it was already a feature of the case law of this Court, prior to the entry into force of the CFR, that Community legislation impacting on fundamental rights should be subject to full review and to an interpretative obligation, as necessary and to the extent possible, in order to ensure respect for fundamental rights protected by the Community legal order, see the earlier cases cited immediately above and, e.g., Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 69-94; also Opinion 2/94 *Re Accession by the EU to the ECHR* [1996] ECR I-1759, *passim*.

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[3] E.g., Case 44/79, *Hauer v Land Rheinland-Phalz* [1979] ECR 3727; Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case 104/75, *de Peijper* [1976] ECR 613; Case C-384/93, *Alpine Investments* [1995] ECR I-1141; Case C-353/99P, *Council v Hautala*, 6 December 2001, unreported; Case C-112/00, *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659; Case C-36/2002, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609; Case-341/05, *Laval v Svenska Byggnadsarbetareforbundet et al* [2007] ECR-I 11767.

10. In the submission of the IHRC the direct challenge to the Directive in this case is in certain respects similar to the challenges to the Data Protection Directive in Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof* and Case C-101/01 *Lindqvist.* In *Rechnungshof* the CJEU held that collecting information on income and communicating it to third parties was an infringement of private life under Article 8 ECHR, as part of the general principles of EC law. As to whether the interference was necessary, the Court stated that Article 8(2) required that the measure was proportionate to a legitimate aim pursued, with the Member States enjoying a margin of appreciation in that regard. It was for the national court to determine whether such wide disclosure was necessary for and appropriate to the aim of keeping salaries within reasonable limits. In *Lindqvist* the CJEU noted that while the Member States had a margin of manoeuvre in implementing the Directive, there was nothing to suggest that the regime it provided for lacked predictability or that its provisions were, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order.

11. The Court in *Lindqvist* went on to state that it was 'at the stage of the application at the national level of the legislation implementing [the Directive] in individual cases that a balance must be found between the rights and interests involved.' Thus, it was for 'the national authorities and courts responsible for applying the national [implementing] legislation to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.' This means that when the CJEU appraises the compatibility of Directives with the general principles of Community law, in particular fundamental rights, it may quite correctly take into account the fact that, as a Directive, it is a measure which requires legislative elaboration and implementation by the Member States. In that regard, and critically from the perspective of the IHRC, fundamental rights protection in the Community legal order is to a very important extent assured, in respect of implementing measures, at the national level.

12. In the submission of the IHRC, this last point underlines the complementary character of the jurisdiction of this Court and of the national courts, in cases of challenges to

Directives, to review national implementing laws and measures for respect for fundamental rights protected by the Community legal order. In the present case, the referring court is seeking guidance, by its third question, on the scope and intensity of its jurisdiction in that regard.

13. The IHRC also notes that the present reference has been made, in procedural terms, at what is still an early stage of the plenary proceedings before the High Court in Ireland. In particular, no evidence has yet been heard or tested in the substantive plenary action. Whilst the IHRC believes that this consideration does not prevent this Court from answering the questions referred,[4] it is submitted that the necessarily abstract character of the facts contained in the order for reference, and the consideration that the main evidence in the case has still to be heard, point to a potential difficulty faced by this Court in adjudicating on the validity of the Directive in the absence of a more complete factual matrix. At the same time, only this Court has jurisdiction to declare the Directive or any part of it invalid - whilst the referring court may confirm the validity of the EU measure it cannot strike it down - and the net result, in the submission of the IHRC, is to underpin the conclusion that the guidance sought on Question 3 is likely to be the most important in all the circumstances of this case.

14. On a final point, of potential relevance to the Court's answers to all three questions, the IHRC submits that it makes no difference to the standard or intensity of review now required of this Court, and of the referring Court, that Directive 2006/24/EC pre-dates the entry into force of the Charter. The Charter, as primary Union law, must now apply to its full extent and prevail in the event of unavoidable conflict.[5]

Interrelationship of Irish Law with the ECHR

15. The right to privacy, and in that context the protection from interferences with personal

[4] See for example Case C-415/93, *Bosman* [1995] ECR I-4921 paras 55-67; Case C-297/89 *Ryborg* [1991] ECR I-1943 para 6; Case C-279/06 *CESPA* [2008] ECR I-6681, paras 26-32; and Opinion of AG Maduro in Case C-210/06 *Cartesio* (ECJ, 16 December 2008) para 13.

[5] This result is also fully consistent with the corresponding jurisdiction of the European Court of Human Rights, when considering challenges, to keep measures constantly under review in light of developing jurisprudence.

data, is protected in varying degrees under the Constitution of Ireland, the ECHR[6] and the CFR. Ireland has been a party to the ECHR since 1953, but only gave direct legal effect to the Convention by legislation in 2003.[7] The method of domestic incorporation of the ECHR is important in that there are constraints on the remedies that the domestic courts can provide where it is alleged that either legislation is incompatible with the ECHR or where it is claimed an administrative measure does not comply with the State's obligations under the ECHR.

16. In relation to a claim of incompatibility of legislation, the only remedy that may be provided by the national court is a 'declaration of incompatibility'.[8] Such a declaration has no impact on the continuing validity of the legislation in question, which remains in force. The declaration must, however, be brought before the Oireachtas (national parliament) for consideration, and there may then be a political response to the declaration. However, in legal terms, a declaration of incompatibility does not in itself bring about a change in the law, and as such it is a dilute form of incorporation of the ECHR, particularly when compared to the equivalent powers of the Irish courts in respect of legislation found to be inconsistent or repugnant to the Constitution.[9]

17. Other than declarations of incompatibility, there is a general obligation on all 'organs of the State' to perform their functions in a manner compatible with the State's obligations under the Convention.[10] However, this statutory duty has no greater status than other statutory provisions or rules of law, and therefore, where the discharge of a function in a certain manner is necessitated by legislation or a rule of law, and the power or duty is otherwise prescribed and exercised in a constitutional manner, the administrative measure will stand notwithstanding that the exercise of the power or duty is not consistent with the State's obligations under the Convention.

