**THE HIGH COURT**

**[2006 No. 3785 P]**

**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 OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered on the 19th day of July, 2017**

1. In this case the plaintiff seeks an order setting down for trial as a preliminary matter the European Union Law issues in the proceedings or in the alternative an order of referring to the Court of Justice of the European Union the question: -

> *"whether, in light of the Provisions of the Charter of Fundamental Rights and Freedoms and the findings of the Court of Justice (sic) in Digital Rights Ireland v. Ireland a domestic legislative measure which requires indiscriminate retention of telecommunications data for a period longer than is required for the legitimate commercial purposes of the telecommunications providers, is valid."*

2. The application is brought pursuant to O. 25 and O. 34, r. 2 of the Rules of the Superior Courts. Order 34 r. 2 provides: -

> *"If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried… the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."*

3. Order 25 provides: -

> *"1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.*
>
> *2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action … the Court may thereupon dismiss the action or make such other order therein as may be just."*

**Background**

4. The plaintiff is a company limited by guarantee which has as one of its objects the promotion and protection of civil and human rights, particularly those arising in the context of modern communication technologies. In these proceedings, the plaintiff alleges that the defendants have wrongfully exercised control over data in that they have illegally processed and stored data relating to the plaintiff, its members and other mobile phone users contrary to statute European Union law and the Constitution.

5. These proceedings already have a lengthy history. They were commenced by way of plenary summons on the 11th August, 2006, in the wake of the adoption of Directive 2006/24/EC of the European Parliament and of the Council on the 15th March, 2006, on retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (the Directive). Among other reliefs, the plaintiff sought a reference to the CJEU on the question of where the Directive 2006/24/EC was valid notwithstanding Articles 6 (1) and (2) of the EU Treaty, Articles 10 and 18 of the EC Treaty, Articles 7, 8, 11 and 41 of the Charter of Fundamental Rights and Freedoms ("the Charter") and Article 5 of the EC Treaty.

6. The plaintiff also sought declarations that certain provisions of domestic law were repugnant to the provisions of the Constitution, were incompatible with certain provisions of the European Convention on Human Rights ("ECHR") or were invalid having regard to the provisions of the Charter of Fundamental Rights of the European Union/2000/C364/01 ("the Charter") and two decisions in particular of the CJEU, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, and Others C-293/12 and Karntner Landesregierung and Others* (joined cases C-293/12 and C-594/12) EU:C:2013:845 ("*Digital Rights*") and *Tele2 Sverige AB v. Post-och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others* (joined cases C-203/15 and C-698/15) EU:C:2016:970 ("*Watson*")

7. On the 5th May, 2010, the High Court (McKechnie J.) held that the plaintiff had *locus standi* to bring an *actio popularis* and refused the defendants' motion for security for costs. He referred the validity of the Directive to the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The Court of Justice declared that the Directive was invalid in a judgment delivered on the 8th April, 2014.

8. Prior to the judgment, the member states had in the meantime introduced national legislation implementing the Directive in their respective states. In light of the decision in *Digital Rights*, some member states concluded that their domestic legislation was invalid based upon the decision of the CJEU.

9. In Sweden and the United Kingdom issues arose as to whether their respective domestic legislation was valid in light of the decision in *Digital Rights*. Two requests for a preliminary ruling concerning the interpretation of Article 15 (1) of Directive 2002/58/EC of the European Parliament and of the Council of 12th July, 2002 concerning the processing of personal data and protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications) as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25th November, 2009 (the ePrivacy Directive) read in the light of Articles 7 and 8 and Article 52 (1) of the Charter and of the conformity of their respective legislative provisions with EU law. On the 21st December, 2016

the 2016 the court ruled that Article 15 (1) of the ePrivacy Directive must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. It also ruled that Article 15 (1) of the ePrivacy Directive must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authority to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

