IN THE INVESTIGATORY POWERS TRIBUNAL Case No. IPT/15/110/CH

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANT'S SKELETON ARGUMENT
for hearing commencing 8 March 2017

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*References in the form **[Bundle/Page]** are to the updated hearing bundles lodged with the Tribunal for the previous hearing in these proceedings.*

A. Introduction

1. Following this Tribunal's earlier judgment ([2016] UKIPTrib 15_110-CH, [2016] HRLR 21 (the '**October 2016 Judgment**')), four issues remain for determination:
   a) EU law;
   b) transfer of data;
   c) proportionality; and
   d) the report on searches.

2. Much relevant information is still missing. Once again, late disclosure of important evidence seems inevitable. A RFI was served on 17 February 2017 and a response is awaited. A second RFI has been necessary as a result of the report on searches. The Claimant will serve a supplemental note if necessary once responses to the RFIs are available. Such note will, if necessary, further address the consistency of what is

disclosed with the requirements of Article 47 of the Charter of Fundamental Rights of the EU ('**Charter**'), as explained by the CJEU in the case of C-300/11 ZZ ECLI:EU:C:2013:363 ('**ZZ**') (both set out below).

3. In summary:

a) The collection of bulk communications data ('**BCD**') and bulk personal datasets ('**BPD**') engages EU law. The mandatory safeguards in Joined Cases C-203/15 and C-696/15 *Tele2 Sverige and Watson* ECLI:EU:C:2016:970 ('***Watson***') apply: blanket retention is prohibited, and there must be prior independent authorisation for access, notice provisions, retention in the EU and restrictions on the use of the material. Neither the regime under section 94 of the Telecommunications Act 1984 ('**TA 1984**') nor the BPD regime complies with the requirements of EU law.

b) There appear to be no adequate safeguards governing the transfer of data from the Agencies to other bodies, whether they are other UK law enforcement agencies, commercial companies or foreign liaison partners.

c) The section 94 regime and the BPD regime are a disproportionate interference with Convention and EU charter rights.

d) The heavily redacted version of the report on searches is unclear and does not provide a sufficient factual basis for submissions on the Tribunal's determination or relief. A further RFI has been served.

B. EU law

Watson

4. On 21 December 2016, the Grand Chamber of the Court of Justice handed down judgment in *Watson*. The *dispositif* provides (underlining added):

> *"1. Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament*

and of the Council of 25 November 2009, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, 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.

2. Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, 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 authorities 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.

3. The second question [as to whether there is difference between EU and ECHR law] referred by the Court of Appeal (England & Wales) (Civil Division) is inadmissible".

5. The Grand Chamber affirmed its judgment in C-293/12 *Digital Rights Ireland* ECLI:EU:C:2014:238 and rejected the submissions made by the Secretary of State. The CJEU held that:

a) EU law is engaged by arrangements governing access of material retained by communications providers. The contrary arguments are dismissed (§71-73).

b) Blanket bulk retention of communications data is not lawful:

i) Directive 2002/58/EC (the '**e-Privacy Directive**') seeks to ensure a high level of protection for communications, especially from automated storage and processing (§82-83).

ii) The e-Privacy Directive requires that systems be designed to limit data from ever being collected or retained, where possible (§87).

iii) Any derogation or exception must be strictly construed, otherwise the exception would become the rule and the protection given to the privacy of communications data by Article 5 of the Directive would become meaningless (§89, 103-104).

iv) The proper test is of strict necessity (§96).

v) The Swedish law provides for universal data retention (§97). It is therefore general and indiscriminate.

vi) Communications data is very sensitive and can be used for profiling. Universal collection leads to feelings of constant surveillance, which interferes with freedom of expression as well as the right of privacy (§99-101).

c) Retention of data is only proper for the purposes of preventing and detecting serious crime (including terrorism), given the seriousness of the interference with privacy involved in data retention (§115, 119).

d) There must be prior review of a request for access by a court or other independent authority, following a reasoned request, save in cases of urgency (§120).

e) There must be provisions for notification to persons whose data have been obtained, to enable their rights to be vindicated by complaint or legal proceedings, as soon as that notification is no longer liable to jeopardise the investigations being undertaken by those authorities (§121).

f) Retained data must remain in the EU (§122).

6. All of the UK's submissions were rejected, including those as to the scope of EU law and whether EU law imposed mandatory requirements. The Grand Chamber confirmed its existing case law in *Digital Rights Ireland* (supra) and C-362/14 *Schrems* ECLI:EU:C:2015:650, emphasising the importance of preventing blanket data retention and strong safeguards on access.

Legal framework

7. Article 7 of the Charter (which reflects Article 8 of the European Convention on Human Rights) provides:

> *"Everyone has the right to respect for his or her private and family life, home and communications."*

8. Article 8 of the Charter provides:

> *"1. Everyone has the right to the protection of personal data concerning him or her.*
>
> *2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
>
> *3. Compliance with these rules shall be subject to control by an independent authority."*

9. Article 8(3) of the Charter has no direct analogue in the ECHR; there is no express right under the ECHR for all processing of personal data to be under the control of an independent authority. The official Explanations to the Charter[1] note:

> *"This Article [8] has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union."*

10. Article 47 of the Charter, which harmonises the CJEU's case-law on effective remedial protection, provides (underlining added):

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."*

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[1] The explanations are published at OJ 2007/C 303/02. Their status is as follows: *"These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter."* Further, Article 6 TEU requires *"due regard"* to be given to the explanations, which set out the source of the provisions of the Charter.

It thus guarantees, amongst other things: (a) the provision of an effective remedy; (b) a public hearing; and (c) the possibility of representation. This can mean only the possibility of effective representation by lawyers independent of the Court/Tribunal and the adverse party.

11. The demands of Article 47 of the Charter have been explained by the CJEU in ZZ at §§64-69. Such reasoning requires at least the disclosure of a full and informative gist of the key features of the Secretary of State's case, of the measures, policies or practices he relies upon; and of the conduct identified to be unlawful and in breach of directly effective and fundamental rights of privacy.

12. Article 51(1) of the Charter provides that it is "*addressed to… the Member States only when they are implementing Union law*".

13. Article 52(3) of the Charter provides:

> *"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."*

14. Article 4 TEU provides:

> *"1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.*
>
> *2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*
>
> *3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

15. The e-Privacy Directive provides a harmonised level of protection across the Union for the confidentiality of communications and associated communications data. Article 1(2) states that its provisions particularise and complement the provisions of Directive 95/46/EC (the '**Data Protection Directive**'). Article 1(3) provides:

> *"This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law."*

16. Article 5 provides (underlining added):

> *"1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). ..."*

17. Article 6(1) provides that *"Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to ... Article 15(1)"*. Article 9 contains similar protections for location data.

18. Article 15 sets out the limits of any permissible derogation by a Member State:

> *"1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6 ... and Article 9 ... of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in*

accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union."

19. Article 22 of the Data Protection Directive provides:

> *"Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question."*

20. The IPT is part of that framework of EU harmonised judicial remedies; the relief it offers must comply with Article 22 of the Data Protection Directive, and through it Article 47 of the Charter.

Submissions

(i) BCD Regime

21. A direction under section 94 of TA 1984 to a communications service provider ('**CSP**') engages EU law:

a) Article 5 of the e-Privacy Directive requires that the confidentiality of telecommunications be ensured *except* when access is legally authorised in accordance with Article 15(1) of that Directive.

b) The CJEU in *Watson* held that a retention notice issued under section 1 of the Data Retention and Investigatory Powers Act 2014 ('**DRIPA**') fell within the scope of the e-Privacy Directive; see §§ 70-81 of *Watson*. At §73, the CJEU held:

> *"Article 15(1) necessarily presupposes that the national measures referred to therein, such as those relating to the retention of data for the purpose of combating crime, fall within the scope of that directive, since it expressly authorises the Member States to adopt them only if the conditions laid down in the directive are met."*

c) A direction under section 94 of the TA 1984, imposing retention, processing and delivery requirements on a CSP in relation to BCD, is materially identical to a DRIPA retention notice for these purposes. It therefore falls equally within the scope of the e-Privacy Directive.

22. Large-scale bulk retention of communications data is unlawful under EU law. See the summary of *Watson* at paragraph 5(b) above.

23. In any event, the statutory scheme under s. 94 of the TA 1984 does not contain any of the necessary safeguards on access to data (see the summary of *Watson* at paragraphs 5(c) to (f) above). On its face, it permits interference with privacy and confidentiality rights that is unnecessary and disproportionate:

a) There is universal mass retention of communications data.

b) There is no mechanism to ensure that BCD acquired under s. 94 of the TA 1984 is used only for the purpose of fighting serious crime.

c) There is no requirement for prior independent authorisation for access.

d) There are no procedures for notification of use of the data.

e) There are no adequate controls on how BCD acquired under s. 94 of the TA 1984 is shared.

f) Nor is there any prohibition on transfers of BCD outside of the EU.

24. The powers conferred by section 94 are entirely discretionary. The Secretary of State has been obliged (there being no textual or interpretative barrier to such conclusion) to exercise such discretion in accordance with the e-Privacy Directive (the material provisions of which are directly effective) since 31 October 2003. Since there is no basis to believe (pending disclosure of further information regarding the typical contents of section 94 directions) that *any*, still less *all* of these criteria are met for the section 94 directions made to date, it follows that all such directions are *ultra vires* and have been since 31 October 2003. As such, since that date all action taken pursuant to such directions is not "*in accordance with law*" and necessarily breaches Articles 7 and 8 of the Charter.

25. Further, and in any event, the section 94 regime is unlawful for the same reasons as previously advanced in relation to the ECHR. The section 94 regime is not prescribed by law and is a disproportionate interference with fundamental rights.

(ii) BPD Regime

26. The obtaining of BPDs engages EU law pursuant to the Data Protection Directive.

27. Where the information contained in a BPD is of a broadly equivalent level of intrusiveness to communications data, the principles of necessity and proportionality will require an equivalent level of safeguards governing access to data as those identified in *Watson*. See the Opinion of Advocate General Mengozzi in *Opinion 1/15* ECLI:EU:C:2016:656 (8 September 2016) concerning the EU-Canada draft agreement on the transfer and processing of Passenger Name Record Data (in particular, §§169-171, 328).

28. Such datasets are likely to include:

a) BPDs containing intercept material (it has been avowed that "*some BPDs are obtained by interception*" – David Anderson QC *Bulk Powers Review* (August 2016), footnote 119).

b) health datasets (the Agencies have said that they do not currently retain such datasets, although they presumably might do so in the future, and may have done so in the past);

c) financial datasets (e.g. information about personal expenditure, which will often include location);

d) location and travel datasets (e.g. Automatic Number Plate Recognition and Oyster card data); and

e) any BPDs containing privileged material or identifying journalistic sources.

29. The BPD regime does not contain any of the safeguards referred to above; it therefore permits interference with privacy and confidentiality rights that is unnecessary and disproportionate:

a) There is mass retention of BPD.

b) There is no mechanism to ensure that BPDs are used only for the purpose of fighting serious crime.

c) There is no requirement for prior independent authorisation for access.

d) There are no procedures for notification of use of the data.

e) There are no adequate controls on how BPDs are acquired are shared.

f) Nor is there any prohibition on transfers of BPDs outside of the EU.

(iii) Respondents' submissions

30. The Respondents make three points in their Outline Response of 17 February 2017:

a) A section 94 direction made in the interests of national security does not fall within the scope of EU law because (§2):

i) Article 4(2) TEU puts such directions outside the scope of EU law;

ii) Article 1(3) of the e-Privacy Directive has the same effect;

iii) The reasoning in *Watson* "*does not apply in the case of national security*"; and

iv) A direction under section 94 "*is not to be treated for these purposes as analogous to a retention notice made under* [DRIPA]".

b) Alternatively, Member States have "*the broadest possible area of discretion in operating in the field of national security*" so "*Watson cannot be read across to data collected, retained and accessed specifically because it is necessary in the interests of national security*" (§3-4).

c) The same arguments are made, *mutatis mutandis,* in respect of BPD.

31. None of these points has any merit. Indeed, the attempt by the Secretary of State to advance such arguments is, in substance, a collateral attack upon the validity of judgment to which the Secretary of State was a party where the arguments it now seeks to put again were made, heard and rejected. Were a private party to attempt such a bold manoeuvre, the public authority affected would no doubt label such course as an abuse of process (as in *BA & ors v Home Office* [2012] EWCA Civ 944), not least since the Respondents in this case secured the adjournment of the EU law issues precisely so that they could be answered by the CJEU in *Watson*, and *Watson* was plainly intended to stand as a test-case ruling (as in *Ashmore v British Coal Corporation* [1990] 2 QB 338) on the key points of common principle.