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[6] See for instance *Leander v Sweden*, Judgment 26 March 1987, *Amann v Switzerland*, 16 February 2000, *Klass and Ors v Germany*, Judgment 6 September 1978 and *Malone v The United Kingdom*, Judgment 2 August 1984.
[7] The European Convention on Human Rights Act 2003, came into force on 31 December 2003. Ireland is a dualist state, and so an international treaty does not become part of the domestic legal order upon ratification.
[8] Section 5, European Convention on Human Rights Convention Act 2003.
[9] For example, in 2007 a declaration of incompatibility was made in relation to certain provisions of the Civil Registration Act 2004, in the proceedings entitled *Foy v An tArd Chlaraitheoir & Ors*, [2007] IEHC 470, insofar as the provisions constituted a breach of Article 8 ECHR, however to date, despite the declaration, the said legislation has not been amended by the State to bring it into compliance with the ECHR.
[10] Section 3, European Convention on Human Rights Act 2003.

18. In the submission of the IHRC these considerations point to the importance, in answering Question 3 in the present case, of emphasising the scope and force of the duty of review on the part of the referring court when interpreting and considering the validity of the implementing measures of European law at issue in this case.

Constitutional Immunity of Measures Necessitated by Community Membership

19. Similarly, and of equal if not greater contextual significance to the third question referred, is the consideration that laws enacted, acts done or measures adopted by the State that are necessitated by Ireland's membership of the European Union are, by virtue of Article 29.4.10° of the Constitution, immune from scrutiny for invalidity on constitutional grounds, including on grounds that such laws or measures may infringe fundamental rights protected by the Irish Constitution.

20. Whilst the High Court and Supreme Court of Ireland retain a power to review whether, in fact, laws or measures are 'necessitated' by Union membership, this power of review is necessarily formal, and the courts are naturally hesitant to finely scrutinise whether certain implementing measures fall within or without the strict necessity of the requirements of EU law, see *Crotty v. An Taoiseach* [1987] I.L.R.M. 400 (H.C.), *Lawlor v. Minister for Agriculture* [1988] I.L.R.M. 400 (H.C.), *Greene v. Minister for Agriculture* [1990] I.L.R.M. 364 (H.C.), *Condon v. Minister for Agriculture* High Court, unreported, 12 October 1990, *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 (H.C. & S.C.), *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (H.C. & S.C.).

21. The net effect of this deference, dictated in part, and correctly so, by respect for the principle of the supremacy of EU law, is that there is a certain risk to or chilling effect upon the force of domestic review that might otherwise obtain in respect of the validity of implementing measures. This is a point that is relevant to the principle of co-existence of fundamental rights standards, returned to below, cf. also Hogan and Whelan, *Ireland and the European Union, Constitutional and Statutory Texts and Commentary* (1995), at p. 73; Whelan, "Article 29.4.3º and the Meaning of Necessity" (1992) 2 *Irish Student Law Review*, 60; Tomkin, *Implementing Community Legislation*

into National Law: The Demands of a New Legal Order (2004) JSIJ 130.

22. This point is again relevant, in the submission of the IHRC, to the importance in practice of ensuring that Irish courts fully understand and fulfil their role, as a matter of European Union law, in scrutinising laws and measures that implement Union law for compliance with the fundamental rights protected by the Community legal order.

Scope of Questions under Reference

23. The present proceedings were commenced by way of Plenary Summons in August 2006. At the relevant time, Part 7 of the Criminal Justice (Terrorist Offences) Act 2005 was the statutory provision which permitted the Garda Commissioner (the Third Named Defendant) to request telecommunications providers to retain and provide access to certain data for a period of time, up to three years. Access to the data was permitted to An Garda Síochána in certain circumstances, subject to a limited form of oversight by a High Court Judge. Whilst this legislative provision predates the adoption of Directive 2006/24/EC, it deals with precisely the same subject matter, and was the legislative provision in force at the date on which the State was obliged to have transposed the Directive into national law, that is 15 September 2007.[11]

24. Since these proceedings commenced, the State has repealed Part 7 of the 2005 Act, and replaced it with the Communication (Retention of Data) Act 2011 ("the 2011 Act").[12] This Act is expressly stated to be the transposing instrument for Directive 2006/24/EC ("the Directive"). The plaintiff has since amended its pleadings to take account of this change, [13] and is seeking to impugn section 3(1) of the Communications (Retention of Data) Act 2011, which is in similar terms to Part 7 of the 2005 Act, but which, in accordance with the Directive, reduces the maximum period of retention of data to two years and makes various other changes to the oversight mechanism.

25. It is respectfully submitted that, in these circumstances, Part 7 of the 2005 Act remains

[11] Directive 2006/24/EC, Article 15. While the Directive allowed for member states to postpone transposition until at the latest 15 March 2009, Ireland did not make a declaration to this effect, and so the transposition date for Ireland was 15 September 2007

[12] This Act was commenced on enactment on 26 January 2011.

[13] See para 1.2 of the Preliminary Reference.

relevant and material to the issues raised by the present reference. It therefore appears appropriate that the CJEU should also provide guidance to the national court in that regard.

26. In the submission of the IHRC, it is also material to the response of this Court that the Plaintiff in the present case, in addition to seeking to impugn certain provisions of national legislation and EU law, is challenging the lawfulness of a direction in relation to the retention of data made by the Third Named Defendant under the relevant provisions of national law.[14] As those provisions transpose the Directive, it appears appropriate that the CJEU should also provide guidance, having regard to the relevant provisions of the CFR, on the exercise by the law enforcement authorities in Ireland, and throughout the European Union, of the discretion in question in a manner compatible with European Union law.