10. The plaintiffs' claim was amended to reflect statutory changes implemented in the State. In particular, the Communications (Retention of Data) Act, 2011 was enacted to give effect to the Directive and to provide for the retention of and access to certain data for the purposes of the prevention of serious offences, the safeguarding of the security of the State and the saving of human life and to repeal Part 7 of the Criminal Justice (Terrorist Offences) Act, 2005 and to amend the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993. The following provisions of the Act of 2011 are relevant to these proceedings: -

> *2.— This Act does not apply to the content of communications transmitted by means of fixed network telephony, mobile telephony, Internet access, Internet e-mail or Internet telephony.*
>
> *3.— (1) A service provider shall retain data in the categories specified in Schedule 2 , for a period of 2 years in respect of the data referred to in Part 1 of Schedule 2 and for a period of one year in respect of the data referred to in Part 2 of Schedule 2 .*
>
> *4.— (1) A service provider who retains data under section 3 (1) shall take the following security measures in relation to the retained data:*
>
> > *(a) the data shall be of the same quality and subject to the same security and protection as those data relating to the publicly available electronic communications service or to the public communications network, as the case may be;*
> >
> > *(b) the data shall be subject to appropriate technical and organisational measures to protect the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful storage, processing, access or disclosure;*
> >
> > *(c) the data shall be subject to appropriate technical and organisational measures to ensure that they can be accessed by authorised personnel only;*
> >
> > *(d) the data, except those that have been accessed and preserved, shall be destroyed by the service provider after—*
> >
> > > *(i) in the case of the data in the categories specified in Part 1 of Schedule 2 , a period of 2 years and one month, or*
> > >
> > > *(ii) in the case of the data in the categories specified in Part 2 of Schedule 2 , a period of one year and one month.*
> >
> > *(2) The Data Protection Commissioner is hereby designated as the national supervisory authority for the purposes of this Act and Directive No. 2006/24/EC of the European Parliament and of the Council.*
>
> *5.— A service provider shall not access data retained in accordance with section 3 except—*
>
> > *(a) at the request and with the consent of a person to whom the data relate,*
> >
> > *(b) for the purpose of complying with a disclosure request,*
> >
> > *(c) in accordance with a court order, or*
> >
> > *(d) as may be authorised by the Data Protection Commissioner.*
>
> *6.— (1) A member of the Garda Síochána not below the rank of chief superintendent may request a service provider to disclose to that member data retained by the service provider in accordance with section 3 where that member is satisfied that the data are required for—*
>
> > *(a) the prevention, detection, investigation or prosecution of a serious offence,*
> >
> > *(b) the safeguarding of the security of the State,*
> >
> > *(c) the saving of human life.*
> >
> > *(2) An officer of the Permanent Defence Force not below the rank of colonel may request a service provider to disclose to that officer data retained by the service provider in accordance with section 3 where that officer is satisfied that the data are required for the purpose of safeguarding the security of the State.*
> >
> > *(3) An officer of the Revenue Commissioners not below the rank of principal officer may request a service provider to disclose to that officer data retained by the service provider in accordance with section 3 where that officer is satisfied that the data are required for the prevention, detection, investigation or prosecution of a revenue offence.*

*7.— A service provider shall comply with a disclosure request made to the service provider.*

*10.— (1) A contravention of section 6 in relation to a disclosure request shall not of itself render that disclosure request invalid or constitute a cause of action at the suit of a person affected by the disclosure request, but any such contravention shall be subject to investigation in accordance with the subsequent provisions of this section and nothing in this subsection shall affect a cause of action for the infringement of a constitutional right.*

*(2) A person who believes that data that relate to the person and that are in the possession of a service provider have been accessed following a disclosure request may apply to the Referee for an investigation into the matter.*

*(3) If an application is made under this section (other than one appearing to the Referee to be frivolous or vexatious), the Referee shall investigate*

*(a) whether a disclosure request was made as alleged in the application, and*

*(b) if so, whether any provision of section 6 has been contravened in relation to the disclosure request.*

*(4) If, after investigating the matter, the Referee concludes that a provision of section 6 has been contravened, the Referee shall—*