32. Rather than accept that *Watson* is entirely inconsistent with the scheme of section 94 (and, for that matter, the provisions on BCD in the Investigatory Powers Act 2016), the Respondents are seeking to repeat arguments they have already made, presumably in the hope of engineering a further reference, with all the delay that will bring, on a case it has now lost at least twice already.

33. In *Watson* before the domestic courts, the Respondents conceded that EU law was engaged by a DRIPA retention notice:

> *"It is acknowledged ... that national data retention regimes must comply with the derogation in Article 15 of [the e-Privacy Directive], which includes reference to the general principles of EU law"* (*Watson* Detailed Grounds of Resistance in the Divisional Court §102).

34. However, by the time of the reference, the Respondents had withdrawn their concession and expressly sought to rely on both Article 4(2) TEU and Article 1(3) of the e-Privacy Directive: see *Watson* at §65; and see, more fully, §20-30 of the UK's observations in *Tele2 Sverige* and §18-19 of its observations in *Watson*. The points now advanced are not new. They were developed fully by the UK before the CJEU.

35. Indeed, DRIPA *is* national security legislation. The suggestion that DRIPA and *Watson* were about criminal investigation alone is wrong. DRIPA expressly permits a retention

order to be made for the purposes of national security.[2] It is to be assumed that DRIPA retention orders have been made for national security purposes. The CJEU was well aware of the use of DRIPA for national security purposes.[3]

36. The scope arguments advanced above were rejected by the CJEU. In a detailed judgment, the CJEU referred to the various submissions made about the scope of EU law (*Watson* at §§65-66). The Court then cited Article 1(3) and noted that it overlapped with Article 15(1), and referred to the national security context (at §72).

37. The CJEU then held that a national data retention measure was within the scope of EU law, both as regards retention and (here, disagreeing with the AGO) as regards access to that data retained by the service provider: see *Watson* at §§73-81, especially §§75-76 and §78 (in which the CJEU refers to granting access to data "*for the purposes set out in [Article 15(1)]*"). The reasoning necessarily applies to all the purposes listed in Article 15(1) of the e-Privacy Directive, including national security.

38. The CJEU's judgment on scope is clear and was made after the UK had a full opportunity to address whatever submissions it wished to about the scope of EU law. For this Tribunal, which is (at present) a final court under Article 267 TFEU, it provides a full and very recent statement of the law in a very closely analogous case. As such, the law is *acte éclairé* against the Government.

39. Further, in subsequent passages after the scope issue was decided, the CJEU expressly held that its ruling applied to data retention for the purposes of national security. Notably, the Court indicated the (limited) extent to which the mandatory requirements it identified were to be applied differently in national security cases (at §§ 90 and 119):

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[2] Section 1(1) of DRIPA provided: "*The Secretary of State may by notice (a "retention notice") require a public telecommunications operator to retain relevant communications data if the Secretary of State considers that the requirement is necessary and proportionate for one or more of the purposes falling within paragraphs (a) to (h) of section 22(2) of the Regulation of Investigatory Powers Act 2000 (purposes for which communications data may be obtained).*" Section 22(2)(a) of the Regulation of Investigatory Powers Act 2000 ('**RIPA**') identifies a purpose as "*in the interests of national security*".

[3] The above domestic statutory regime was set out by the CJEU in *Watson* at §§29 and 33.

> *It must, in that regard, be observed that the first sentence of Article 15(1) of Directive 2002/58 provides that the objectives pursued by the legislative measures that it covers, which derogate from the principle of confidentiality of communications and related traffic data, must be 'to safeguard national security – that is, State security – defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system', or one of the other objectives specified in Article 13(1) of Directive 95/46, to which the first sentence of Article 15(1) of Directive 2002/58 refers …*
> *… access can, as a general rule, be granted, in relation to the objective of fighting crime, only to the data of individuals suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime … . However, in particular situations, where for example vital national security, defence or public security interests are threatened by terrorist activities, access to the data of other persons might also be granted where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating such activities.*

40. The Court thus tailored its judgment to national security cases. The adjustments made to its approach in national security cases is fatal to the Respondents' argument that national security retention was not being considered in *Watson*.

41. The suggestion that the power under section 94 is materially different to the power to issue a DRIPA retention notice is equally hopeless. Both national provisions are used to impose a requirement on a CSP to retain and process data. Both therefore fall within the scope of EU law, for the reasons given in *Watson* at §78. A direction under section 94 is an obligation on a CSP to process data in a manner that breaches (at least) Article 5 of the e-Privacy Directive:

> *"In those circumstances, a legislative measure whereby a Member State, on the basis of Article 15(1) of Directive 2002/58, requires providers of electronic communications services, for the purposes set out in that provision, to grant national authorities, on the conditions laid down in such a measure, access to the data retained by those providers, concerns the processing of personal data by those providers, and that processing falls within the scope of that directive."*

42. Further, it is a key part of the Respondents' case on sharing that they are entitled to take BCD obtained for national security purposes and share it for other purposes, such as the detection of serious crime. As such, the argument that BCD obtained under section 94 is somehow 'set apart' because of the national security basis of the direction is not open to the Respondents; BCD is used for purposes other than protecting national security.

43. The mandatory safeguards identified in *Watson* are not present. This appears to be common ground. Therefore, the use of section 94 to obtain BCD was and remains unlawful.

44. The Respondents have not explained why BPD is any different, or why the same analysis should not apply.

C. **Sharing BPD and BCD with third parties**

45. This Tribunal held in its October 2016 Judgment at §95, underlining added:

> *"The only area in which we need to give further consideration relates to the provisions for safeguards and limitations in the event of transfer by the SIAs to other bodies, such as their foreign partners and UK Law Enforcement Agencies. There are detailed provisions in the Handling Arrangements which would appear to allow for the placing of restrictions in relation to such transfer upon the subsequent use and retention of the data by those parties. It is unclear to us whether such restrictions are in fact placed, and in paragraph 48.2 of their Note of 29 July 2016 the Respondents submit that the Tribunal is not in a position to decide this issue. We would like to do so and invite further submissions."*

46. The issue in *Liberty/Privacy (No. 1)* [2015] 1 Cr App R 24 was the legality of the regime for *receipt* of intercept material collected by foreign partners. This case concerns the reverse situation: what standards and safeguards apply to bulk data which is given to third parties? Indeed, BPDs may well contain intercept material; it has been avowed that some BPDs are obtained by interception (see paragraph 28(a) above).

Facts

47. There are two different ways in which BCD and BPD may be shared with third parties:

a) Transfer. The third party receives a copy of the data which has been selected for sharing: a legal analogy might be giving someone a copy of the entire set of the Law Reports.

b) Remote access. The third party is given the ability to remotely access the Agencies' own databases, allowing for querying and search of SIA databases: a

legal analogy would be giving someone a username and password for Westlaw or LexisNexis, allowing for searches of a database held elsewhere.

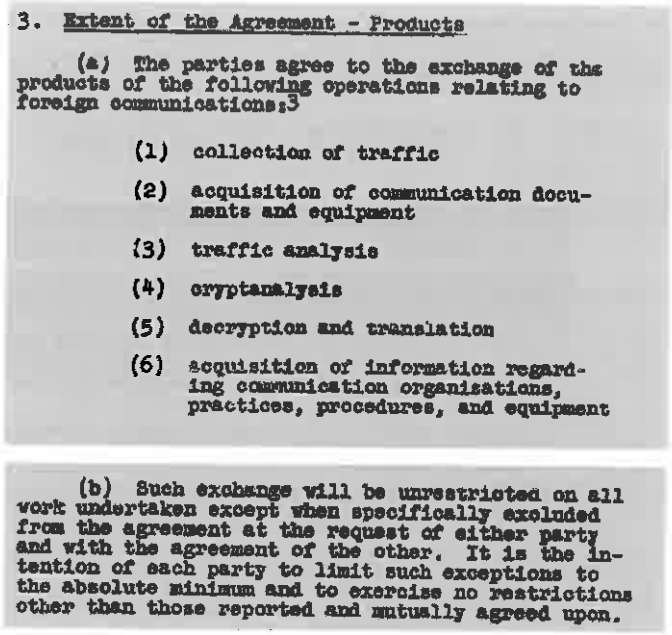
48. Each method may be used by the Agencies. This is avowed. See GCHQ Exhibit 3 (*"the Agencies may share applications..."*) and MI5 Exhibit 2 (*"Sharing data and applications in situ* [REDACTION] *Sharing data in this way requires both the requesting and disclosing agencies to assess the necessity and proportionality of the access and use being sought* [REDACTION] *The senior MI5 official should be consulted in relation to any proposals to... allow SIA access into MI5 systems..."*.

49. It is common ground that GCHQ disclose entire databases of *"raw sigint data"* to *"industry partners"* who have been *"contracted to develop new systems and capabilities for GCHQ"* **[3/476]**. It is avowed that there are *"frequent releases of routine sets of raw Sigint data to industry partners"* **[3/476]**. When this occurs, there appear to be few safeguards. For example, there appears to be no requirement for each search to be explained and justified in writing. Security clearance is required only *"wherever possible"* **[3/476]**.

50. It is clear that at least one CSP has been sufficiently concerned to demand that foreign sharing of its customers' BCD did not occur:

> *"In one case a PECN had asked the agency to ensure that that* [sharing with other jurisdictions] *did not happen and we were able to confirm that their data had not been shared with another jurisdiction. In other cases PECNs stated they would be very concerned if their data was shared with other jurisdictions without their knowledge"* (Burnton Report, §6.7 **[A4/82]**)

51. Further, the Agencies share bulk data with foreign partners, in particular the Five Eyes countries. The pretence of "neither confirm nor deny" is maintained as to the fact of sharing. But this cannot survive the disclosure of the (still extant) UKUSA Agreement governing the Five Eyes partnership, which provides for routine sharing of raw intelligence data:



3. Extent of the Agreement - Products

(a) The parties agree to the exchange of the products of the following operations relating to foreign communications:3

(1) collection of traffic

(2) acquisition of communication documents and equipment

(3) traffic analysis

(4) cryptanalysis

(5) decryption and translation

(6) acquisition of information regarding communication organisations, practices, procedures, and equipment

(b) Such exchange will be unrestricted on all work undertaken except when specifically excluded from the agreement at the request of either party and with the agreement of the other. It is the intention of each party to limit such exceptions to the absolute minimum and to exercise no restrictions other than those reported and mutually agreed upon.

See also the disclosure of standard GCHQ forms dealing with intelligence sharing (see **[3/477-481]**).