27. The question arises for this Court as to whether the Directive is valid in light of the provisions of the CFR and ECHR.[15] If the Directive is found to be valid, a residual question will have to be addressed by the national court, as to whether national measures, being the transposing legislation and a particular administrative decision, are also valid.

28. As set out in the Preliminary Reference,[16] if the Directive is found to be valid and in compliance with EU law by this Court, then the 2011 Act, to the extent that it is necessitated by EU law, will be immune from constitutional challenge. However the remaining part of the plaintiff's claim will still require to be determined; that is whether the legislation is compatible with the ECHR, and EU law (compatibility with

[14] It is also alleged that a direction was made by a Minister of State by which measure it is claimed that the said Minister came into and exercised control over certain data relating to users of mobile phones, including the Plaintiff. The alleged direction was made pursuant to section 110, of the Postal Telecommunications Services Act 1983 (as amended by the Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993. This allegation is denied by the State, but in any event pre-dates the requirement to have transposed Directive 2006/24/EC.

[15] Article 6 TEU. It is noted that the EU is in negotiations with the Council of Europe (CDDH-UE) to ratify the ECHR, as required by Article 6 TEU. Following such ratification individuals will be able to bring complaints against States and the EU concerning the implementation of EU law before the European Court of Human Rights.

[16] Paras 4.1- 4.5.

the Directive and the CFR). Insofar as the 2005 Act is relied upon as a pre-existing implementation of the Directive, the compatibility of Part 7 of that Act, and any measures taken under it may also be challenged by the plaintiff, for the period after the transposition date for the Directive passed until its repeal and replacement by the 2011 Act. It is submitted that a question therefore necessarily arises for the national court regarding the application of the CFR.

Application of the Charter

29. The CFR formally became part of European Law on 1 December 2009.[17] Pursuant to Article 51(1) of the Charter, the CFR binds the institutions of the EU as well as the Member States 'when they are implementing Union law'. This critical limitation is contained in Article 51(1) of the Charter, which provides in full as follows:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

30. Member States act 'within the scope of Union law' when they apply Treaty provisions or implement Union acts, including when transposing Directives into domestic law, Case 222/84 *Johnston* [1986] ECR 1651, paras 13-21; Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Osterreichischer Rundfunk & Others [2003] ECR I-4989, paras 68-91;* Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood GSP* [2003] ECR I-7411, paras 88-92 (also the Opinion of AG Mischo in that case).[18] In consequence, the Court of Justice has confirmed that the provisions of the Charter may be prayed in aid against the authorities of the Member States whenever they implement EU law,[19] or in a situation where a "national measure… is connected in any other way with EU law".[20]

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[17] Article 6, Treaty of Lisbon.

[18] Thus, the mere fact that the Member State acts within a policy area covered by EU competences is not sufficient. C-361/07, Polier, [2008] ECR I-6, points 13-15, and already C-309/96, Annibaldi, [1997] ECR, I-7493. For a contrary view (but proposed not *de lege lata* prior to 1 December 2009 and leaving open whether *de constitutione ferenda* or "*de Charta lata")* AG Sharpston, in: C-34/09, Zambrano, [nyr], points 163 et.seq.

[19] See orders in the following cases among others: Case C-339/10 *Asparuhov Estov and Others* [2010] ECR

31. Furthermore, national rules fall within the scope of Union law if they obstruct the exercise of freedoms guaranteed by the Treaties, cf. Case C-7/98 *Krombach* [2000] ECR I-1935, paras 35-45 and Case C-394/07 *Gambazzi* [2009] ECR I-2563, paras 26-48. Admittedly, here the Member State acts not as an EU agent but in its own interest and on the basis of its own law. However, when scrutinising whether a restriction to a fundamental freedom is proportionate and thus, justified under the Treaty it is impossible to leave aside fundamental rights impacts from the comprehensive assessment required under the proportionality principle. This is true for both constellations covered by this line of cases: where the restriction of a fundamental freedom also affects the fundamental rights of the same person (as, e.g., in C-260/89 *ERT* [1991] ECR I-2925 or C-368/95 *Familiapress* [1997] ECR I-3689), and where the need to protect a fundamental right is invoked as justifying the restriction (as , e.g., in C-112/00 *Schmidberger* [2003] ECR I-5659 or C-36/02 *Omega* [2004] ECR I-9609).

32. As regards the transposition of Directives, it appears that Article 51 should apply not only where the transposing legislator has no margin, but also where it uses options or derogations foreseen in the Directive, but not where, merely at the occasion of transposing, it adds national provisions not induced by the Directive.[21] Where a Directive, or indeed the Treaty, requires national measures to be "compatible with the Treaties", that is not enough to make the Charter applicable, since such a clause does not determine which part of Treaty law is applicable in the first place.[22] However, where an EU provision aiming to implement a specific equality right applies to a given national act, that has been accepted as a sufficient link to also apply the corresponding fundamental equality right.[23]

I-nyr, paragraph 13; Case C-457/09 *Chartry* [2011] ECR I-nyr, paragraph 25; and order of 14 December 2011 in Joined Cases C-483/11 and C-484/11 *Boncea and Others*, paragraph 29.

[20] Case C-27/11 *Vinkov v Nachalnik Administrativno-nakazatelna deynost* 7 June [2012] ECR I-nyr at para 59.

[21] C-540/03, Parliament v. Council, [2006] ECR I-05769, point 104; See also joined cases C-411/10 and C- 493/10, N.S. and Others,v Secretary of State for the Home Department, paras 64-69, confirming that where a regulation grants Member States a discretionary power, the exercise of that power may still be an "implementation of Union law" where the power is merely an element of a comprehensive Union regime (here: the Common European Asylum System).

[22] C-6/03, Eiterköpfe, [2005] ECR I-2753, points 59-64, for the proportionality principle. See also the structural funds example mentioned further below.