*(a) notify the applicant in writing of that conclusion, and*

*(b) make a report of the Referee's findings to the Taoiseach.*

*(5) In addition, in the circumstances specified in subsection (4), the Referee may, if he or she thinks fit, by order do either or both of the following—*

*(a) direct the Garda Síochána, the Permanent Defence Force or the Revenue Commissioners to destroy the relevant data and any copies of the data,*

*(b) make a recommendation for the payment to the applicant of such sum by way of compensation as may be specified in the order.*

*(6) The Minister shall implement any recommendation under subsection (5)(b).*

*(7) If, after investigating the matter, the Referee concludes that section 6 has not been contravened, the Referee shall notify the applicant in writing to that effect.*

*(8) A decision of the Referee under this section is final.*

*(9) For the purpose of an investigation under this section, the Referee is entitled to access, and has the power to inspect, any official documents or records relating to the relevant application.*

*(10) Any person who was concerned in, or has information relevant to, the making of a disclosure request in respect of which an application is made under this section shall give the Referee, on his or her request, such information relating to the request as is in the person's possession.*

*11.— Section 8 of the Act of 1993 is amended by the substitution of the following for subsection (1):*

*"(1) The President of the High Court shall from time to time after consulting with the Minister invite a person who is a judge of the High Court to undertake (while serving as such a judge) the duties specified in this section and section 12 of the Communications (Retention of Data) Act 2011and, if the invitation is accepted, the Government shall designate the judge for the purposes of this Act and the Communications (Retention of Data) Act 2011.*

*(1A) Subsection (1) does not affect the functions of the Data Protection Commissioner under section 10 of the Data Protection Act 1988 .".*

12.— (1) In addition to the duties assigned under section 8 of the Act of 1993, the designated judge shall—

*(a) keep the operation of the provisions of this Act under review,*

*(b) ascertain whether the Garda Síochána, the Permanent Defence Force and the Revenue Commissioners are complying with its provisions, and*

*(c) include, in the report to the Taoiseach under section 8(2) of the Act of 1993, such matters relating to this Act that the designated judge considers appropriate.*

*(2) For the purpose of carrying out the duties assigned under this section, the designated judge—*

*(a) has the power to investigate any case in which a disclosure request is made, and*

*(b) may access and inspect any official documents or records relating to the request.*

*(3) Any person who was concerned in, or has information relevant to, the preparation or making of a disclosure request shall give the designated judge, on his or her request, such information relating to the request as is in the person's possession.*

*(4) The designated judge may, if he or she considers it desirable to do so, communicate with the Taoiseach or the Minister concerning disclosure requests and with the Data Protection Commissioner in connection with the Commissioner's functions under the DataProtection Acts 1988 and 2003.*

Under s.1: -

> *"serious offence" means an offence punishable by imprisonment for a term of 5 years or more, and an offence listed in Schedule 1 is deemed to be a serious offence;*
>
> *Schedule 1*
>
> *Offences Deemed to be Serious Offences*
>
> *Section 1*
>
> *1. An offence under sections 11 and 12 of the Criminal Assets Bureau Act 1996 .*
>
> *2. An offence under section 6 of the Criminal Evidence Act 1992 .*
>
> *3. An offence under section 12 of the Non-Fatal Offences against the Person Act 1997 .*
>
> *4. An offence under section 1 of the Prevention of Corruption Acts 1889 to 1995.*
>
> *5. An offence under section 5 of the Protections for Persons Reporting Child Abuse Act 1998.*

**Plaintiff's submissions**

11. The plaintiff submits that in light of the decisions of CJEU in *Digital Rights and Watson* that certain issues of union law are *Acte Éclairé* and that it is thus appropriate to try as a preliminary matter the European Union law issues in the proceedings. It says the effect of the two decisions is to establish five cardinal principles: -

> (1) Mass retention of data is prohibited.
>
> (2) A two year retention period of data is unacceptable.
>
> (3) Access by competent authorities must be monitored by a court or an independent body prior to affording the competent authority access to the retained data.
>
> (4) The retention of data should be confined to data belonging to targeted persons.
>
> (5) The domestic legislation of the member states should ensure that the data is retained within the European Union.