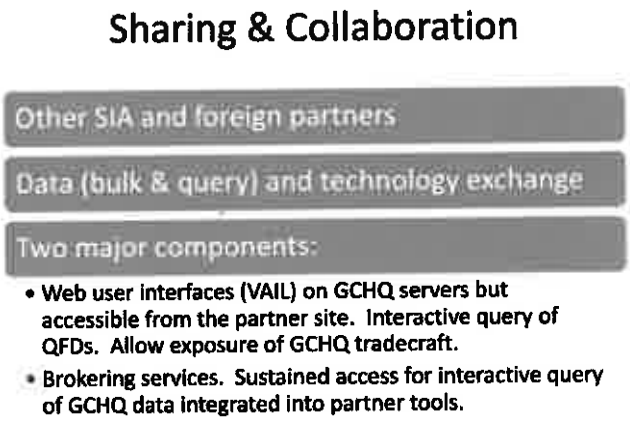
52. The Snowden documents contain more detail of the types and extent of information sharing that take place, and the risks involved. For example:

a) The Director of the NSA was briefed that Sir Iain Lobban (former Director of GCHQ) was likely to ask about whether UK-sourced data might be given by the NSA to, for example, the Israeli government, to conduct "*lethal operations*". The fact that GCHQ needed to ask such questions indicated that appropriate safeguards were not in place at the time of transfer:

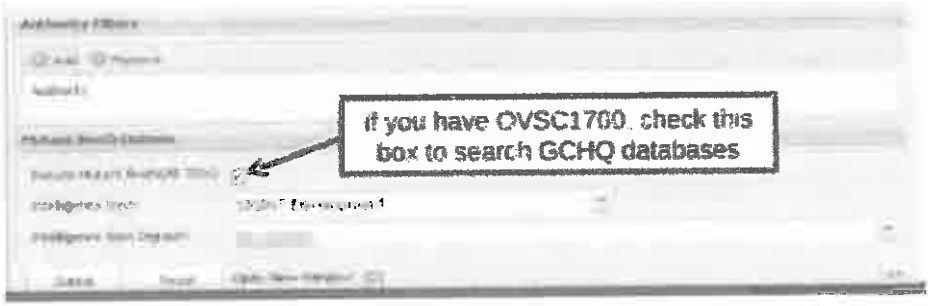
> (TS//SI//NF) **UK Intelligence Community Oversight:** GCHQ and its sister intelligence agencies are challenged with their activities and operations being subject to increased scrutiny and oversight from their government (and public). As a result, closer attention is being paid to how UK-produced intelligence data is being used by NSA, and other partners. It is possible that Sir Iain may ask about what safeguards NSA may be putting in place to prevent UK data from being provided to others, the Israelis for instance, who might use that intelligence to conduct lethal operations. *For additional information about this subject, and other UK Intelligence Community legal issues and legislation, see the attached paper prepared by Mr.* [redacted] *Office of the General Council, London.*

b) GCHQ documents confirm that sharing takes place with other Agencies and foreign partners, including data transfers in bulk and remote access. GCHQ

provide "*web user interfaces*" that are "*accessible from the partner site*" and offer "*sustained access for interactive query… integrated into partner tools*":



c) For foreign partner agencies in the Five Eyes, access to GCHQ's databases is as simple as ticking a box on a computer form. The only requirement at the NSA is to have completed a training exercise, known as OVSC1700:



d) One particularly important industry partner is the University of Bristol. Snowden documents indicate that researchers are given access to GCHQ's entire raw unselected datasets, including internet usage, telephone calls data, websites visited, file transfers made on the internet and others. Researchers are also given access to GCHQ's entire targeting database ("*delivered… at least once a day…*"), an exceptionally sensitive dataset:[4]

[4] The extracts below are curtailed at F.1.1, F.1.2 and F.1.4.

F.1.1 SALAMANCA

The contents of this dataset are classified TOP SECRET STRAP2 CHORDAL.

GCHQ collects telephone call record events from a wide variety of sources, and these are stored in a database called SALAMANCA [W36]. This data is also fed to the SUN STORM cloud and the BHDIST DISTILLERY cluster (and other DISTILLERY clusters). This data is a relatively low rate feed of user events, around 5000 events per second, and can be viewed as

F.1.2 FIVE ALIVE

FIVE ALIVE is an ICTR prototype Query Focused Dataset (QFD) providing access to bulk IP-IP connection events, giving a unique unselected view of all activity on SIGINT bearers. Each record in FIVE ALIVE summarises a *flow* between two IP addresses. This summary

F.1.3 HRMap

The contents of this dataset are classified TOP SECRET STRAP2 CHORDAL.

When a user requests a webpage from the internet, this is observed in SIGINT as an HTTP GET request. As well as the page requested it often contains the URL of the previously viewed page. The hostname of the requested page is the "HOST" and the hostname of the previous page is the "REFERRER". When we consider just the hostnames rather than the full URI then this is considered events data. This can be viewed as a directed graph of hostnames, and is given the name HRMap at GCHQ. It is a moderately high rate stream (around 20000 events per second) which should be suitable for the streaming EDA and streaming expiring graphs topics.

F.1.4 SKB

The contents of this dataset are classified TOP SECRET STRAP2 CHORDAL UKEO.

The Signature Knowledge Base is a system for tracking file transfers made on the internet. A record is made each time we see certain file types being transferred. Each file is identified by its format and a hash of some of its content. Whilst this does mean we can store the data,

F.3.2 Target selectors

The contents of this dataset are classified TOP SECRET STRAP2 UKEO.

Our target knowledge database is BROAD OAK which includes the ability to task various selector types including phone numbers and email addresses. The resulting list of selectors is sometimes called the target dictionary and is delivered to our DISTILLERY clusters at least once a day, and is also available on our Hadoop clusters. This data could be used to see if some result set contains an increased density of targets.

e) Other UK agencies, such as HMRC, are given access to GCHQ data via the 'MILKWHITE Enrichment Service'.[5]

53. These methods of sharing each carry distinct but overlapping risks:

a) Transfer results in the Agencies losing control of how the data is used, stored, retained, disclosed or destroyed. As the Intelligence and Security Committee

accurately put it, "*... while these controls apply within the Agencies, they do not apply to overseas partners with whom the Agencies may share the datasets*") (§163 **[A4/79]**). Once the data has been handed over to the third party, it could be deployed in support of an unlawful detention or torture programme, in the violent interrogation of a suspect, or used to identify a target for a lethal operation. It may be (overtly or covertly) passed onto another country, even though the UK would be unwilling to share directly with that state. There is no evidence that the control principle is operated or respected by the partners with whom data is shared.

b) Permitting remote access allows the third party to quickly search vast quantities of data which remains on the Respondents' systems. The third party gets all the benefits of access to the Agencies' systems and the power and intrusiveness of access to indexed and searchable material, without having to process the data itself.

54. It appears that there is little, if any, oversight by the Commissioners in respect of either transfer of BCD or BPD to other agencies or remote access to it. In particular, it is unclear whether the use of shared data is even auditable, or audited in fact. The Interception of Communications Commissioner has started an investigation into sharing of intercept material, but not yet reported (*Annual Report for 2015* (July 2016), p. 36, §6.83). It is unclear if the investigation has been progressed or completed. There is nothing in the Intelligence Services Commissioner's reports that indicates that any audit or analysis of what data has been shared has taken place. Disclosure has been requested.

Article 8 ECHR

55. Any sharing prior to avowal was unlawful, for the reasons given in the October 2016 Judgment.

56. The arrangements after avowal still do not comply with the *Weber* criteria. Any interference with Article 8 must be "*in accordance with the law*" (see Article 8(2)). This

[5] https://edwardsnowden.com/2016/10/28/milkwhite-enrichment-services-mes-programme/

requires more than merely that the interference be lawful as a matter of English law: it must also be "*compatible with the rule of law*": Gillan v United Kingdom (2010) 50 EHRR 45 **[A3/58]** at §76. There must be "*a measure of legal protection against arbitrary interferences by public authorities*", and public rules must indicate "*with sufficient clarity*" the scope of any discretion conferred and the manner of its exercise: Gillan at §77.

57. In Weber & Saravia v Germany (2008) 46 EHRR SE5 **[A3/53]**, the ECtHR held at §§93-94:

> *"The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures ... Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference."*

58. In Weber, the Court at §95 referred to the minimum safeguards in order to avoid abuses of power, including the need for safeguards on sharing:

> *'In its case law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: ... the precautions to be taken when communicating the data to other parties;*

59. There are no restraints in primary legislation on the sharing of bulk data:

a) Section 19 of the Counter Terrorism Act 2008 (the '2008 Act') **[A1/9]** permits sharing and onward disclosure and the use of material obtained for one purpose for another. Sharing of information pursuant to section 19 of the 2008 Act does not require any warrant or other external authorisation, regardless of the private or sensitive nature of the information. There is no requirement for oversight of a decision to share information under section 19.

b) If a BPD contains intercept material, the basic safeguards in section 15(2) and (3) of RIPA limiting the number of persons to whom the material is disclosed, the extent of copying and arrangements for destruction may be disapplied by the

Secretary of State. The Secretary of State may decide to retain such requirements *"to such extent (if any) as the Secretary of State thinks fit"* (section 15(7)(a) of RIPA).

c) Nothing in section 94 of the TA 1984 imposes any restriction on sharing.

d) The Data Protection Act 1998 ('**DPA**') has been abrogated by ministerial certificate. The eighth data protection principle provides *"Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data"*. That principle is disapplied by each of the Agencies' certificates made under section 28 of the DPA. For example, GCHQ's certificate **[3/17-20]** provides for the following exemption:

PART A			
	Column 1		Column 2
1.	Personal data processed in the performance of the functions described in section 3 of the Intelligence Services Act 1994 ("ISA") or personal data processed in accordance with section 4(2)(a) ISA.	i) ii) iii) iv) v)	Sections 7(1),10 and 12 of Part II; Sections 16(c), 16(e), 16(f),17,21,22 and 24 of Part III; Part V; the first data protection principle; the second data protection principle;
2.	Personal data relating to the vetting of candidates, staff, contractors, agents and other contacts of GCHQ in accordance with the Government's security and vetting guidelines and policy including but not limited to:	vi) vii)	the sixth data protection principle to the extent necessary to be consistent with the exemptions contained in this certificate; and the eighth data protection principle.

60. Nor is there any secondary legislation or Code of Practice providing safeguards over the sharing of BPD or BCD.

61. There are three reasons why this situation is in breach of Article 8 ECHR:

a) it constitutes a circumvention of the limited safeguards in the TA 1984, RIPA and DRIPA;

b) the absence of foreseeable rules and safeguards; and

c) the inadequacy of those safeguards.

62. A direction under section 94 of the TA 1984 may be made only if '*necessary in the interests of national security or relations with the government of a country or territory outside the United Kingdom*'; on the face of the statute, the BCD direction may be made only for national security/international relations purposes. However, the ability to share data so acquired for other purposes circumvents this restriction:

a) As explained above, neither a body such as HMRC nor the agencies could obtain a section 94 authorisation for a non-national security purpose, such as the detection of tax evasion. Other powers exist to obtain communications data for that purpose, in Part I, Chapter II of RIPA.

b) If GCHQ and/or MI5 give access to their section 94 data to HMRC, for the purposes of detecting tax evasion, HMRC is circumventing the RIPA safeguards. HMRC and the NCA could have requested and obtained communications data themselves under RIPA. The effect of getting access to the same data under section 94 is to circumvent the protection of the Designated Person, the SPoC, the Interception of Communications Commissioner and the other safeguards in the Codes of Practice.

c) Such circumvention is not compatible with Article 8 ECHR. In *Liberty/Privacy (No. 1)* **[A2/38]** the Tribunal held that Agencies must apply the RIPA safeguards by analogy when obtaining information from a foreign partner. This was common ground: see §§30 and 53. Where there was no procedure to ensure that RIPA safeguards were always implemented, such a procedure had to be introduced.

63. Moreover, such use also circumvents the safeguards provided by DRIPA and the Regulations made under it, which built upon the basic architecture of RIPA. For instance, such 'recycling' of BCD would enable the Security Services to share data retained by it beyond the 12-month limit applicable to bodies bound by section 1(5) of DRIPA.

64. Secondly, the arrangements are not sufficiently foreseeable. There are no published arrangements governing the safeguards to be applied when considering sharing of data with foreign intelligence services or other UK law enforcement agencies.

65. Finally, if there are safeguards (disclosure is awaited), it appears unlikely they are adequate. A crucial factor is likely to be the presence or absence of oversight and control:

a) Has the Commissioner reviewed and audited the sharing of data? There is no evidence of any such review or audit in any of the published reports.

b) Is the use made of the shared data auditable and audited?

c) Has any misuse been discovered?

d) Would a claim to the Tribunal identify such misuse, or would the Tribunal's standard searches fail to detect misuse?

e) If and where controls are applied, how do the Agencies prevent information being used improperly, such as in support of an unlawful rendition operation, mistreatment or torture?

f) How do the Agencies and the Commissioner check whether or not a researcher at a commercial partner or HMRC has (like a number of intelligence officers) carried out an unlawful search of bulk data to find out about the movements and internet use of a friend, partner or family member? Have they ever done so?

EU law

66. The position under EU law is *a fortiori*. To the extent BCD is transferred out of the EU, this is unlawful following *Watson*: see §§114, 122 and 124.

67. Where the information contained in a BPD is of a broadly equivalent level of intrusiveness to communications data, the principles of necessity and proportionality will require an equivalent level of safeguards governing access to data as those identified in *Watson*. See paragraph 27 above, and the opinion of Advocate General Mengozzi in *Opinion 1/15* (supra).