[23] C-555/07, Kücükdeveci, [2010] ECR I-365.

33. Whereas there may in certain contexts be good reasons for ensuring that the notion of 'implementing' Union law is not given too wide a scope, it is submitted that there can be no doubt but that the implementing measures here at issue fall squarely within the parameters of Article 51(1) of the Charter.[24] In the submission of the IHRC, the 2011 Act as well as Part 7 of the 2005 Act are manifestly measures implementing EU law. Those measures must comply with the underlying Directives which they transpose, and in addition they must comply with the requirements of the CFR. Furthermore, if and to the extent that these national measures allow for the exercise of discretions, it is submitted that the exercise of those discretions must not breach (as by disproportionately encroaching upon) rights protected by the Community legal order including the CFR.

34. The IHRC relies in this last connection on the analysis of Advocate General Trstenjak in her Opinion of 22 September 2011, in Case C-411/10, *N. S. v Secretary of State for the Home Department*, at paragraphs 71 to 83, which in the result was upheld by the judgment of the Grand Chamber in its judgment in Joined Cases C-411/10 and C-493/10, *NS and ME* [2011] ECR I-0000, as follows:[25] (with certain footnotes omitted)

> 71. Article 51 of the Charter of Fundamental Rights defines the field of application of the Charter. Article 51 confirms, first of all, that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the European Union, and to the Member States. Secondly, it is ensured that the binding force of fundamental rights for the EU institutions and the Member States does not have the effect of either shifting powers at the expense of the Member States or extending the field of application of EU law beyond the powers of the European Union as established in the Treaties.[26]
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> 72. In order to preclude an extension of the European Union's powers in relation to the Member States, Article 51(1) of the Charter of Fundamental Rights provides in particular that
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> – the application of the Charter must not restrict the principle of subsidiarity (first sentence of Article 51(1)),

[24] Cf. Clemens Ladenburger, FIDE Report (2012), 16 et seq; also Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question* (2002) CMLRev 945-994.
[25] With certain of the footnotes omitted and adapted here.
[26] Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 32).

– the Member States are bound by the Charter only when they are implementing EU law (first sentence of Article 51(1)),

– the observance and application of the Charter must respect the limits of the powers of the European Union as conferred on it in the Treaties (second sentence of Article 51(1)).

73. In addition, Article 51(2) of the Charter of Fundamental Rights contains the general statement that the Charter does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties.

74. Against this background, with its first question the referring court takes up the requirement laid down in the first sentence of Article 51(1) of the Charter of Fundamental Rights that the Member States are bound by the Charter only when they are implementing EU law. In this connection it asks whether the Member States 'are implementing Union law' within the meaning of that provision where they decide, on the basis of their discretion under Article 3(2) of Regulation No 343/2003, whether or not to examine an asylum application instead of the Member State which is primarily responsible.

75. In my view, this question must be answered in the affirmative.

76. As can be seen from the Explanations relating to the Charter of Fundamental Rights ('the Explanations'),[27] the principle laid down in the first sentence of Article 51(1) of the Charter of Fundamental Rights, according to which the Member States are bound by the Charter only when they are implementing EU law, is to be regarded as a confirmation of the Court's previous case-law on respect by the Member States for the fundamental rights defined in the context of the European Union. The Explanations make express reference to the decisions of principle in *Wachauf*[28] and *ERT*,[29] and to *Karlsson*.[30]

77. In *Wachauf* the Court found that the requirements of the protection of fundamental rights are also binding on the Member States when they implement EU rules and the Member

[27] OJ 2007 C 303, p. 32. Under Article 52(7) of the Charter of Fundamental Rights, the Explanations, drawn up as a way of providing guidance in the interpretation of the Charter, are to be given due regard by the courts of the European Union and of the Member States. The importance of the Explanations for the interpretation of the individual provisions of the Charter is also expressly confirmed in the third subparagraph of Article 6(1) TEU.
[28] Case 5/88 [1989] ECR 2609.
[29] Case C-260/89 [1991] ECR I-2925.
[30] Case C-292/97 *Karlsson and Others* [2000] ECR I-2737. This judgment can be classified in the 'Wachauf' line of case-law.

States must, as far as possible, apply those rules in accordance with those requirements.[31] In *ERT* the Court also found that restrictions of the fundamental freedoms made by the Member States must satisfy the requirements of the protection of fundamental rights in the EU legal order.[32]

78. Having particular regard to the fact that the Explanations make reference to both the *Wachauf* case-law and the *ERT* case-law, the Member States must be regarded as being bound by the Charter of Fundamental Rights, under Article 51(1) of the Charter, both when they implement EU rules and in the context of national restrictions of the fundamental freedoms.[33]

79. Against this background, the question arises in the present case whether a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum is to be regarded, for the purposes of Article 51(1) of the Charter of Fundamental Rights and in the light of the *Wachauf* case-law, as a national implementing measure for Regulation No 343/2003.

80. In my view, this question must be answered in the affirmative. The discretion enjoyed by the Member State in making that decision does not preclude that assessment. Rather, the crucial factor is that Regulation No 343/2003 lays down exhaustive rules for determining the Member State responsible for examining an asylum application. The option afforded to the Member States to examine asylum applications pursuant to Article 3(2) of Regulation No 343/2003 is an integral part of those rules, which is, inter alia, reflected in the fact that the regulation lays down comprehensive rules governing the legal consequences of such a decision.[34] Consequently, decisions taken by the Member States on the basis of Article 3(2) of Regulation No 343/2003 are also to be regarded as implementing measures, despite the discretion available to them.