12. The plaintiff argues that the Irish legislation fails to satisfy each of these five principles. It permits mass retention of data, it permits the retention of the data for up to two years, there is no prior monitoring of access to the data by a court or independent body, the persons whose data is retained and made available to competent authorities are not targeted and there is no mandatory requirement that the data remain within the EU. It submits that the Communications (Retention of Data) Act, 2011 mirrors the provisions of Directive. As this was declared to be invalid in *Digital Rights*, there is a strong argument, applying the decisions of the CJEU in *Digital Rights and Watson* that the Act of 2011 is likewise invalid.

13. The plaintiff submitted that the issues of law are readily identifiable and the argument at trial will be based upon the provisions of domestic law and comparing them with the rulings of the CJEU. It was submitted that evidence would not be necessary or, in the alternative, in light of submissions made on behalf of the defendants, that the submission of evidence was irrelevant to two critical features of the Irish legislation – that it requires the retention of the data of all subscribers for a period of up to two years and that it did not require a prior authorisation by a court or independent administrative body before issuing a disclosure request pursuant to s. 6 to a service provider to disclose the data. On that basis, evidence was not required and this was an appropriate case in which to deal with the matter in an efficient and cost effective way by trial of a preliminary issue of the issues of European law in the proceedings.

**Defendant's submissions**

14. The defendants submitted that the trial of a preliminary issue is an exception to the normal rule of a unitary trial with oral evidence where all matters of law and fact are determined together. Orders 25, r. 1 and 34, r. 2 permit the trial of discrete issues of law before the trial of the action. Counsel identified principles from the case law on the question whether a court should direct the trial of a preliminary issue.

> (1) The issue must be precisely defined.
>
> (2) The issue must be tried on the basis of agreed facts, or at least, undisputed facts.
>
> (3) The court must be satisfied that the order will result in the saving of costs and expense.
>
> (4) The court will not usually direct the trial of a preliminary issue if, nonetheless, other issues in the case will remain to be resolved.
>
> (5) The order should be refused if it would cause an unfair prejudice to a party to the action.

15. He emphasised that the purpose of the procedure is to save time and costs (*Duffy v. Newsgroup Newspapers Ltd* (No. 2) [1994] 3 I.R. 63, 77; *L.M. v. Commissioner of An Garda Síochána & Ors* [2015] IESC 81, para. 32).

16. Order 34 r. 2 only applies in circumstances where the discreet question or point of law is capable of being determined before any evidence is given or any question of fact is tried (*Tara Exploration and Development Company Ltd & Anor v. The Minister for Industry and Commerce* [1975] I.R. 242).

17. A preliminary issue of law cannot be tried in vacuo; it must be tried in the context of either agreed or established facts. This was held by Lynch J. in *McCabe v. Ireland* [1999] 4 I.R. 151, 157 and endorsed by Laffoy J. in *Dempsey v. Minister for Education and*

*Science* [2006] IEHC 183 and *Fitzharris v. O'Keeffe* [2008] IEHC 438.

18. The defendants say that the issues raised by the plaintiff cannot be determined divorced from facts and the facts in this case have not been agreed. They say that they have pleaded in their defence that the legislative measures in issue were in accordance with law and necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime and the protection of the rights and freedoms of others. They submitted it was likely that central issues in dispute between the parties will be the necessity and proportionality of the national data retention measures. These issues cannot be properly addressed without appropriate evidence, including expert evidence. The defendants will give evidence of the fact that there is a dedicated unit within An Garda Síochána which receives requests from the officers who are investigating particular crimes or other matters and the Chief Superintendent who makes a decision on the request is insulated from the investigation. They submit that there would be an issue as to whether or not this arrangement is compatible with EU law and the Charter. They say it is a fact that will arise as to what information will be retained in any event by the companies for their own commercial reasons and for how long. The defendants will wish to adduce evidence to establish how the objective of fighting serious crime and protecting national security is in fact met by the existing provisions and whether this objective can be achieved through the targeted retention of data referred to by the CJEU in Watson. They emphasise that it is very important that the case is decided on the basis of the best evidence available at the trial of the action.