D. Proportionality

Bulk Powers Review

68. A useful starting point is David Anderson QC's *Bulk Powers Review* (August 2016), which examined the "*operational case*" for such powers. Crucially, Mr Anderson QC was not permitted to opine on safeguards, nor make any assessment of proportionality (§9.8):

> *"It is not the function of this Report to pronounce on the overall case for bulk powers. The Government has been clear that "consideration of the safeguards that apply to [the bulk] powers, and associated questions of proportionality" should not form part of this Review…"*

69. Mr Anderson QC concluded that there was a good "*operational case*" for BPD and BCD generally, but noted that better oversight was required:

> ***"Reducing the privacy footprint***
> *9.23 Also in need of technological expertise are the IPC inspectors whose task it will be to audit the disclosure, retention and use of material acquired pursuant to the new law (clause 205). Are the SIAs' systems equipped with "privacy by design" and if not what can be done about it? Could procedures be amended in such a way as to reduce privacy intrusion (for example by greater use of anonymised search results), without jeopardising operational efficiency? Such issues need a practical understanding of how systems are engineered, how powers are operated, and what could be done to minimise the privacy footprint of the SIAs' activities. The Bill already confers duties to audit, inspect and investigate. What is needed in addition is the expertise to enable those duties to be carried out in the most effective possible way."*

70. The absence of properly resourced technical audit of BCD and BPD demonstrates that there are not sufficient safeguards over the use of such powers, which are therefore both not in accordance with the law, and disproportionate. The following basic questions do not appear to have been considered:

a) How many 'failed searches' take place, where data is accessed but no useful intelligence purpose is served? Have the Commissioners examined the failure rate?

b) Have the Commissioners considered how the 'privacy footprint' of the use of BPD and BCD could be improved, and less data accessed?

c) What technical understanding do the Commissioners and the Tribunal have of the search techniques used by sharing partners? Are the searches and algorithms audited?

d) How are artificial intelligence techniques audited, if at all?

e) What examination have the Commissioners made of profiling, where information from multiple datasets is aggregated, in order to build a comprehensive profile about individuals and their activities?

71. These questions are all suitable for being dealt with in open hearings, but, if necessary, the Tribunal should hear evidence and find facts on them in closed. It is striking that, in their evidence, none of the witnesses called by the Agencies has made any attempt to address the proportionality of the use of BPD and BCD.

Article 8 proportionality

72. Of course, an "*operational case*" does not equal proportionality. An excellent "*operational case*" can be made for a mandatory national DNA database, with a sample taken from each child at birth, or bulk retention of domestic communications content. Such schemes would nevertheless be unlawful:

a) In *S & Marper v UK* (2008) **[A3/54]** the UK noted that DNA data, which had proven to be of great value, would be deleted if the applicants were successful. Figures were provided (§92). The Court accepted that evidence (§§115-117) but nevertheless held that the retention of data was disproportionate (§§121-122). An "*operational case*" marks the start of an analysis of proportionality, not the end. A DNA fingerprint (which contains no personal information) is simply a unique identifier. It contains less intrusive personal information than a detailed record of a person's location and personal associations collected over several months, contained in BCD or BPD. Even though a sound 'operational case' may have existed, the retention was unlawful.

b) In *MK v France* (Application 19522/09) **[A3/56]** the Strasbourg Court at §40 again rejected the idea that blanket and indiscriminate retention of data was lawful *"accepting the argument based on an alleged guarantee of protection against potential identity theft would in practice be tantamount to justifying the storage of information on the whole population of France, which would most definitely be excessive and irrelevant"*.

c) The collection of BCD and BPD involves a more comprehensive and intrusive database than any previously considered by the Strasbourg court. A profile is built or capable of being built about any identifiable individual. The profile will reveal an individual's network of family, friends, business acquaintances, meetings and contacts and leisure and private activities. Accordingly, a scheme involving blanket retention of BCD or entire datasets of BPD, without independent authorisation, notification of usage or appropriate restrictions on scope is unlawful.

EU law

73. *Watson* is binding authority that the safeguards presently in place are inadequate. In particular, there is general and indiscriminate retention, no prior independent authorisation for access, no requirement for data to be retained in the EU and no notification provision.

E. Report on searches

74. The open extracts of the report on searches is difficult to understand and raises so many questions that it is difficult to make useful submissions on it at present. A RFI has been served. A response is awaited.

THOMAS DE LA MARE QC

BEN JAFFEY QC

DANIEL CASHMAN

Blackstone Chambers

BHATT MURPHY

23 February 2017

Case No. IPT/15/110/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANT'S SKELETON ARGUMENT

for hearing commencing 8 March 2017

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IN THE INVESTIGATORY POWERS TRIBUNAL **Case No. IPT/15/110/CH**

BETWEEN:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Respondents

SKELETON ARGUMENT
ON BEHALF OF THE RESPONDENTS
for hearing on 8-10 March 2017

A. Introduction and Summary

1. The regimes applicable to the obtaining of BCD pursuant to a direction under s.94 of the Telecommunications Act 1984 ("**TA 1984**") to a CSP, and to the obtaining of BPDs, by the UK Security and Intelligence Agencies ("**SIAs**") pursuant to the Security Service Act 1989 ("**SSA 1989**") and the Intelligence Services Act 1994 ("**ISA 1994**") neither engage nor infringe EU law.

2. The Claimant's argument on the EU law issues amounts to the assertion that the CJEU's judgment in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige* and *Watson & ors* ("***Watson***") can be applied directly to both the directions made under s.94 of the Telecommunications Act 1984 to a CSP, and to the obtaining of BPDs. In each case, the Claimant contends that the effect of *Watson* is:

   2.1 that the relevant regime engages EU law pursuant to Directive 2002/58/EC ("***the e-Privacy Directive***") in the case of s.94 directions and Directive 95/46/EC ("***the Data Protection Directive***") in the case of BPDs.

   2.2 that bulk retention of BCD and BPDs is unlawful under EU law;

2.3 that there is no mechanism to ensure that BCD acquired under s.94 and BPDs are used only for the purpose of fighting serious crime – and that is the sole purpose permitted under EU law; and

2.4 that the use of such BCD and BPDs lack safeguards which are mandatory under EU law, namely:

(a) a requirement for independent authorisation for access;

(b) procedures for notification of use of the data;

(c) adequate controls on how they are shared; and

(d) a prohibition on the transfer outside of the EU.

3. It is submitted first that s.94 directions and the BPD regime do not engage EU law: see **Section B** below. In summary:

3.1 The European Union may only act, and the EU Charter only applies, within the limits of competences conferred upon it by the Member States in the Treaties. Competences not conferred upon the Union in the Treaties remain with the Member States. Matters of Member States' national security are not conferred on the EU. On the contrary, they are positively identified as being the sole responsibility of Member States in Article 4(2) TEU. Further, such matters do not constitute a derogation from EU law and are not to be interpreted restrictively. Since primary EU law cannot be altered by any secondary EU measures, the scope of the e-Privacy Directive and the Data Protection Directive does not and cannot extend to activities of Member States in support of national security. Each of those Directives excludes those activities from their scope (as they must).

3.2 Accordingly, insofar as relevant to the issues in this litigation, the activities of the SIAs, including in relation to the obtaining of information/data from third parties (including CSPs) under the SSA 1989, the ISA 1994 and the TA 1984, are outside the ambit of EU law. The mere fact that information/data is – necessarily – acquired by the SIAs from other individuals (including providers of electronic communications services) is not sufficient to engage EU law: the acquisition of personal data for analysis by the SIAs is the paradigm example of national security activity, and core to the SIAs' ability to function.

3.3 Further and in any event, even in the context of the fight against serious crime by law enforcement agencies (distinct from the field of national security), the use of BCD acquired under a s.94 direction and of BPDs falls outside the scope of the Directives. The Claimant is incorrect to suggest that *Watson* is authority for the proposition that <u>any</u> retention of or access to communications data or BPDs falls within the scope of EU law. The Swedish laws at issue in

Tele 2 Sverige and DRIPA were both analysed by the CJEU as imposing a requirement on electronic communicationcs service providers to retain and provide access to communications data. Even in the field of criminal law, the CJEU made clear that "*activities of the State*" do not fall with the scope of the Directives, and are to be distinguished from the activities of providers of electronic communications services or any other individuals. The CJEU did not address the acquisition and use of BCD and BPD by the State.

4. Further, neither the effect of a s.94 direction nor of the BPD regime is to require providers or any other individual to retain any data. The Claimant's central premise that a s.94 direction is materially identical to a DRIPA retention notice, and that BPD is no different, is incorrect. See **Section C** below.

5. The Claimant is also incorrect to suggest that EU law requires that BCD or BPDs may only be used for the purposes of fighting serious crime. That suggestion is based upon a misreading of *Watson.* See **Section D** below.

6. Alternatively, even were EU law engaged, with the result that a proportionality analysis was required to be undertaken in respect of the justification for the use of s.94 directions and BPDs against the intereference with rights under Article 7 and 8 of the Charter, the safeguards identified in the context of *Watson* are not to be read across and applied here. On the (incorrect) hypothesis that EU law, and the requirements of the Directives in particular, are engaged:

   6.1 In the context of national security, the effect of Article 4(2) TEU is that a Member State has broadest possible margin of discretion to judge what is necessary and proportionate in the interests of national security. The use of s.94 directions and BPDs in the work of the SIAs is judged to be necessary and proportionate to national security.

   6.2 The safeguards identified in *Watson* were judged to be necessary and appropriate in the case of a requirement on service providers to retain and disclose communications data for the purposes of the targeted investigation, detection and prosecution of serious crime, to which the court's judgment in *Watson* is directed. But it does not follow that they must, or can properly, be likewise applied in the context of any use of bulk data by the SIAs (or indeed other state authorities, including law enforcement agencies). To the contrary, they cannot sensibly be applied in the context of the acquisition or use of BCD under a s.94 direction or of BPDs. Such safeguards are neither adaptable nor appropriate to such circumstances. To do so would significantly undermine the ability of the SIAs to protect the public by protecting the UK's national security.

   6.3 In those circumstances, any proportionality analysis that was required to be undertaken would yield the result that the existing regime is lawful.

Alternative safeguards are in place which are suitable and proportionate to the circumstances of the nature of the data in question and of the use to which the data are put. As has already been held by this Tribunal, such safeguards are in accordance with those required by the ECHR; and, if that is so, it is impossible to see why it should be appropriate or permissible to require more, especially when the effect would be to introduce serious risks to national security. See **Section E** below.

7. Finally, at **Section F** below, the Respondents deal with the proportionality arguments as now advanced by the Claimant, insofar as it is possible to do so in OPEN[1]. In summary, the Respondents' s.94 BCD and BPD activities are proportionate and have been throughout the relevant period:

7.1 In the field of national security a wide margin of appreciation is accorded to the Government in assessing the pressing social need and choosing the means for achieving the legitimate aim of protecting national security (see *Liberty/Privacy*, §§33-39).

7.2 The United Kingdom faces serious national security threats, including from international terrorism (where the threat level is SEVERE) and from hostile states. Developments in technology, particularly the increasing use of encryption and increasing difficulty of interception, make capabilities such as BCD and BPD much more important to the SIAs.

7.3 The usefulness of **BCD** obtained under s.94 directions is clear. It provides more comprehensive coverage than is possible by means of interception. For example, it enables GCHQ to *"tip off"* the Security Service when a subject of interest arrives in the UK. Security Service investigations are made more sophisticated and timely as a result of having a BCD database rather than having to rely solely on individual CD requests made to CSPs.

7.4 The BCD capability also leads to a significant *reduction* of the intrusion into privacy of individuals of no intelligence interest. Analysis of BCD, and of patterns of communication and potential subjects of interest, enables identification of specific individuals without first having to carry out more intrusive investigations into a wide range of individuals.

7.5 **BPD** is also a highly important capability for each of the SIAs. It has been used e.g. to identify a suspected Al-Qaida operative using fragmentary information to reduce possible candidates from 27,000 to one. The speed of analysis as a result of the use of electronic BPDs is of particular importance.

[1] The Respondents' skeleton argument relating to the issues of the legality of sharing will be served by 4.00 pm on Friday 3 March, as ordered by the Tribunal at the interlocutory hearing on 1 March

7.6 The importance of BPDs to the SIAs has been accepted in emphatic terms by David Anderson QC, the Independent Reviewer of Terrorism Legislation, in his August 2016 *Report of the Bulk Powers Review*. He noted, inter alia, their *"great utility to the SIAs"* and found that case studies which he examined *"provided unequivocal evidence of their value"*. He found that the work of MI5 and SIS *"would be substantially less efficient without the use of BPDs"* and also accepted the utility of BPDs to GCHQ *"to enrich information obtained through other means."* In the *"vital"* areas of pattern analysis and anomaly detection, which can provide information about a threat in the absence of any other intelligence, *"no practicable alternative to the use of BPDs exists."* He concluded that the operational case for BPD is *"evident"*.