81. This view is confirmed in *Wachauf*, in which the Court examined, among other things, the compatibility of individual provisions of Regulation No 1371/84 with the requirements of the protection of fundamental rights in the EU legal order. Regulation No 1371/84 conferred on the Member States the power to give the lessee of a milk-producing farm, under certain circumstances, compensation for the definitive discontinuance of milk production at the end of the lease. In the main proceedings, a lessee brought an action because he had been refused

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[31] *Wachauf*, cited above in footnote 14, paragraph 19. That judgment was confirmed in Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 104 et seq.

[32] Case C-260/89 *ERT*, cited above in footnote 15, paragraph 41 et seq.

[33] See also Ladenburger, C., Article 51, in *Europäische Grundrechtecharta* (ed. Tettinger, P./Stern, K.), Munich 2006, paragraph 22 et seq.; Nowak, C., in *Handbuch der Europäischen Grundrechte* (ed. Heselhaus/Nowak), Munich 2006, § 6, paragraph 44 et seq.

[34] Under Article 3(2) of Regulation No 343/2003, the Member State which decides voluntarily to examine the application for asylum becomes the Member State responsible within the meaning of that regulation and assumes the obligations associated with that responsibility.

such compensation, even though he had definitively closed the farm intended for milk production he had built up. Against this background, the Court was required to rule, inter alia, on whether that refusal to grant compensation inevitably followed from Regulation No 1371/84 and whether it was consistent with the EU fundamental rights which had been recognised as general principles of law. In its judgment, the Court held, on the one hand, that the refusal to grant a departing lessee the compensation in question should be regarded as an infringement of the requirements of the protection of fundamental rights in the EU legal order if he was deprived, without compensation, of the fruits of his labour and of his investments in the tenanted holding.[35] Because, however, Regulation No 1371/84 allowed the Member States, specifically in these cases, a sufficient margin of appreciation in granting the lessees due compensation which was consistent with the requirements of the protection of fundamental rights, in the view of the Court, the rules contained in the regulation were to be regarded as consistent with the fundamental rights.[36]

82. Even though in *Wachauf* the Court addressed, first and foremost, the consistency of the contested regulation with fundamental rights, it confirmed, at least implicitly, that the decisions by the Member States to grant compensation to departing lessees, which are taken by the national authorities on the basis of the discretion conferred by Regulation No 1371/84, must, as far as possible, be in accordance with the requirements of the protection of fundamental rights. The Court thus confirmed, at the same time, that decisions made by the Member States on the basis of the discretion available to them under EU legislation are to be regarded as implementing measures for that EU legislation for the purposes of protection of fundamental rights under EU law.[37]

83. In the light of the foregoing, the first question must be answered to the effect that a decision made by a Member State under Article 3(2) of Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the regulation constitutes a measure implementing EU law for the purposes of Article 51(1) of the Charter of Fundamental Rights.

35. In the submission of the IHRC, this analysis is wholly consistent with and supported by the tenor and content of the emerging jurisprudence of this Court on the interpretation of Article 51(1) of the Charter, cf. also AG Sharpston in Case C-34/09, *Zambrano*, [nyr], points 163 et.seq.; AG Bot in Case C-108/10, *Scattolon*, [nyr], points 118-110; Advocate General Cruz Villalón in Case C-617/10 *Fransson*; and, *mutatis*

[35] *Wachauf*, cited above in footnote 14, paragraph 19.
[36] Ibid. (paragraph 22 et seq.).
[37] See also Case C-540/03 *Parliament* v *Council*, cited above in footnote 17, paragraph 104.

mutandis, in a pre-Charter context, Case C-60/00, *Carpenter* [2002] ECR I-6279; and Case C-71/02 *Karner* [2004] ECR I-3025.

Application of Articles 8 and 10 ECHR

36. Article 6(3) TEU now provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

37. Recital 9 of Directive 2006/24/EC provides as follows:-

> "Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 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 organized 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. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the ECHR is therefore a necessary measure."

In addition, Recital 25 provides:-

> This Directive is without prejudice to the power of Member States to adopt legislative measures concerning the right of access to, and use of, data by national authorities, as designated by them. Issues of access to data retained pursuant to this Directive by national authorities for such activities as are referred to in the first indent of Article 3(2) of Directive 95/46/EC fall outside the scope of Community law. However, they may be subject to national law or action pursuant to Title VI of the Treaty on European Union. Such laws or action must fully respect fundamental rights as they result from the common constitutional traditions of the Member States and as guaranteed by the ECHR. Under Article 8 of the ECHR, as interpreted by the European Court of Human Rights, interference by public authorities with privacy rights must meet the requirements of necessity and proportionality and must therefore serve specified, explicit and legitimate purposes and be exercised in a manner that is adequate, relevant and not excessive in relation to the purpose of the interference,

Article 4 of the Directive, entitled 'Access to Data', provides:-

> 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 European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

It follows from these provisions, and in particular from the express provisions of Article 4, that Directive 2006/24/EC as well as national laws and measures taken in implementation of the Directive must comply, as a matter of Union law, with Article 8 and Article 10 ECHR, cf., *mutatis mutandis*, Joined Cases C-411/10 and C-493/10, *N.S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] OJ C 274/21 and OJ C 13/18, paragraph 15 of the judgment of the CJEU. In that case, having emphasised the extent to which the Directive there at issue expressly stated that it respected, and therefore was to be interpreted and applied in a manner that ensured respect for fundamental rights including those derived from the Charter, the Court stated as follows at paragraphs 76 and 77 of its judgment:-

> "As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.
>
> According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28)."

38. In the respectful submission of the IHRC, these express provisions of the Directive reflect the position that would in any event obtain, absent those provisions, by virtue of the established case law of this Court as reaffirmed by Article 6(3) TEU, see for example Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629 paragraphs 14 to 15; and Opinion 2/94 *Re Accession by the EU to the ECHR* [1996] ECR I-1759, paragraph 34.

