

## Summary and Conclusion

In conclusion, the general position would appear to be that:

- ⤴ RIPA<sup>1</sup> is a key statute in the pending cases on phone hacking by certain members of the press.
- ⤴ S1(1) of RIPA<sup>2</sup> was supposed to implement s5(1) of the Directive on Privacy and Electronic Communications,<sup>3</sup> which prohibits *listening, tapping, storage or other kinds of interception or surveillance of communications ...by persons other than users, without the consent of the users concerned.*
- ⤴ The Regulation of Investigatory Powers Act 2000 specifies that the interception must be made intentionally. Under the provisions of the Directive on Privacy and Electronic Communications<sup>4</sup>, there is no such requirement – it is a strict liability offence, and there is no requirement to show that the offence was committed intentionally, merely that it was committed.
- ⤴ RIPA<sup>5</sup> also had a defence that the interception of a communication was lawful if the person who intercepted a communication had ‘reasonable grounds for believing<sup>6</sup>’ that consent to do so has been given. These UK law provisions did not comply with Article 2(h) of the Data Protection Directive<sup>7</sup> which defines consent as “*any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed*”. Statutory

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1 The Regulation of Investigatory Powers Act 2000

2 The Regulation of Investigatory Powers Act 2000

3 Directive on Privacy and Electronic Communications 2003 art 5(1)

4 Directive on Privacy and Electronic Communications 2003 art 5(1)

5 The Regulation of Investigatory Powers Act 2000

6 Regulation of Investigatory Powers Act 2000 art 3(1)

7 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h)

instrument 2011/1340<sup>8</sup> has now removed the defence of implied consent, and also introduced into RIPA<sup>9</sup> a sanction for ‘unintentional unlawful interception’<sup>10</sup> broadly consistent with Article 5(1) of the Directive on Privacy and Electronic Communications<sup>11</sup>.

- ⤴ EU law has supremacy over national law.<sup>12</sup>
- ⤴ Where a directive has not been correctly implemented a national court is required to interpret a case before it which concerns an incorrectly implemented directive in the “light of the wording and purpose of the directive<sup>13</sup>”.
- ⤴ Where a directive is transposed belatedly into a Member State’s domestic law (as is the case here with Directive 2002/58/EC<sup>14</sup>) the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired,
  - ⤴ in the light of the wording and the purpose of the directive concerned
  - ⤴ with a view to achieving the results sought by the directive,
  - ⤴ favouring the interpretation of the national rules which is the most consistent with that purpose
  - ⤴ in order thereby to achieve an outcome compatible with the provisions of the directive.<sup>15</sup>

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8 The Electronic Communications Postal Services - The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 SI 2011/1340

9 Regulation of Investigatory Powers Act 2000

10 Regulation of Investigatory Powers Act 2000 (as amended) s1(1A)

11 Directive on Privacy and Electronic Communications 2003 art 5(1)

12 See Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585,593, Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

13 C- 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984] ECR 1891

14 Directive on Privacy and Electronic Communications 2003 art 5(1) read in the light of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data art 2(h), 24 and 28 OJ L 281

## Implications

Given that RIPA<sup>16</sup> did not correctly implement the provisions of s5(1) of the Directive on Privacy and Electronic Communications<sup>17</sup> and also provisions of the Data Protection Directive<sup>18</sup>, a number of options would appear to be available to a national law judge looking to discharge his/her duty of harmonious interpretation. It would be a matter for the judge how they interpreted and discharged this obligation to interpret RIPA<sup>19</sup> ‘in the light of the wording and purpose’<sup>20</sup> of the Directive on Privacy and Electronic Communications<sup>21</sup> and the provisions of the Data Protection Directive<sup>22</sup>. This would potentially vary depending on whether the case concerned a civil or a criminal liability. Furthermore, there are certain key timelines that will need to be borne in mind, as different principles will apply, depending on when the offence took place.

- (i) Cases of unlawful interception of communications that took place between the 28<sup>th</sup> July 2000 (date of Royal Assent of RIPA<sup>23</sup>) and 30<sup>th</sup> October 2003 will be governed by RIPA.
- (ii) Civil cases of unlawful interception of communications, which took place between the 31 October 2003 (date by which the provisions of Directive 2002/58/EC<sup>24</sup> were due to

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15 Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057

16 The Regulation of Investigatory Powers Act 2000

17 Directive on Privacy and Electronic Communications art 5(1)

18 Specifically, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h), 24 and 28.

19 The Regulation of Investigatory Powers Act 2000

20 C- 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984] ECR 1891

21 Directive on Privacy and Electronic Communications

22 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h), 24 and 28.