7.7 The use of BPD also significantly reduces the needs for *more* intrusive techniques to be used. The identification of targets from a wider pool by means of searching BPDs avoids the need to investigate that wider pool in a more intrusive manner. The electronic nature of the searches also means that the data of subjects which is searched but does not produce a *"hit"* will not be viewed by the human operator of the system but only viewed electronically.

7.8 For these reasons, the use of BPDs and BCD obtained under s.94 directions is and has at all times been proportionate.

B. The s.94 and BPD regimes fall outside the scope of the Directives

(i) National security falls outside the scope of EU law and the Directives

8. Article 4(1) and (2) TEU provide as follows (underlining added):

> *"1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.*
>
> *2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."*

9. Article 5(1) and (2) TEU further provide:

> *"1. The limits of Union competences are governed by the principle of conferral. ...*
>
> *2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."*

10. Notably, in the International Law Decision of 18-19 February 2016, it was confirmed that

> *"Article 4(2) of the Treaty on European Union confirms that national security remains the sole responsibility of each Member State. This does not constitute a derogation from Union law and should therefore not be interpreted restrictively. In exercising their powers, the Union institutions will fully respect the national security responsibility of the Member States."*[2]

11. The effect of Article 4(2) was more recently explained in Case C-51/15 *Remondis*. That case concerned the issue of whether the definition of "*public contracts*" in the EU directive on public procurement extended to an agreement between two regional authorities to form a common special-purpose association with separate legal personality. The CJEU answered it by reference to Article 4(2) TEU, adopting the view of Advocate-General Mengozzi that such matters fell outside the scope of EU law altogether. It is apparent that:

    11.1 The matters covered by Article 4(2) are solely matters for each Member State and do not fall under EU law. The fact that the Union must respect "*essential State functions*" (including the division of responsibility as between national, regional and local government, and, in the present case, national security) is consistent with the principle of conferral of powers laid down in Articles 5(1) and (2) TEU, no provision having conferred on the Union the power to intervene in such matters: see the Opinion of AG Mengozzi at §§38-39.

    11.2 As acts of secondary legislation such as a directive must be in conformity with primary law (i.e. the Treaties), they cannot be interpreted as permitting interference in the matters which benefit from the protection conferred by Article 4(2) TEU. Such matters remain outside the scope of EU law and, more specifically, EU rules set out in a directive: see the Opinion of AG Mengozzi at §§41-42, as endorsed by the CJEU in its Judgment at §§40-41.

12. National security is quintessentially such a matter, as emphasised not only by the second sentence of Article 4(2) TEU but also the third sentence.

13. Thus, when Article 16(2) TFEU provides for the EU legislature to make rules on the protection of personal data, it does so in terms that confine the power only to those activities of Member States which fall within the scope of EU law (underlining added):

> *"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with*

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[2] On 18-19 February 2016, the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, made a Decision concerning a new settlement for the United Kingdom within the European Union. At section C.5 of the Decision, the Heads of State and Government stated that The Decision did not formally come into force given that the United Kingdom did not vote to remain a member of the European Union in the referendum. However, in accordance with Article 31 of the Vienna Convention on the Law of the Treaties, it remains an interpretative decision agreed by all parties to the EU Treaties.

regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities."

14. Likewise, in Title V of Part Three of the TFEU (relating to the Area of Freedom, Security and Justice), it is confirmed that responsibility for national security remains with Member States, and is not conferred upon the EU. See:

    14.1 Article 72 TFEU provides: "*This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*"; and

    14.2 Article 73 TFEU provides: "*It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.*"

    14.3 Similarly, Article 276 TFEU makes clear that "*in exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*"

15. Consistently with Article 4(2) TEU and Article 16(2) TFEU, both the Data Protection Directive and the e-Privacy Directive exclude national security from their scope.

    15.1 Article 3(2) of the Data Protection Directive provides that it "*shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.*"[3]

    15.2 Article 1(3) of the e-Privacy Directive provides that it "*shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.*"[4]

16. Likewise, in the General Data Protection Regulation (Regulation (EU) 2016/679, which will repeal and replace the Data Protection Direction with effect from 25 May 2018, Recital (16) makes clear:

[3] See also Recital (13) of the Data Protection Directive.
[4] See also Recital (11) of the e-Privacy Directive.

"This Regulation does not apply to issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security."

17. It is plain from those provisions that the EU legislature intended to confine the scope of each of the Directives to those activities falling outside the various identified areas. In light of the primacy of Article 4(2) TEU and Article 16(2) TFEU, that was inevitable in the case of national security and essential State functions, given that competence in such matters had not been conferred upon the EU at all.

(ii) Application to s.94 directions and BPDs

18. Once it is acknowledged that Article 4(2) TEU excludes activities concerning national security from the scope of EU law, the only issue is what activities may be properly categorised as falling within that concept. In considering that issue it is to be noted that Article 4(2) is not a derogation, and is thus not to be interpreted narrowly.

19. The acquisition and use of personal data (including communications data) for the purpose of identifying and disrupting national security threats is a core national security activity. Indeed, it is a paradigm activity of the SIAs, who rely on the acquisition of personal data to provide the raw material of intelligence. It falls squarely within the heart of Article 4(2) TEU.

20. In Joined Cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-4721, the CJEU held at §59 that a Commission Decision that adequate arrangements had been made for the protection of bulk PNR data (collected for airlines' commercial purposes) to the United States authorities fell outside the scope of the Data Protection Directive. The reason was that the processing of such data *"falls within a framework established by the public authorities that relates to public security"*: see §58. *A fortiori,* processing of data involved in activities such as the transfer of bulk data to the SIAs (rather than to a foreign state), in particular for the purposes of national security, does not fall within the scope of the Data Protection Directive; nor equally can it engage the e-Privacy Directive.

21. The Respondents' response to this claim (as redacted and gisted for OPEN disclosure) confirms at §§7-16:

    21.1 Both GCHQ and MI5 acquire BCD from providers of electronic communications services (referred to variously as "communications servive providers" (CSPs) or "communication network providers" (CNPs)) pursuant to s.94 directions. The data received is retained and aggregated in a database held by GCHQ and MI5 respectively. The communications data provided by CSPs is limited to traffic data and service use information. This does not include communication content or subscriber information, and so cannot be ascribed to an individual, taken alone.

21.2 GCHQ merges the data with its wider datasets, enriching the results of analytic queries made on those systems. Such analysis of BCD is vital for identifying and developing intelligence targets.

21.3 MI5 retrieves data from its database using sophisticated software, run against the data to answer specific investigative questions. Requests of the database can be made only where an authorisation is granted under a process akin to section 22 of RIPA, if judged necessary and proportionate.

21.4 The communications data is provided by CSPs on a regular basis. It is data which is maintained and retained by CSPs for their own commercial purposes (particularly billing and fraud prevention).

22. Section 94 directions therefore operate in a different way to retention notices under DRIPA. They do not require providers of electronic communication services to retain any data that they would otherwise not have retained. Nor do they require providers to process such data by searching their systems in order to retrieve and disclose information in response to specific requests for targeted requests. Instead, the only obligation on such providers is to transfer bulk communications data (without subscriber information) to GCHQ and MI5 respectively.

23. Similarly, in the case of BPDs, the SIAs collect datasets from a variety of sources, which are then incorporated into an analytical system and used and accessed for intelligence purposes. Although this may involve some data processing by a person other than state authorities, any such processing does not in itself fall within the scope of the Data Protection Directive, for the reasons identified by the court in *Parliament v Council*: they are inextricably bound up with the carrying out of the national security activities themselves.

24. The recent opinion of AG Mengozzi in *Opinion 1/15* on the draft agreement between Canada and the EU on the transfer and processing of PNR data is to similar effect. That Opinion concerns a draft agreement between the EU and Canada concerning the transfer of PNR data to the Canadian competent authorities[5]. AG Mengozzi cast no doubt upon the conclusion in *Parliament v Council* that the transfer of data in that case occurred within a framework established by public authorities that relate to public security, which did not come within the scope of the Data Protection Directive: see §85.

25. Since the purposes for which the data is processed fall outside the scope of EU law, Charter rights are not engaged:

[5] Such an agreement by definition fell within the scope of EU law. Specifically, it was made on the basis of Article 82(1)(d) TFEU and Article 87(2)(a) TFEU, read in conjuction with Article 218(6)(a)(v) TFEU. Those provisions refer to police and judicial cooperation in criminal matters (and in the case of Artcle 218 for the making of international agreeements by the EU). In the view of AG Mengozzi, the agreement ought also to be made on the basis of Article 16(2) TFEU.

25.1 Article 6(1) TEU makes clear that "*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*" Article 51(2) of the Charter further confirms that "*The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*"

25.2 Moreover, Article 51(1) of the Charter nakes clear that the provisions of the Charter are addressed to the Member States "*only when they are implementing Union law*". The s.94 and BPD regimes do not implement EU law.

It follows that Articles 7 and 8 of the Charter have no application to the present circumstances. The only test of the proportionality of the use of bulk data arises under Article 8 ECHR, and not under EU law.

(iii) The use of bulk data by law enforcement agencies

26. Further and in any event, even in the context of the fight against serious crime by law enforcement agencies (distinct from the field of national security), the use of BCD acquired under a s.94 direction and of BPDs falls outside the scope of the Directives. The Claimant is incorrect to suggest that *Watson* is authority for the proposition that any retention of or access to communications data or BPDs falls within the scope of EU law.

27. In *Watson,* the CJEU recognised at §69 that Article 1(3) of the e-Privacy Directive excludes from its scope "*activities of the State*" in the areas of criminal law. The CJEU expressly drew an analogy with Article 3(2) of the Data Protection Directive, whose effect it had already considered in Case C-101/01 *Lindqvist* at §43 and Case C-73/07 *Satakunnan Markkinapörssi* at §41. In those cases, the CJEU had confirmed that that by virtue of Article 3(2), the Data Protection Directive does not apply to the processing of personal data in the course of an activity which falls outside the scope of EU law such as those listed, being "*activities of the State or of State authorities and unrelated to the fields of activity of individuals.*"

28. At §70 of *Watson*, the CJEU contrasted the effect of Article 1(3) of the e-Privacy Directive with that of Article 3, which sets out where the directive does apply – namely, to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the European Union, including public communications networks supporting data collection and identification devices ("***electronic communications services***"). Consequently, the CJEU concluded, "*that directive must be regarded as regulating the activities of the providers of such services*" (emphasis added).

29. It is therefore apparent that, in the context of areas of criminal law, the CJEU drew a direct contrast between "*activities of the State*" falling within the specified fields on the

one hand, which fall outside the scope of the e-Privacy Direcive, and "*activities of the providers of electronic communications services*" on the other, to which the Directive directly applies. It was necessary for it to do so because, as Article 1(3) makes clear, it is only "*activities of the State*" in areas of criminal law which are excluded. The Respondents note that the same qualification is not imposed by Article 1(3) in the area of national security, where the exclusion is wider.

30. Against that background, the CJEU considered the effect of Article 15(1) of the e-Privacy Directive at §§71-74.

30.1 At §71, the CJEU noted that Article 15(1) specifically stated that Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Articles 5, 6, 8(1)-(4) and 9, including measures "*providing for the retention of data*".

30.2 At §72, the CJEU again confirmed the importance of the contrast between activities "*characteristic of States or State authorities*" and those which are "*unrelated to fields in which individuals are active*" (referring to Case C-275/06 *Promusicae*, which in turn referred back to *Lindqvist* at §43), noting that "*Admittedly, the legislative measures that are referred to in Article 15(1) of [the e-Privacy Directive] concern activities characteristic of States or State authorities*", and noting the overlap of the objectives of such measures with those pursued by the activities referred to in Article 1(3) of the Directive.

30.3 At §73, the CJEU made clear that that tension could not be resolved simply by concluding that all such legislative measures were themselves excluded from the scope of the Directive: indeed, Article 15(1) necessarily pre-supposed that the legislative measures referred to fell within the scope of the directive (and would be deprived of any purpose if that were not the case).

30.4 At §74, the CJEU resolved the tension: it noted that the legislative measures referred to in Article 15(1) governed "*the activity of providers of electronic communications services*" (and not the activity of the State or of State authorities). Hence Article 15(1), read together with Article 3 (which, made clear that the Directive applies specifically to providers of electronic communications providers – see §70), must be interpreted as meaning that such legislative measures fall within the scope of the Directive.