Guiding Principles

39. When a Directive or Regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-0000).

40. The overarching objective of Directive 2006/24/EC is to harmonise national provisions relating to the retention of data by service providers for the prevention, investigation, detection, and prosecution of criminal offences.[38] The Directive acknowledges the usefulness of such data for dealing with crime.[39] However, the Directive repeatedly affirms the importance of observing fundamental rights, as reflected in respect of the Convention in Recitals 9 and 25 and in Article 4 of the Directive, set out above. In addition, Recital 22 affirms that Directive 2006/24/EC is understood to respect the fundamental rights and observe the principles recognised by the CFR. It provides as follows:-

> 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.

41. Whilst it can be noted that these assertions are at the heart of the subject matter of the present preliminary reference, and beg the question as to whether the Directive and its implementing measures in fact comply with the requirements of fundamental rights protected by the Community legal order, nonetheless they reflect a recognition, in formal terms, of the importance of those protections in the particular context of the retention of data on private communications for law enforcement purposes. To that extent, they can and do serve as an interpretative tool of relevance to the Questions referred. See paragraph 15 of the Judgment of the CJEU in joined Cases C-411/10 and C-493/10, *N.S. (C-411/10) v. Secretary of State for the Home Department and M. E.*

[38] Recital 6, Directive 2006/24/EC.
[39] Recital 7, Directive 2006/24/EC.

and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2011] OJ C 274/21 and OJ C 13/18.

42. Article 52 of the Charter sets out the scope of the rights guaranteed and also defines the inter-relationship between the rights in the CFR and the corresponding rights guaranteed by the ECHR.[40]

> "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
>
> 2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

43. It follows that a proper understanding of the Charter's provisions necessarily requires a proper understanding of the relevant Strasbourg jurisprudence since Article 52(3) of the Charter requires that those Charter rights which correspond to rights already guaranteed by the ECHR be given the same meaning and scope as, and no lesser degree of protection than, is provided under the ECHR. In the present case, the right to privacy is protected both under the ECHR (Art 8) and correspondingly under the CFR (Arts 7 and 15). Therefore the meaning and scope of that protection under the CFR must at a minimum be at the same level as under the ECHR. In Case C-400/10 PPU *J McB v LE* the CJEU ruled that where Charter rights paralleled ECHR rights, the Court of Justice should follow any clear and constant jurisprudence of the European Court of Human Rights, noting that:[41]

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[40] Refer to Article 53 CFR.

[41] [2010] ECR I-0000 at paragraph 53.

> "It is clear that the said Article 7 [of the EU Charter] contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. *Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights* (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48)."

44. It also follows from Article 53 of the Charter that the Charter recognises and encourages the capacity for double scrutiny of implementing measures, by reference to national human rights standards as well as Community law, in accordance with what is known as the principle of co-existence of several layers of fundamental rights protection. For example, this Court's judgment in case C-135/08, *Rottmann*, [2010] ECR I-1449, paragraph 55, admits a double scrutiny of national acts implementing Union law, in that case proportionality under EU and national law; cf also Case C – 399/11, *Melloni* (pending). Commenting on this double scrutiny jurisdiction, Clemens Ladenburger, of the Commission Legal Service, in his Report at the XXV Congress of FIDE, in Tallinn, May/June 2012, states as follows:-

> The real challenge, in *Wachauf* situations, is to interpret the Union law that is being implemented in order to ascertain the margin of appreciation or discretion it really leaves.[42] In *ERT* situations, it would be paradoxical if Union law deprived an EU citizen, who challenges a national measure restricting his or her fundamental freedoms, of a national fundamental rights argument; rather that argument should co-exist with the Charter rights which that citizen can invoke. The principle of co-existence is also conducive to respect for Member States' national identities, including their fundamental constitutional structures (Article 4 (2) TEU).[43] Finally, a strong argument is now provided by the basic architecture of the EU's forthcoming accession to the ECHR: Under the Accession Treaty, the Union as such will assume international responsibility pursuant to the ECHR only with regard to the acts of its own institutions and bodies, while Member States will fully retain their responsibility for all their acts, including those implementing Union law and subject only to a procedural co-respondent mechanism. There will thus in any event be a cumulative application of the Charter and the ECHR as incorporated in national law.
>
> ...
>
> Admittedly, the principle of co-existence of several layers of fundamental rights protection

[42] E.g., for such an interpretation, joined cases C-383/06 to C-385/06, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, [2008] ECR I-1561, points 53-59 (in relation to the principle of legitimate expectations).

[43] On that principle, see L. Besselink, 6 Utrecht Law Review (2010), p. 36 - 42.

> as arguably enshrined in Article 53 has a price: complexity. Particularly in situations of colliding rights, it can become a daunting task for a national administrator or judge to assess which margin, if any, a norm of Union law may leave for applying rights other than those of the Charter, and then to identify the various applicable fundamental rights and their meaning pursuant to the case law of the Strasbourg, Luxembourg and the national constitutional court. But in our view, this complexity cannot be avoided by imposing a stern antagonism between applying either the Charter or national fundamental rights. It is rather one more factor commending a prudent determination of the field of application of Article 51 (1).

45. In the specific case of Ireland, as indicated above, the manner of incorporation of the ECHR into Irish law means that the remedies available may not adequately ensure the full protection of the rights concerned, particularly where an issue of compatibility of legislation arises. The immunity of acts and measures necessitated by Union membership from review for invalidity on constitutional grounds, pursuant to Article 29.4.10° of the Constitution, provides a further limitation. On the other hand, compliance with EU law is mandatory. Against this background, in the submission of the IHRC it is precisely because it is in the exercise of discretions under the Directive, and under its implementing laws and regulations as a matter of national law, that the balance may be tipped against the proportionality of particular measures or decisions, that the critical guidance to be given by this Court, in answer to the questions under reference, will fall to be given in relation to the interpretation and application in practice of the Directive and of its implementing measures.