19. The defendants referred to the decision of the Supreme Court in *P.J. Carroll & Co. Limited v. the Minister for Health and Children* [2005] 1 I.R. 294. In this case the plaintiffs claimed that certain legislation relating to tobacco constituted a disproportionate interference with their constitutional rights and was in breach of European law. The defendants contended that to the extent there was such an interference, they were justified in having regard to the harmful effects of tobacco on public health and in their defence relied on a considerable amount of factual information. The defendants sought to call expert evidence in this regard. Certain factual matters were not put in issue in the pleadings and in consequence the plaintiffs contended that there was no need to call such evidence. Geoghegan J. said that the defendants were clearly entitled to call oral evidence to support the contention that the legislation under challenge was proportional notwithstanding the fact that the plaintiffs had admitted certain facts. At para. 13 he said: -

> *"Although courts in this jurisdiction interpret statutes by reference to the words used, they do not do so in a vacuum. There is always a contextual background of which the courts are perfectly well aware. There can be no question of course in a constitutional challenge, of the State adducing evidence as to what were the intentions as such of the Oireachtas or particular members thereof. But that is quite different from suggesting that there cannot be evidence of objective external facts existing at the time that the legislation was enacted. Indeed, this would seem to fit in with the first of the three tests set out by Costello J. [in Heaney v. Ireland [1994] 3 I.R. 593, 607] in relation to proportionality".*

20. On the basis of this decision, the defendants say that they are entitled to lead evidence relevant to the proportionality of the national measures to achieve the objective identified. They would be unfairly prejudiced in their defence of the action if they were prevented from adducing this evidence, as was their entitlement, *a fortiori*, where the factual matters, far from being agreed or admitted, were hotly contested.

21. The defendants referred to the decision of the Supreme Court in *L.M. v. Commissioner of An Garda Síochána & Ors.* [2015] IESC 81 where O'Donnell J. emphasised the importance of precision in defining any preliminary issue to be tried separately. At para. 28 he stated: -

> *"If a preliminary issue is to be useful in disposing of the case, there must be a degree of precision about what the case involves … Without such precision, preliminary issues can be mired in a fog of speculation and become rather futile exercises in legal ingenuity in hypothesising possible claims, rather than an identification and determination of the claim."*

21. At para. 32 he stated: -

> *"It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer. The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law."*

22. The defendants complain that the preliminary matter identified by the plaintiff lacks the required precision. The proceedings involve challenges to numerous pieces of Irish legislation, not merely the Act of 2011, yet the plaintiff does not specify the specific measures to which it makes reference in its application, simply referring to "*a number of items of legislation in force which provide for retention of communication status*". They submit that it is common case that the proceedings are detailed and complex and that it is not possible to identify and isolate "*The European Union Law issues*" as distinct from the other issues of law and fact in the case.

23. Furthermore, insofar as such issues arise within the proceedings, they overlap to a considerable degree with issues of Irish law, including Irish Constitutional Law and human rights law. The defendants say that it is not possible or practicable to seek to draw a line between these issues in the manner proposed by the plaintiff. In addition, it is hard to see how the trial of the European law issues could, in the circumstances, lead to a saving of costs and expense or indeed, court time.

24. On this basis, the proposed preliminary issue does not satisfy the tests established in the cases for such a trial. The proposed issue lacks the precision required. There are no agreed or undisputed facts. On the contrary, the defendants wish to adduce extensive evidence which is not accepted by the plaintiff. The preliminary trial has neither the possibility of terminating the claim nor the likelihood of saving costs and time. The defendants would be unfairly prejudiced if the case were to proceed on that basis.

**Discussion**

25. It is important to emphasise that I am not concerned with the merits of the plaintiff's case or the arguments advanced on either side. I am concerned with how the case should proceed to be tried and whether, in accordance with the rules and the case law, it is appropriate to direct a trial of a preliminary issue in this case. I received detailed submissions from counsel for both parties on the substantive arguments. I have deliberately refrained from addressing any of these issues in this judgement though they have been of assistance in placing the issues upon which I have to decide in context.