31. At §§75- 80, the CJEU went on to consider whether, in consequence, the scope of the Directive extended not only to measures requiring the retention of such data, but also to the access of the national authorities to the data retained by the providers of electronic communications providers. As appears at §§65-66, the UK and the Commission had contended before the CJEU that only legislation relating to the retention of the data, but not legislation relating to the access to that data by the national authorities, fell within the scope of the Directive.

31.1 At §75, the CJEU confirmed that legislative measures requiring providers of electronic communications services to retain traffic and location data fell within the scope of the directive, since to retain such data necessarily involves the processing "*by those providers*" of personal data.

31.2 At §76, the CJEU stated that the scope of the Directive also extended to a legislative measure relating to the access of the national authorities to the data retained *"by the providers of electronic communications services"*. There were two reasons given for that conclusion.

(a) The CJEU stated at §§77-78 that a legislative measure under Article 15(1) requiring providers of electronic communications services to grant national authorities access to the data retained by those providers, notwithstanding the confidentiality of electronic communications and related traffic data guaranteed by Article 5 of the Directive, "*concerns the processing of personal data by those providers, and that processing falls within the scope of that directive*" (emphasis added).

(b) The CJEU stated at §79 that "*since data is retained only for the purpose, when necessary, of making that data accessible to the competent national authorities, national legislation that imposes the retention of data necessarily entails, in principle, the existence of provisions of access by the competent national authorities to the data retained by the providers of electronic communications services*" (underlining added). At §80 it observed that that interpretation was confirmed by Article 15(1b) of the e-Privacy Directive, which made clear that providers were to establish internal procedures for responding to the requests for access to users' personal data.

32. The Respondents emphasise that the context in which all of these observations are made concerns:

32.1 traffic and location data which is retained by *providers* (not State authorities);

32.2 access to such data which is provided by the further processing of the data by the *providers* (not State authorities); and

32.3 data which is retained *only* for the purposes of such processing as subsequently required by national authorities, not data which is held for the commercial purposes of the providers themselves (and transferred in bulk to State authorities for their own use and access for the purposes of national security and/or other purposes specified by Article 1(3)).

33. None of those matters cast any doubt at all upon the principle that the e-Privacy Directive is concerned with the processing of personal data by service providers and not by State authorities (including retention and provision of access to such data) in

areas of criminal law, which fall outside the scope of the Directive and of EU law. That is also consistent with the earlier conclusion of the CJEU in Case C-301/06 *Ireland v European Parliament and Council* that the provisions of Directive 2006/24 (***"the Data Retention Directive"***), which amended the e-Privacy Directive, were *"essentially limited to the activities of service providers"*, to the exclusion of State activities coming under Title VI of the TEU (as it then stood, dealing with police and judicial cooperation in criminal matters): §§80-84. The CJEU did not refer to or qualify this decision in *Watson*, despite the fact that the referring court (the Court of Appeal) had specifically drawn attention to it: see *Davis and ors v SSHD* [2015] EWCA Civ 1185 at (among other places) §§56-58 and 95-96. Even if the CJEU's earlier conclusions on whether access to data retained by service providers fall within scope of the e-Privacy Directive have to be read as moderated in *Watson*, the essential finding that access to data or the use there of by the State authorities does not fall in scope is not affected in any way.

34. Nor do they cast any doubt upon the conclusion that the CJEU did not intend to lay down in its judgments in *Digital Rights Ireland* (or in *Watson*) any mandatory requirements applicable to national legislation on access to data that does not implement EU law: see the Court of Appeal's observations in *Davis* at §103 (as noted by CJEU at §57).

35. The result is that the use of bulk data under the s.94 and BPD regimes by law enforcement agencies falls outside the scope of the Directives also. No other approach provides any meaning to Article 1(3) of the e-Privacy Directive and Article 3(2) of the Data Protection Directive (and the Claimant gives them none). Even absent Article 4(2) TEU, the same would be true of the SIAs, who are self-evidently State authorities also.

(iv) Response to the Claimant's submissions on the scope of EU law and the Directives

36. **First**, the Claimant contends (at skeleton §§21(c) and 41) that a s.94 direction is "*materially identical*" to a DRIPA retention notice. It is incorrect to do so. A s.94 direction places no obligation on a *provider* of electronic communication services to retain data, or to search its systems in order to retrieve and disclose specific data in response to targeted requests. The Claimant's suggestion that the CJEU's judgment extends to all retention of data *by State authorities*, whether or not for national security purposes or for other specified purposes falling within Article 1(3) of the e-Privacy Directive or Article 3(2) of the Data Protection Directive, is incorrect.

37. **Secondly**, the Claimant also seeks (at skeleton §§21(b) and 36-37) to extend the effect of §73 of the CJEU's judgment to the national security context. However, §73 cannot be read as suggesting that any national measures on national security may fall within the scope of the e-Privacy Directive simply by virtue of the reference to "*national security*" in Article 15(1):

    37.1 That would be inconsistent with primary law, namely Article 4(2) TEU.

37.2 In any event, the Claimant ignores §74, which makes clear that "*the legislative measures referred to in Article 15(1) govern, for the purposes mentioned in that provision, the activity of providers of electronic communications services.*" Article 15(1) plainly does not refer to legislative measures which govern the activities of the State authorities concerning national security, or any other activities which are so closely connected with the State's activities that they form part of the "*framework*" of national security (as the term was used in *Parliament v Council*): in each case, those matters fall outside the scope of the Directive by virtue of Article 1(3), with the result that Article 15(1) can have no application to them. Just as the court recognised that the activities of State authorities in the area of criminal law remained out of scope of the Directive notwithstanding the terms of Article 15(1) (see §69), the same is true of activities falling within the national security framework.

37.3 The reference to "*national security*" in Article 15(1) of the Directive makes clear that legislative measures may be taken to restrict the rights and obligations referred to where necessary, appropriate and proportionate to safeguard national security *even where* the Directive *is* engaged.

38. **Thirdly**, the Claimant claims (at skeleton §26), without elaboration, that the obtaining of BPDs engages EU law pursuant to the Data Protection Directive. That is incorrect: the obtaining of BPDs within the framework of national security does not engage EU law (see Article 4(2)) or the Directive (see Article 3(2) of the Directive and *Parliament v Council*, supra).

39. **Fourthly**, the Tribunal is not assisted by the Claimant's suggestion (at skeleton §§31-32) that the Respondent's submissions on these points amount to a "*collateral attack*" on the validity of the judgment in *Watson*, or amount to an abuse of process. The points set out above were not determined in *Watson*.

40. **Fifthly**, the Claimant is also incorrect (at skeleton §§33-34) in its account of the arguments advanced by the UK before the CJEU, which were materially different: in particular, they took as their starting-point that the retention of communications data by service providers under a DRIPA retention notice fell within the scope of EU law. The CJEU's conclusion that access to such retained data also fell within the scope of EU law depended upon the fact that retention of such data by service providers for the purposes of access already engaged EU law, and that provision of access by the service providers amounted to a further act of data processing by them: see *Watson* at §§78-79. There is no equivalent retention or provision of access by service providers in the present case.

41. **Sixthly**, the Claimant contends (at skeleton §§35 and 39-40) that DRIPA was "*national security legislation*" and that it is wrong to suggest that DRIPA and *Watson* were about criminal investigation alone; and that the CJEU had "*tailored its judgment to national security cases*", which is said to be "*fatal to the Respondent's argument that national*

security retention was not being considered in Watson". In substance, beyond the arguments on scope already set out above, this argument is based upon the final sentence of §119 alone. However, in §119, the reference to national security arises explicitly in the context of "*objective of fighting crime*" (in the second sentence): the subsequent reference to national security arises only in relation to a subset of crime, namely in a "*specific case*" of "*terrorist activities*", where wider access to data might be granted other than that of a suspect. National security is otherwise ignored in the analysis, and plays no part in the *dispositif* – with good reason, as it falls out of scope. There is therefore no analysis at all of national security activities such as nuclear counter-proliferation, defence against cyber-attacks from a hostile state, support of troops in an armed conflict abroad, counter-espionage, or even counter-terrorism in its national security aspect (rather than purely criminal aspect).

42. **Seventhly**, the Claimant observes (at skeleton §42) that BCD acquired by the SIAs for national security purposes under a s.94 direction may be shared (pursuant to s.19(2), (3) and (5) of the Counter-Terrorism Act 2008) for use for other purposes, such as the detection of serious crime. However, the use of such data after its acquisition for the purpose of criminal investigation falls outside the scope of the e-Privacy Directive (by virtue of Article 1(3)) as it would at that stage relate to "*the activities of the State in areas of criminal law*": it does not matter that it is used for purposes other than protecting national security.

43. **Eighthly**, the Claimant does not identify (at skeleton §44) any separate basis in EU law upon which it may be said that the BPD regime engages EU law. The correct position is that, for the reasons set out above, s.94 directions and the BPD regime do not fall within the scope of EU law.

C. Retention of BCD and BPDs by the SIAs is lawful

44. The Claimant's bald assertion (at skeleton §22) that it was held in *Watson* that large-scale bulk retention of BCD is unlawful under EU law is incorrect. In *Watson,* the CJEU considered (in the context of the *Tele2 Sverige* reference) only the lawfulness of the imposition:

    44.1 of a requirement on service providers

    44.2 for the general and indiscrimate retention of communications data

    44.3 which they would not otherwise have retained for any commercial or operational purpose

    44.4 for the purpose of fighting crime.

45. As to the **first** of those points, the issue of retention of data by *service providers* does not arise in the case of s.94 directions: such directions do not require service providers to retain any data.

46. As to the **second**, the complaint about the general and indiscriminate retention of communications data related only to the Swedish position, not that in the UK.

47. As to the **third**, just as under the s.94 regime, there is nothing in the BPD regime that requires any other individuals to retain any data either. Any data with which the BPD regime is concerned relates to data lawfully retained for the purposes of the activities of the data owners concerned.

48. As to the **fourth** of those points:

    48.1 The Swedish legislation in question provided for the retention of communications data so that it could be accessed by national police, the Swedish Security Service and Swedish Customs Authority in order to avert, prevent or detect criminal activity involving any offence punishable by imprisonment for over 2 years, and certain specified offences punishable by a lesser term of imprisonment. The retained data was also required to be disclosed to the prosecution authority, police, Security Service or other public law enforcement authority if the data was connected with any presumed criminal offence. National authorities could also place a person under surveillance in respect of the preliminary investigation of offences punishable by imprisonment for at least six months: see *Watson* at §§22, 25, 26.

    48.2 The first question referred to the CJEU expressly made clear that the legislation was sought to be justified "*for the purpose of combating crime*", and was addressed by the court on that basis: §§51, 62.

49. As set out above and by contrast, the retention of data by the SIAs for the purpose of national security falls outside the scope of EU law and is accordingly lawful if authorised by domestic legislation and otherwise compatible with the ECHR. Further, the retention of data *by State authorities* for any purpose falling within Article 1(3) of the e-Privacy Directive and/or Article 3(2) of the Data Protection Directive falls outside the scope of EU law. *Watson* is not authority to the contrary. It follows that the s.94 regime and the BPDs regime are materially different from the position considered by the CJEU in *Watson.*

D. The purposes for which BCD and BPDs may be acquired or accessed are not limited to the purpose of fighting serious crime

50. The Claimant contends that the s.94 and BPD regimes are unlawful because there is no mechanism to ensure that BCD acquired under a s.94 direction or BPDs are used only

for the purpose of fighting serious crime. Even if and to the extent that EU law is engaged at all in the present context (which is denied), there would still not be any such requirement. The Claimant's contention to the contrary is based upon a misreading of *Watson*.

51. The starting-point (where they are engaged at all) is the terms of the Data Protection Directive and the e-Privacy Directive themselves. Neither restricts the purpose for which interference with any protected rights may be permitted to that of "*fighting serious crime*".

51.1 Article 13(1) of the Data Protection Directive makes clear that

> "*Member States may adopt legislative measures to restrict the scope of obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:*
>
> *(a) national security;*
>
> *(b) defence;*
>
> *(c) public security;*
>
> *(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;*
>
> *(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;*
>
> *(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);*
>
> *(g) the protection of the data subject or of the rights and freedoms of others.*"

51.2 Article 15(1) of the e-Privacy Directive similarly makes clear that

> "*Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3), (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of [the Data Protection Directive]. ...*"

51.3 In Case C-275/06 *Promusicae*, the court held at §53 that the express reference to Article 13(1) of the Data Protection Directive at the end of the list of exceptions in Article 15(1) of the e-Privacy Directive also authorised the Member States to adopt legislative measures to restrict the obligation of confidentiality of personal data (under Article 5(1) of the e-Privacy Directive) where that restriction is necessary for the purposes set out in Article 13(1) (including to protect the rights and freedoms of others).