46. It is well established that the actions of Member States when seeking to implement or enforce an EU law provision may be subjected to the same fundamental rights review as this Court applies to the actions of the EU institutions, Case 5/88 *Wachauf v Germany* [1989] ECR 2609; Case C-235/99 *R v Secretary of State for the Home Department ex parte Kondova* [2001] ECR-I 6427. Furthermore, fundamental rights as protected by EU law govern the actions of Member States when seeking to implement an EU Directive, Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood GSP v Scottish Ministers* [2003] ECR I-7411; as well as in seeking to derogate from it, Case C-260/89 *ERT v DEP* [1991] ECR I-2925, Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* [1997] ECR I-3689, at paras 18-

27.

47. It follows that fundamental rights considerations are properly matters for considering and testing as appropriate the validity of the legislative and administrative actions of Member States when purporting to implement EU Directives. As stated by this Court in Case C-299/99 *Kremzow v Austria* [1997] ECR I-2629 at paragraph 15:-

> "[W]here national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the Convention – whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law."

48. Accordingly, it is only where the national legislation is regarded by this Court as falling within the exclusive jurisdiction of the Member State and as having no effect in an area covered by EU law that this Court may decline to offer its opinion on the compatibility of a national measure with the requirements of fundamental rights as they derive from the Charter and the Convention, see for example O'Neill, *EU Law for UK Lawyers* (2011), 202, citing Case 159/90 *SPUC v Grogan* [1991] ECR I-4685 *per* Advocate General van Gerven at para 31.

49. In accordance with this case law, national courts have a duty under EU law to ensure that national measures falling within the field of operation of EU law accord with respect for fundamental rights as interpreted and applied by the CJEU. As the Grand Chamber of this Court emphasised in Case C-275/06 *Produtores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271 at para 68:-

> "Member States must, when transposing the directives … take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality."

50. In the submission of the IHRC this principle is itself a reflection of the duty of sincere cooperation between the institutions of the EU and Member States, as provided for in Article 4.3 TEU (ex Article 10 EC). This principle applies to the relationship between the CJEU and the national courts. Accordingly, pursuant to that obligation, there is both a positive and a negative obligation on the Member State, including its courts. The State must take positive measures to ensure the fulfilment of EU law, but in addition there is a negative obligation, incumbent on the national referring court, to refrain from an interpretation or application of the national implementing measures that would frustrate the achievement of the Union's objectives including, in the present case, the due protection of fundamental rights deriving from the Community legal order.

51. In the submission of the IHRC, it follows from the above case law that the obligation referred to in Question 3 of the questions under reference is not only an obligation that derives from the treaty duty of sincere cooperation, but more importantly, and fundamentally, it is an obligation that the national court is obliged as a matter of law to undertake pursuant to Article 51(1) of the CFR. In respect of Convention rights, whilst that same obligation of inquiry does not derive from the Charter, the equivalent obligation of scrutiny is reflected in the well established jurisprudence of this Court.[44]

52. In essence this Court is asked whether Directive 2006/24/EC complies with fundamental rights protections. If the answer is yes, then the national court, in fulfilling its role, will be asked to then consider whether the national legislation intended to transpose the Directive also respects fundamental rights, principally Article 8 of the ECHR, under the terms of the ECHR Act 2003 and under the terms of the Directive itself, as well as Articles 7 and 15 of the CFR.

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[44] See for instance joined Cases C-411/10 and C-493/10, *N.S. (C-411/10) v. Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] OJ C 274/21 and OJ C 13/18.

53. As indicated above, the ECHR has been incorporated into domestic law at a sub-constitutional level, and only offers limited remedies for a breach of the ECHR. Furthermore, experience demonstrates that the intensity or review on the part of Irish courts as to whether a measure is 'necessitated' by membership of the European Union, and therefore immune from scrutiny for invalidity on constitutional grounds including by reason of failure to respect fundamental rights guaranteed by the Irish Constitution, may be somewhat muted.

54. In these circumstances, in the submission of the IHRC, it is of particular importance, from a human rights perspective, that the Irish courts are given clear guidance as to the scope and force of their duty to scrutinise laws and measures that implement Union law for compliance with the fundamental rights protected by the Community legal order. The IHRC relies in this connection on the following statement of practice, made by Clemens Ladenburger, of the Commision Legal Service, in his Report at the XXV Congress of FIDE, in Tallinn, May/June 2012, which the IHRC believes to accurately reflect the relations between this Court and the national referring court, and the respective responsibilities and duties arising in respect of the review of implanting legislation by the respective courts:-

> To the extent that choices are not made by the EU legislator itself, the Court and national courts, cooperating under the preliminary reference procedure, need to ensure a fair balance between colliding rights, be it by scrutinising acts of national authorities or by setting the balance themselves in litigation between private parties. This can be particularly delicate for the Court: a balance must not only be found between colliding rights, but also between the respective remits and responsibilities of the intervening European and national levels.
>
> In the *Promusicae* case,[45] characterised by a collision between two classic fundamental rights – data protection and intellectual property – arising within the scope of several EU directives, the Court first scrutinised whether the case was determined by an express choice of the EU legislator. This not being the case in the Court's view,[46] the task fell on the national transposing legislator, and for the authorities and courts applying such legislation, to strike a fair balance in line with the principle of proportionality. Interestingly, rather than binding such national action directly by Union fundamental rights, the Court prefers to stress the duty of national authorities to rely on an interpretation of the relevant EU directives which is compatible with those rights and allows a fair

[45] C-275/06, 2008 [ECR] I-271.
[46] But see AG's Kokott's different view, at points 85 – 89 of her opinion; and P. Oliver, 46 CMLR (2009), p. 1443, 1466 et seq

balance to be struck. This approach is respectful of the national legislator but also encourages national judges to develop – and test with the Court – interpretations of EU legislation in the light of the Charter. However, the recent judgments *Scarlet Extended* and *SABAM*,[47] delivered in the same area of the digital market and in a very similar constellation of colliding rights, show that the Court's deference has its limits: the Court does not hesitate to find itself that a national measure has exceeded a reasonable margin of appreciation where it appears *un*balanced on its face – but it is also remarkable how meticulously the Court scans the applicable acquis, so as to rely not on the Charter alone but in the first place on legislative provisions, read in the light of fundamental rights, when censuring the national measure.