26. Critically, it is apparent that the issues for resolution in these proceedings are complex and not straightforward. There are no agreed facts or undisputed or established facts. In those circumstances, I cannot accept that it is permissible or appropriate to proceed without evidence. In the *P.J. Carroll* case, the Supreme Court made it clear that the defendants were entitled to lead

evidence as to the proportionality of the measure adopted in defence of an allegation that the legislation was unconstitutional. The principle must likewise apply in these proceedings no matter how strong the case asserted by the plaintiff may appear to be. The action cannot be tried *in vacuo*.

27. Furthermore, I am not satisfied that the proposed preliminary issue has been defined with sufficient precision. No specific issues have been identified. It is not clear what reliefs are still sought in the aftermath of the judgment of the CJEU in *Digital Rights*. The plaintiff has not related the "European law issues" to any pleas or relief in the statement of claim and it would appear to me that the proceedings may require to be amended to reflect the judgment of the CJEU. A trial of the issue as drafted would involve too many hypotheses to amount to a useful or appropriate procedure.

28. Also, I am not satisfied that the issue is one which could result in the terminating of the claim as described by O'Donnell J. in *L.M*. If the plaintiff was successful and the legislation impugned was held to be invalid by reason of the provisions of the Charter and European law, then the legislation would be struck down. But, this by no means disposes of the balance of the case or even leads inevitably to the failure of the defences raised to those other issues. For instance, the plaintiff seeks declarations that a letter of the Minister for Public Enterprise dated 25th April, 2002 was ultra vires and of no effect and seeks an injunction restraining the first named defendant from relying on the letter. This does not necessarily follow from a ruling that the provisions of the 2011 Act, or its precursor, were invalid by reason of the provisions of European law. I am reinforced in this conclusion by the fact that counsel for the plaintiff accepted that, even assuming the plaintiff were to succeed on the preliminary issue, nonetheless a second hearing would be required to dispose of the balance of the issues in the case.

29. Further, I am not satisfied that the trial of the preliminary issue would result in any saving of time or costs. The preliminary issue is likely to be relatively lengthy given the complexities of the legal case, but not much longer than if there is a full trial on all the issues because of the degree to which the other claims overlap with the claims involving European law. Furthermore, there was no estimate at all before the court of the time which could be saved. The application was advanced on the presumption that there would be no evidence led but I have concluded that this is not possible or appropriate in this case.

30. I therefore refuse the application for the trial of a preliminary issue in this matter.

**Should there be a reference to the CJEU?**
31. As an alternative, the plaintiff invited the court to make a reference to the CJEU as quoted in the first paragraph of this judgment. It was accepted in oral submissions that the question set out in the notice of motion would have to be recast in light of the decision in *Watson*. In fact, it would have to be assessed in light of the issues which might actually require to be clarified in light of the facts established at trial. It may be that there will, in fact, be no such issues, if the plaintiff is correct in its assertion that the decisions of CJEU are *Acte Éclaire*. On the other hand, if the defendants are correct, any such reference will need to be in the context of, *inter alia*, the evidence they wish to lead in the case to justify the proportionality of the measures adopted.

32. A party may request a court to refer an issue to the Court of Justice but there is no entitlement to such a reference. It is solely a matter for the discretion of the court of first instance as to whether the court believes such a reference is necessary to enable the court to resolve the case before it. At this stage in the proceedings I am not satisfied that such a reference is required to enable the court to decide these proceedings. It may be that the trial judge, when he or she has heard the relevant evidence in these proceedings, may decide that a reference to the CJEU is required to clarify the issue or issues in the case. It is not necessary at this stage in the proceedings when the issues as they arise from the facts in the case have not yet been clarified. Accordingly, I refuse the application for a reference pursuant to Article 267 of TFEU.

**33. Conclusion**
I refuse the reliefs sought and dismiss the notice of motion.