52. Unsurprisingly, therefore, in *Watson* the CJEU held that a legislative measure which restricted rights under the e-Privacy Directive could be adopted to pursue any of those objectives (and confirmed its conclusion in *Promusicae* that the permitted objectives could include those set out in Article 13(1) of the Data Protection Directive), but no others: §§90, 115.

53. The CJEU then went on to hold that given the serious nature of the interference with rights under Article 7, 8 and 11 of the Charter, as a matter of proportionality, "*in the area of prevention, investigation, detection and prosecution of criminal offences*" (or "*fighting crime*" for short), only the objective of fighting "*serious*" crime was capable of justifying the legislative measures for retention and access to traffic and location data: §§102, 115. This was not a conclusion that the other objectives set out in Article 15 of the e-Privacy Directive could not justify a legislative measure interfering with such rights, as the Claimant contends. Instead, the CJEU concluded that where such legislation was sought to be justified by reference to the objective of fighting crime, the level of interference entailed would not be capable of being justified by reference to less serious crime (however that may be defined at a national level). That is why, in making such reference to a requirement that the interference be justified in the interests of "*fighting serious crime*", the CJEU was careful to make clear that it was dealing with legislative requirements introduced "*for the purpose of fighting crime*", or "*in the context of fighting crime*": see §§102, 112, 115, 119 and 125. It is to be noted that the legislation at issue in the *Tele2 Sverige* case was expressly sought to be applied *only* in the context of fighting crime.

54. While the purposes for which retention notices could be issued or data accessed under the Data Retention and Investigatory Powers Act 2014 ("***DRIPA***") were wider, in that they extended to any of the purposes set out in s.22(2) of the Regulation of Investigatory Powers Act 2000 ("***RIPA***") (see §33), those purposes included that of "*preventing or detecting crime or of preventing disorder*", without limitation as to the seriousness of crime or disorder involved: s.22(2)(b) RIPA. In that context, the CJEU chose to answer the first reference question in the DRIPA case together with the second question in the *Tele2 Sverige* case: see §§113-114, and to provide a single answer to it at §125. The result was that the court focused in particular on the particular question of the proportionality of providing access to retained data in relation to the objective of fighting crime, even though it recognised that other objectives were also permissible: §§115, 119.

55. The CJEU did not address the question of the proportionality of access to retained data in <u>other</u> circumstances:

    55.1 Even where, at §119, the CJEU recognised that national security, defence or public security interests could be threatened, justifying greater access than it thought might otherwise be proporortionate, it still did so in the context of "*particular situations*" including the prevention, investigation, detection or prosecution of specific cases of criminal (terrorist) activity.

55.2 It did not address the proportionality of access to retained data for other national security purposes, for example, in the context of the fight against nuclear proliferation, counter-espionage, defence against cyber-attacks by a foreign state, or military conflicts threatening the geo-political security of Member States of the EU (such as events in Ukraine or Syria). Still less, for the other legitimate objectives set out at Article 15(1) of the e-Privacy Directive and Article 13(1) of the Data Protection Directive.

56. The fact that the CJEU did not enter into a discussion of the proportionality of accessing retained data in such contexts cannot be taken to mean that the objectives set out in Article 15(1) of the e-Privacy Directive and Article 13(1) of the Data Protection Directive have been narrowed only to that of fighting serious crime. Such a contention is simply irreconcilable with both the CJEU's judgment, and indeed with the express terms of the legislation which the CJEU was seeking to interpret.

E. The safeguards identified in *Watson* are neither necessary nor appropriate to ensure the proportionality of access to BCD and BPDs, in particular in national security cases

57. The Claimant asserts that the use of BCD acquired under a s.94 direction and BPDs lack safeguards which are mandatory under EU law, namely:

57.1 a requirement for independent authorisation for access;

57.2 procedures for notification of use of the data;

57.3 adequate controls on how they are shared; and

57.4 a prohibition on the transfer outside of the EU.

58. Even if EU law were engaged and the Directives applied (which they do not), it would not follow that such safeguards are required in the case of the acquisition and use of BCD under a s.94 direction and BPDs. The Claimant's submission ignores:

58.1 the proper approach to the assessment of proportionality and the breadth of discretion afforded to Member States on matters of national security;

58.2 the context in which the SIA use bulk data, and in particular the difference in purpose and nature of access to BCD obtained under a s.94 direction and to BPDs (none of which was in evidence before the CJEU in *Watson*);

58.3 the impact that that difference has on the appropriateness of and necessity for the safeguards identified in *Watson*.

59. When the nature and purpose of such access is assessed in its proper context, it is apparent that the "safeguards" proposed by the Claimants are neither necessary nor appropriate. Alternative safeguards are in place which are suitable and proportionate to the circumstances of the nature of the data in question and of the use to which the data are put.

(i) The proper approach to the proportionality assessment and margin of appreciation

60. The proportionality assessment is a fact-sensitive one, for the national court to apply. As it was put by Lord Reed and Lord Toulson JJSC in *R (Lumsdon) v Legal Services Board* [2016] AC 697 at §§29-30:

> *"29. On the other hand, when the validity of a national measure is challenged before a national court on the ground that it infringes the EU principle of proportionality, it is in principle for the national court to reach its own conclusion. It may refer a question of interpretation of EU law to the Court of Justice, but it is then for the national court to apply the court's ruling to the facts of the case before it. The court has repeatedly accepted that it does not have jurisdiction under the preliminary reference procedure to rule on the compatibility of a national measure with EU law: see, for example, Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Case C-55/94) [1996] All ER (EC) 189, para 19. It has explained its role under that procedure as being to provide the national court "with all criteria for the interpretation of Community law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it": Gebhard, para 19.*
>
> *30. Nevertheless, where a preliminary reference is made, the Court of Justice often effectively determines the proportionality of the national measure in issue, by reformulating the question referred so as to ask whether the relevant provision of EU legislation, or general principles of EU law, preclude a measure of that kind, or alternatively whether the measure in question is compatible with the relevant provision of EU legislation or general principles. That practice reflects the fact that it can be difficult to draw a clear dividing line between the interpretation of the law and its application in concrete circumstances, and an answer which explains how the law applies in the circumstances of the case before the referring court is likely to be helpful to it. The practice also avoids the risk that member states may apply EU law differently in similar situations, or may be insufficiently stringent in their scrutiny of national measures. It may however give rise to difficulties if the court's understanding of the national measure, or of the relevant facts, is different from that of the referring court (as occurred, in a different context, in Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd (formerly Loyalty Management UK Ltd) [2013] 2 All ER 719)."*

61. The last sentence of §30 is prescient. It is particularly to be borne in mind when the principles identified in one context are sought simply to be transposed into another context involving *different* facts. Moreover, this Tribunal is well placed properly to understand the present context and the work of the SIAs.

62. Further, on the hypothesis that the effect of Article 4(2) TEU was not to exclude national security from the scope of EU law, its effect would still be that Member States have the broadest possible margin of appreciation in the field of national security, including in designing systems for collecting, retaining and accessing data. Article 4(2)

TEU confers a special status on national security matters, which it is not for the EU institutions (including the CJEU) to assess. Given that national security remains the "*sole responsibility*" of each Member State, only the Member State is in a position to assess the seriousness of the threats that it faces, and hence the necessity of using bulk data to assist in averting those threats, in particular by identifying the individuals who present them. It also remains for the national authorities to consider the effectiveness of the measures adopted in the interests of national security. That has inevitable implications for any assessment of the proportionality of any measures introduced on grounds of national security: cf. *R (Lord Carlile of Berriew QC) v SSHD* [2015] AC 945, at §§19-38. Although the court is ultimately responsible for the assessment of proportionality, that exercise must be undertaken on the basis that a Member State's authorities responsible or national security have particular wide discretion as to what is required.

(ii) Difference in purpose and nature of access and use

63. Neither access to BCD acquired under a s.94 direction nor the acquisition or access to BPDs are properly comparable to the DRIPA regime. There are (at least) four important differences.

64. **First**, bulk data (whether BCD or BPDs) is used *inter alia* to identify, understand and disrupt threats to national security. For example, bulk data can be used to discover and identify individuals who may not previously have been known to the security and intelligence agencies, but who may be so identified by the application of complex analysis, automated processing and scenario tools or predetermined assessment criteria to the bulk datasets held (in combination with each other). That is a fundamentally different use to the circumstances contemplated by the court in *Watson* at §§111 and 119, which took as their starting point only that data relating to specific individuals who were under investigation in respect of a specific criminal offence (whether already committed or in the planning) could be retained and accessed on a targeted basis. That is not how the process of target identification works, or could possibly work.

65. **Second**, under the DRIPA regime (as under the Swedish laws discussed in *Tele2 Sverige*), the service providers were required to retain data for which they had no further commercial use. The sole purpose of retention was to ensure that data that would not otherwise be held by a CSP for business purposes is available to be accessed and disclosed to the authorities on request. That is not the position in the bulk data regime. The difference is significant:

    65.1 Compare the opinion of AG Mengozzi in *Opinion 1/15* at §§178-179, relating to the draft agreement on the bulk generation of PNR data by air carriers flying between Canada and the EU: that act did not entail any interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter resulting from the EU's draft agreement to provide that data to the Canadian authorities. See further *Watson* at §§86 and 92.

65.2 See also *Watson* at §79, where it was made clear that it was because data was retained *only* for the purpose, when necessary, of making that data accessible to the competent national authorities, that the fact that the national legislation in question imposed the retention of data necessarily entailed the existence of provisions relating to access by the competent national authorities to the data retained.

66. **Third**, so far as BCD acquired under a s.94 direction is concerned, the data omits subscriber information, distinguishing the position from that described in *Watson* at §98 (although the data may be used to identify a person in combination with other datasets, depending on their content).

67. **Fourth**, so far as BPDs are concerned, the Claimant appears to assert that the Data Protection Directive is equivalent in effect to the e-Privacy Directive. It is not. There are significant differences:

67.1 So far as the e-Privacy Directive is concerned, it imposes an obligation of confidentiality on CSPs in respect of matters within its scope (Article 5), and then provides for derogations in certain circumstances (Article 15). In *Watson,* the CJEU was considering the requirements of necessity, appropriateness and proportionality for legislation falling within that derogation.

67.2 The Data Protection Directive operates differently. Article 1 states that "*In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data*". This aim is then achieved through the text of the Directive. The Directive imposes no similar obligation of confidentiality comparable to that in Article 5 of the e-Privacy Directive, and to which the Article 15 derogation attaches. Instead, Article 6 (principles relating to data quality) requires Member States to provide that personal data must be (in summary):

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and kept up to date; and

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

67.3 Article 7 provides that personal data may legitimately be processed if, among other things, (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).

67.4 Article 13 provides for exemptions and restrictions, in that Member States may adopt legislative measures to restrict the scope of the obligation and rights provided for in Article 6 (among other Articles, but not Article 7), when such a restriction constitutes a necessary measure to safeguard any of the identified objectives (including national security, defence, public security and the fight against crime, amongst other matters).

68. Even if (which is denied) the Data Protection Directive were engaged by the BPD regime, the processing of BPDs would nonetheless fall within Article 7(e) of the Data Protection Directive, for which no derogation under Article 13 is either available or required.

69. Taken in combination, the above matters have a significant impact on the necessity for and appropriateness of safeguards for the use of such data in order to ensure compatibility with rights under Article 7 and Article 8 of the Charter.

(iii) Significance of difference for appropriateness of safeguards

70. In *Watson,* the CJEU identified safeguards at §§119 to 122 which it thought appropriate to the circumstances of the use of retained data in the targeted investigation of serious crime. In so deciding, it drew on its previous judgments in *Digital Rights Ireland* at §§62-68 and *Schrems* at §95, which it considered applied by analogy in the context of the traffic and location data retention regimes at issue.