The Court has more often been seized with collisions between a fundamental freedom and a fundamental right. The judgments *Schmidberger*, *Omega* and *Viking*[48] are emblematic in that regard. Crucially, in all cases the colliding fundamental freedom and fundamental right are approached as having the same rank and needing to be reconciled *in casu*, in line with the principle of proportionality. The sequence of assessment followed in the judgments – looking first at a restriction to the fundamental freedom which is in breach of the Treaty *unless* justified by the aim of protecting the fundamental right – entails no hierarchy between them. Rather, the fundamental freedom is simply the basis for the Court's competence to give preliminary ruling.[49] That said, the Court modulates the intensity of its scrutiny and the corresponding margin of appreciation afforded to the national authorities and judges. In *Schmidberger* and particularly in *Omega*, the Court leaves a wide margin to national authorities and accepts the restriction to a fundamental freedom as justified. In the latter case, it also shows deference to the national fundamental right of human dignity and its particular interpretation in Germany, considering it sufficient that Union law also recognises human dignity in principle. In *Viking*, the Court has a much closer look and, although leaving the ultimate decision to the referring judge, gives rather precise guidance for assessing whether the restriction to freedom of establishment by a trade unions' strike action can be justified. This difference in approach can be explained: the Court's scrutiny must be stricter where, as in *Viking*, the measures at issue may be protectionist and thus go directly against a fundamental Union value, than where there is no such dimension and perhaps even a basic value of a Member State's Constitution at stake, as in *Omega*.[50]

55. The IHRC submits that the facts of the case as outlined in the Order for Reference squarely raise issues of compliance with Article 8 ECHR and Articles 7 and 15 CFR

[47] See footnote 178 above.
[48] C-112/00, Schmidberger, [2003] ECR I-5659; C-36/02, Omega, [2004] ECR I-9609; C-438/05, Viking, [2007] ECR I-10779.
[49] V. Skouris, EBLR 2006, p. 225, 237 et seq.
[50] K. Lenaerts / J. Gutiérrez-Fons (footnote 79), p. 1666. Similarly AG Kokott, in: C-73/07, Satamedia, [2008] ECR I-9831, points 46-51. J.-P. Jacqué (footnote 12), p. 2, 9 et seq.; Editorial by LB and JHR, 4 EuConst (2008), p. 199. On Omega (C-36/02, [2004] ECR I-9609), see in particular L. Besselink, 6 Utrecht Law Review (2010), p. 36, 45.

and/ or of Article 10 ECHR and Article 11 CFR and that, following the ruling of this Court on the three questions referred, it will fall to the national court to determine whether there has been a violation of those provisions on the basis of the relevant legislation and the material facts before it. The national court will be called on to consider *inter alia*, whether the procedural protections available to the plaintiff under Article 8 of the ECHR, Article 7 of the CFR and indeed Article 40.3 of the Constitution, have been properly observed by the Defendants. In this regard it is also noted that the Postal Telecommunications Services Act 1983 (as amended) remains in force.

56. The IHRC submits that the national court will also be called on to adjudicate on whether, *inter alia*, certain directions made by the Garda Commissioner (the Third Named Defendant) constituted an interference with the Plaintiff's right to respect for private life under Article 8(1) ECHR and was "in accordance with law" (in terms of being adequately precise, foreseeable, accessible etc. If determined to be "in accordance with law", the national court would need to consider the tests under Article 8(2): whether the interference was necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. If so, the national court would need to further consider whether the interference was proportionate to the legitimate public end sought to be achieved, including whether it corresponded to a pressing social need and could not have been achieved by other means.

57. It is submitted that in order for the national court to determine these questions, it would benefit from "guidance as to [the] interpretation necessary" from the Court as to the status of the ECHR as it corresponds to the Charter, the status of the Charter in EU law when being transposed into national systems, particularly where the implementing measure is in terms as described in the facts outlined herein.

58. Having regard to all these considerations, the IHRC submits that it is essential in order to uphold the principle of loyal cooperation between EU institutions and Member States pursuant to Article 4.3 TEU, and the legal obligation incumbent on the referring

court under Article 51(1), that Question 3 be answered in a manner, and as completely as this Court requires, in accordance with the principle in *Kremzow*, above, which confirms that the Charter has the force of primary EU law before the national courts in relation to matters of Community law, and that the duty of the referring court is to scrutinise the implementing measures and to interpret and apply those measures so as to ensure respect for the fundamental rights protected by the Community legal order. Where it is alleged that a measure taken by a Member State to give effect to EU law (whether the measures takes the form of legislation, Ministerial Direction, or the directions of law enforcement authorities concerning data retention), and which measure(s) is alleged to breach fundamental rights, the national court must fully inquire into and assess the compatibility of those implementing measures, with the protections afforded by the CFR. Where the implementing measures are found to breach the provisions of the CFR, then they must be declared null and void by the national courts to ensure the effective implementation of Community Law.

59. This approach, it is respectfully submitted, would have the additional benefit of ensuring legal certainty; of reducing potential applications to the European Court of Human Rights, in relation to matters that also concern EU law; and of demonstrating how the EU Institutions and the Member States, when implementing EU law, provide effective domestic remedies for the purposes of the ECHR.

Patrick Dillon-Malone

24th September 2012

Signed: _____

Sinéad Lucey
Solicitor
Irish Human Rights Commission

Signed: _____

Patrick Dillon Malone
Barrister at Law