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President of the Court of Justice of the
European Union
Palais de la Cour de Justice
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31 October 2017

Dear Mr President

Preliminary Reference: Privacy International v (1) Secretary of State for Foreign and Commonwealth Affairs (2) Secretary of State for the Home Department (3) Government Communication Headquarters (4) Security Service (5) Secret Intelligence Service

Request for Expedition

We are the solicitors for the Claimant in the above matter before the United Kingdom's Investigatory Powers Tribunal ("**IPT**"). In the IPT's judgment of 8 September 2017 (the "**Judgment**" attached), the IPT decided to refer questions to the CJEU pursuant to Article 267 TFEU.

We write to respectfully request an expedited procedure, pursuant to Article 105(1) of the Rules of Procedure.

The case is about the bulk collection and retention of communications data by the UK security and intelligence services.

Under section 94 of the Telecommunications Act 1984, the Secretary of State directs operators of Public Electronic Communications Networks ("**PECNs**") to transfer bulk communications data to the UK's Security and Intelligence Agencies (the "**s.94 Regime**"). None of the safeguards identified in the CJEU's case law (in particular in joined cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Watson and Others* (EU:C:2016:970) ('***Watson'***)) are applied.

In particular, there is no judicial or independent authorisation of either retention or access, the data need not be kept in the EU and there are no provisions for notification.

The order for a preliminary reference asks the Court (1) whether the s.94 Regime falls within the scope of Union law and of the e-Privacy Directive[1]; and, if so, (2) whether and to what extent any of the safeguards such as those identified in *Watson* apply to the s.94 Regime.

The Claimant applied to the IPT for the Preliminary Reference to be expedited, but the IPT refused to request expedition for reasons set out in §§74-77 of the Judgment. Accordingly, the Claimant invites the Court of Justice to expedite the hearing of this preliminary reference of its own motion under Article 105(1) of the Rules of Procedure.

The reasons why expedition is appropriate are set out below.

First, the Claimant's case is that the s.94 Regime constitutes a serious interference with the fundamental rights in Articles 7 and 8 of the Charter and is incompatible with those articles in that it does not comply with the requirements laid down by the judgment in *Watson*. The seriousness of the issue can be no less grave than that in *Watson* itself, in which this Court ordered expedition;[2] the Court stated in its reasoning (§§10-11):

> *In that regard, it is clear that national legislation that permits the retention of all electronic communications data and subsequent access to that data is liable to cause serious interference with the fundamental rights laid down in Articles 7 and 8 of the Charter (see judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 37).*
>
> *An answer from the Court within a short time might therefore be able to dispel the uncertainty experienced by the referring court as regards the possibility of serious interference with the fundamental rights laid down in Articles 7 and 8 of the Charter and as regards whether there is any justification for that interference.*

Indeed, if anything the interference must be more substantial than that in *Watson* as it must be presumed that the Secretary of State's directions under s.94 (the full extent of which remain classified) cover the entirety of the communications data held by PECNs who operate in the United Kingdom

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[1] 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.

[2] Order of the President of the Court, 1 February 2016 (ECLI:EU:C:2016:70).

(many of which have extensive operations in other Union member states). The rationale of bulk collection and searching is that all or as much data as possible must be obtained and used. This means that in contrast to *Watson*, which was a regime of blanket retention (by PECNs) followed by target-led searching, the s.94 Regime is one of blanket bulk data transfer followed by regular bulk searching with a view to identifying potential intelligence targets. Such automated bulk analysis is likely to require greater, not lesser, safeguards.

Moreover, the Claimant emphasises that this serious ongoing interference with rights under Articles 7 and 8 is occurring in circumstances where the Grand Chamber of the CJEU has very recently set out the applicable principles and the requirements for such an interference to be justified, not only in *Watson* but also in *Opinion 1/15* (ECLI:EU:C:2017:592). In respect of the first referred question (whether the s.94 Regime falls outside the scope of EU law because it relates to national security), *Watson* also concerned national security legislation, and the CJEU found the issue to be in scope of EU law. The IPT seeks to avoid a finding that the matter is within the scope of EU law by inviting the CJEU to find that its recent judgment in *Watson* was wrong (see §§34-39 of the Order for Reference). While the IPT is entitled to invite the CJEU so to find, the intervening period while the CJEU considers the IPT's view (and while the CJEU's actual reasoning in *Watson* is being ignored) should be kept to a minimum.

Second, the time for resolution of this case may be tight as the United Kingdom Government triggered Article 50 TEU on 29 March 2017. Pursuant to Article 50(3), the Treaties shall therefore cease to apply to the United Kingdom two years after that notification, unless the European Council unanimously decides to extend this period. Privacy International has been advancing these EU arguments since September 2015 and the consequence of any failure to complete the preliminary reference procedure prior to Brexit may be the lapsing of this reference. Even if an answer is possible after Brexit day, under draft legislation in the United Kingdom, it is proposed to make provision that "*a court or tribunal need not have regard to anything done on or after exit day by the European Court*" (section 6(2) of the European Union (Withdrawal) Bill). In the event that the Court's preliminary ruling were handed down after Brexit day, the IPT would therefore be entitled not to have regard to the Court's judgment. Indeed, the IPT has already indicated it will, if necessary, consider a *kompetenz kompetenz* argument should the Court of Justice rule that EU law does apply. In these circumstances, where relevant departments of the United Kingdom Government are Respondents to the Claimant's claim, it would be unjust for the Government to avoid the consequences of the Court's judgment by relying on the potential delay inherent in a non-expedited procedure.

Further, notwithstanding the position of the United Kingdom, we would suggest that answering both Questions 1 and 2 is of pressing importance for the proper comprehension of the limits upon the powers of the intelligence agencies of the other 27 Member States which may themselves be involved in bulk data gathering and interrogation, or contemplating obtaining such capabilities.

Finally, the IPT declined to expedite the case out of a concern that the time available to other member states to participate would be too short. However, *Tele 2 and Watson* was expedited and 13 member states (in addition to the United Kingdom and Sweden) participated and made oral submissions to the Court. Member states are entirely able to make full written and oral representations to the Court in a case decided under an expedited procedure.

For these reasons, we respectfully request that you decide, after hearing the Judge-Rapporteur and the Advocate General, that the reference for a preliminary ruling be determined pursuant to an expedited procedure.

Yours faithfully

Bhatt Murphy