71. However, in *Opinion 1/15*, AG Mengozzi recognised that a different approach to safeguards than that adopted in *Digital Rights Ireland* and *Schrems* was appropriate in the case of the provision of bulk PNR data to the Canadian authorities, in light of the different nature of the activity and the purpose of threat identification served. Thus:

71.1 At §205, AG Mengozzi recognised that the envisaged agreement between the EU and Canada was capable of attaining the objective of public security as a means of threat identification:

> *"... I do not believe that there are any real obstacles to recognising that the interference constituted by the agreement envisaged is capable of attaining the objective of public security, in particular the objective of combating*

terrorism and serious transnational crime, pursued by that agreement. As the United Kingdom Government and the Commission, in particular, have claimed, the transfer of PNR data for analysis and retention provides the Canadian authorities with additional opportunities to identify passengers, hitherto not known and not suspected, who might have connections with other persons and/or passengers involved in a terrorist network or participating in serious transnational criminal activities."

71.2 At §§215-216, he emphasised again that:

> *"215. It is the case that those categories of PNR data are transferred to the Canadian travellers for all travellers flying between Canada and the Union even though there is no indication that their conduct may have a connection with terrorism or serious transnational crime. 216. However, as the interested parties have explained, the actual interest of PNR schemes, whether they are adopted unilaterally or form the subject matter of an international agreement, is specifically to guarantee the bulk transfer of data that will allow the competent authorities to identify, with the assistance of automated processing and scenario tools or predetermined assessment criteria, individuals not known to law enforcement services who may nonetheless present an 'interest' or risk to public security and who are therefore liable to be subjected subsequently to more thorough individual checks."*

> He added at §241: "*Those checks must also be capable of being carried out over a certain period after the passengers in question have travelled.*"

71.3 The difference in nature and purpose of the data was relied upon by the Advocate General to explain why safeguards thought applicable in the context of the Data Retention Directive in *Digital Rights Ireland* (and subsequently to national measures in *Watson*) did not apply in the same way. Thus:

(a) Although in the case of data retention, the court has expressed the view that indiscriminate retention of all data is unlawful and that a more targeted approach is required (including by geographical area), he rejected that approach in the context of bulk PNR data: see §244. Selective acquisition of such data would not be effective:

> *"No other measure which, while limiting the number of persons whose PNR data is automatically processed by the Canadian competent authority, would be capable of attaining with comparable effectiveness the public security aim pursued by the contracting parties has been brought to the Court's attention in the context of the present proceedings."*

(b) Although in the case of data retention, the court has expressed the view that prior authorisation by a court or independent administrative body should be required before retained data is acquired from a CSP, at least in the targeted investigation of serious crime, he rejected that approach in the context of bulk PNR data at §269:

"the appropriate balance that must be struck between the effective pursuit of the fight against terrorism and serious transnational crime and respect for a high level of protection of the personal data of the passengers concerned does not necessarily require that a prior control of access to the PNR data must be envisaged."

(c) So far as post-factum judicial oversight of the measures was concerned, he considered it sufficient that Article 14(2) of the draft agreement (COM (2013) 528 final) provided that Canada was to ensure that any individual who was of the view that their rights had been infringed by a decision or action in relation to their PNR data may seek effective judicial redress in accordance with Canadian law by way of, inter alia, judicial review: see §271. He emphasised that in those circumstances the lack of prior authorisation for access was consistent with the ECtHR's jurisprudence: §270.

(d) A requirement that the data be kept within the EU did not arise. To the contrary, the whole purpose of the agreement was to allow for the appropriate sharing of the data outside the EU. There is no suggestion that such transfer is antithetical to EU law in principle. That is unsurprising: §122 in *Watson* is concerned with the security and protection of data retained by providers of electronic communications services, not with the use of such data once it has been accessed by the national authorities. Those uses must inevitably be international in nature, given the international threat to national security and the need to liaise closely with other trusted countries' intelligence services in order to meet that threat.

72. The EU-Canada agreement was justified on the grounds of the fight against terrorism and serious transnational crime. However, additional matters arise in the context of national security, rendering the data retention safeguards identified in *Watson* even more inappropriate in that context. In particular, the work of the security and intelligence agencies must be conducted in secret if it is to be effective in achieving its aims. The value of intelligence work often relies on an identified target not knowing that his activities have come to the attention of the agencies, and/or not knowing what level of access to his activities the agencies have achieved. The requirement to notify a suspect of the use of bulk data tools against him, simply on the grounds that investigations have been concluded, would fundamentally undermine the work of the agencies. It may also threaten the lives of covert human intelligence sources (CHIS) close to him, such as a source who has provided the target's telephone number or email address to the agencies. In the context of national security, therefore, it is unsurprising that Article 346(1)(a) TFEU stipulates that "*no member state shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.*" In those circumstances, the Claimant's assertion that the requirement for

notification in *Watson* can simply be read across to a national security case is clearly wrong.

73. Evidence has been prepared explaining the real distinctions between the use of bulk data by the SIAs in their work (as compared to a targeted police investigation which seems to have been at the forefront of the CJEU's mind in *Watson*). Those distinctions indicate plainly both (a) that the CJEU cannot be taken to have considered still less ruled on a context such as the present in *Watson*; and (b) that decisions as to the nature of safeguards have to take into account the context in which they are to operate. The evidence goes on to explain why the safeguards identified in *Watson* could not practicably or effectively be adopted in the context of bulk data, see the third witness statement of the GCHQ witness dated 2 March 2017.

74. It follows that the identified safeguards cannot sensibly be applied in the context of national security, nor to the use of BCD obtained under a s.94 direction or of BPDs. Instead, a bespoke set of safeguards, suitable and appropriate to the circumstances of the case, is required. The safeguards in place have been set out in the OPEN versins of the witness statements of each of the GCHQ, Security Service, and SIS witnesses. Save to note that they do not include the *Watson* requirements, the Claimant does not engage with that evidence. For the reasons set out under the heading of "Proportionality" below, the net effect of the safeguards, taken with the importance and value of the use of such data to protect the United Kingdom's national security, is that the regime for the use of BCD and BPDs is proportionate.

F. Proportionality

75. There are considerable limits on the Respondents' ability to address in OPEN the matters which are relevant to an assessment of the proportionality of their activities. However the following brief OPEN submissions are made at this stage.

76. As is made clear eg. in *Leander v Sweden*, in the field of national security the Government has a wide margin of appreciation in assessing the pressing social need and in choosing the means for achieving the legitimate aim of protecting national security (see §§58-59 and see also the Tribunal's conclusions in *Liberty/Privacy* at §§33-39).

77. As explained in detail in the MI5 witness statement of 8 July 2016 at §§6-33 the threat from international terrorism throughout the relevant period, from the July 2005 London transport attacks onwards, has been significant. The current threat level is SEVERE. Serious threats are also posed by hostile states and serious and organised crime (§§18-21). Developments in technology, in particular the increasing use of encryption (§§22-33), and the increased difficulty in intercepting communications, make other capabilities, such as BCD and BPD, much more important to the SIAs.

78. There is a clear value to **BCD** obtained by s.94 directions:

78.1 For GCHQ: *"The specific value of communications data obtained from CSPs under section 94 direction is that it provides more comprehensive coverage than is possible by means of interception under section 8(4) of RIPA"* (GCHQ statement, §115). This provides *"a higher level of assurance that it can identify e.g. patterns of communications than it could be means of interception alone."* (*ibid.*). Examples of the usefulness of BCD to GCHQ's activities are set out at §§120 of the GCHQ statement (e.g. enabling GCHQ to "tip off" the Security Service when a subject of interest arrives in the UK), and §§155-162 (e.g. where an analysis of BCD assisted in identifying a terrorist group and understanding the links between members in a way which *"would not have been possible...at speed by relying on requests for targeted communications data"* (§156); see also §159 for an example involving the disruption of a bomb plot against multiple passenger aircraft).

78.2 The MI5 statement also emphasises the need for a database of BCD: *"in complex and fast-moving investigations, having access to a database of BCD would enable MI5 to carry out more sophisticated and timely analysis, by joining the dots in a manner that would not be possible through individual CD requests made to CSPs."* (MI5 statement, §110). See also *ibid.*, §§152-3, and the emphasis on the speed of BCD techniques compared with other techniques.

79. It is also important to note that the BCD capability in fact leads to a significant *reduction* of the intrusion into privacy of individuals of no intelligence interest: GCHQ statement, §116; MI5 statement, §153. Analysis of BCD, and the resultant identification of patterns of communication and potential subjects of interest, enables specific individuals to be identified *without* having first to carry out more intrusive investigations into a wider range of individuals.

80. **BPD** is a highly important capability for each of the SIAs. Examples of its usefulness are given at:

80.1 MI5 witness statement of 8 July 2016, §38 (suspected Al-Qaida operative identified from fragmentary information; searching a BPD, and matching with two others reduced possible candidates from 27,000 to one), §108;

80.2 GCHQ statement of 8 July 2016, §§16-18, §§106-114;

80.3 SIS statement of 8 July 2016, §8, §21 (identification of an individual planning to travel to Syria out of hundreds of possible candidates).

The speed of analysis as a result of the use of electronic BPDs is of particular importance: MI5, §§39-40; §107; GCHQ statement, §111.

81. The BPD capability also significantly reduces the need for *more* intrusive techniques to be used. The MI5 statement gives an example of how searches of BPD enabled the identity of a suspect for whom a general description had been provided, but no name, to one strong match. More intrusive methods could then be justified *in respect of that individual alone*. Without BPD MI5 would have had to investigate a wider range of individuals in a more intrusive manner: MI5 statement, §108; see also GCHQ statement, §§107, 114; SIS statement, §17, §21.

82. Furthermore, the *electronic* nature of searches of BPD reduces the intrusion into privacy (*"any data which is searched but which does not produce a "hit" will not be viewed by the human operator of the system, but only searched electronically."*: MI5 statement, §48). In reality *"the personal data of the vast majority of persons on a BPD will never, in fact, be seen read or considered by MI5 because it will never feature as a search result."* (*ibid.*, §105). See also the GCHQ Statement, §19 (*"Using BPD also enables the Intelligence Services to use their resources more proportionately because it helps them exclude potential suspects from more intrusive investigations."* (§19)), and the example at §107.

83. The August 2016 *Report of the Bulk Powers Review* by David Anderson QC, the Independent Reviewer of Terrorism Legislation, emphatically accepted the importance of BPDs to the SIAs:

> *"8.33 I have no hesitation in concluding that BPDs are of* ***great utility*** *to the SIAs. The case studies that I examined provided* ***unequivocal evidence of their value****. Their principal utility lies in the identification and development of targets, although the use of BPDs may also enable swift action to be taken to counter a threat.*
>
> *8.34 BPDs are already used elsewhere, in the private as well as the public sector, with increasing sophistication. Their utility to the SIAs has been acknowledged by successive IsComms and by the ISC...As I concluded in AQOT 8.106: "It may legitimately be asked, if activity of a particular kind, is widespread in the private sector, why it should not also be permitted (subject to proper supervision) to public authorities".*
>
> *8.35 BPDs are used by the SIAs for many purposes: for example, to identify potential terrorists and potential agents, to prevent imminent travel, and to enable the SIAs to prioritise work. It will often be possible, in a given instance, to identify an alternative technique that could have been used. However many such alternatives would be slower, less comprehensive or more intrusive.* ***The value of accurate information, obtained at speed, is considerable.*** *I accept the claims of MI5 and MI6 that their work would be* ***substantially less efficient without the use of BPDs and GCHQ's claim that it finds BPDs useful to enrich information obtained through other means.***
>
> *8.36 In some areas, particularly pattern analysis and anomaly detection,* ***no practicable alternative to the use of BPDs exists****. These areas of work are vital, since they can provide information about a threat in the absence of any other intelligence seed. The case studies included a cogent example of the value of pattern analysis (A11/2).*
>
> *8.37 The use to which bulk data can be put is in the course of rapid evolution. MI5 recognised in July 2015 that the development of new technologies and data types, including machine learning and predictive analysis, offered "additional promise" in this field. Future decision-*

makers authorising and approving the use of BPDs will have to be aware of these technological advances, and the effect that they have both on the availability of alternatives and on the extent of intrusion involved in the use of BPDs." (emphasis added)

84. The conclusion of the report was unequivocal: *"The operational case for [BPDs] is evident"* (§9.14(d)).

85. It is therefore submitted that the Respondents' s.94 BCD and BPD activities are proportionate and have been throughout each of the relevant periods.

86. The Claimant makes no separate submission concerning EU law as to proportionality, beyond its complaint that the safeguards identified in *Watson* in the context of DRIPA retention notices have not been adopted in the present context. That submission has already been addressed at section E above.

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2 March 2017