23 The Regulation of Investigatory Powers Act 2000

24 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 communication sector OJ L201/37 (Directive on privacy and electronic communications)

be implemented into national law) and 15<sup>th</sup> June 2011(day before SI 2011/1340<sup>25</sup> came into force) should be interpreted using the principle of harmonious interpretation as outlined above. For offences that occurred within this period, RIPA should be interpreted in the light of the wording and purpose of the Directive on Privacy and Electronic Communications<sup>26</sup>.

(iii) For cases of unlawful interception of communications which took place from the 16<sup>th</sup> June 2011 (which is when SI 2011/1340<sup>27</sup> came into force) to the present the situation is more nuanced. Civil cases should be interpreted in the light of SI 2011/1340,<sup>28</sup> as this now correctly reflects Article 5(1) of the Directive on Privacy and Electronic Communications and Article 2(h) of the Data Protection Directive.<sup>29</sup>

(iv) For offences of unlawful interception of communications, which fall with s1(1) of RIPA (criminal liability),<sup>30</sup> and which took place between 31<sup>st</sup> October 2003-15<sup>th</sup> June 2011, these cases may be interpreted as outlined below.

(v) Given that s1(1) of RIPA<sup>31</sup> is still not correctly implementing the provisions of Article 5(1)<sup>32</sup> in that there is still a requirement to show intent, a national court could arguably still interpret s1(1) of RIPA<sup>33</sup> 'in the light of the wording and purpose of the

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- 25 The Electronic Communications Postal Services - The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 SI 2011/1340
- 26 Directive on Privacy and Electronic Communications art 5(1) read in conjunction with the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h),24 and 28.
- 27 The Electronic Communications Postal Services - The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 SI 2011/1340
- 28 The Electronic Communications Postal Services - The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 SI 2011/1340
- 29 Directive on Privacy and Electronic Communications art 5(1) read in conjunction with the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h),24 and 28.
- 30 The Regulation of Investigatory Powers Act 2000
- 31 The Regulation of Investigatory Powers Act 2000
- 32 Directive on Privacy and Electronic Communications art 5(1)
- 33 The Regulation of Investigatory Powers Act 2000

Directive'<sup>34</sup>, within the limits of the doctrine as they apply to criminal law cases. Therefore, potentially, criminal cases of interception of communications which took place after 16<sup>th</sup> June 2011 could still be interpreted using the principle of harmonious interpretation, as summarized below.

In relation to cases being brought under an infringement of s1(1) of the Regulation of Investigatory Powers Act 2000, (which deals with criminal liability), a national court judge could

- decide that in relation to breaches of s1(1) of RIPA,<sup>35</sup>(in particular on the issue of intent), that it would push the principle of harmonious interpretation too far to interpret RIPA<sup>36</sup> in such a way that it would have the effect of *determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation*<sup>37</sup>, the liability in criminal law of persons who had acted in contravention of Article 5(1) of the Directive on Privacy and Electronic Communications. Depending on the facts of the case, the judge may reach the conclusion that interpreting national law in the light of a directive would have the effect of 'imposing on an individual an obligation laid down by the directive'<sup>38</sup>, which is 'neither permitted nor required by EU law'<sup>39</sup>.
- If, on the other hand, the national law judge felt that the effect of applying the principle of harmonious interpretation would have the effect of creating 'a legal disadvantage or detriment for that party falling short of a legal obligation, then this

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34 C- 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984] ECR 1891

35 The Regulation of Investigatory Powers Act 2000

36 The Regulation of Investigatory Powers Act 2000

37 Case C-168/95 *Luciano Arcaro* [1996] ECR 1-4705

38 Case C-168/95 *Luciano Arcaro* [1996] ECR 1-4705

39 P Craig and G de Búrca, *EU Law Text, Cases and Materials* (5th edition, OUP) p205

could be permitted<sup>40</sup>. However, a request for a preliminary ruling would possibly need to be made to the European Court of Justice to clarify whether it would be appropriate to do so, depending on the facts of the case.

- Thirdly, a national court judge could adopt the more nuanced view taken by the ECJ in *Kofoed*<sup>41</sup> and impose a ‘directive-compliant interpretation of national law on individuals<sup>42</sup>. Furthermore, joined cases *Balkan and Sea Properties ADSIT and, Provadinvest OOD*<sup>43</sup> would appear to suggest that if a national court was unable to interpret RIPA<sup>44</sup> in conformity with s5(1) of the Directive on Privacy and Electronic Communications<sup>45</sup>, it would have to dis-apply the RIPA<sup>46</sup> provisions in so far as they were incompatible with Article 5(1) of Directive 2002/58/EC<sup>47</sup> and Article 2(h) of Directive 95/46/EC<sup>48</sup>.
- In addition, the case of *Ruiz Bernaldez*<sup>49</sup> would appear to suggest that a national court judge would have the option to exclude provisions of national law that created exemptions to the obligations that the Directives<sup>50</sup> were trying to address. With regard to the Regulation of Investigatory Powers Act 2000, these exemptions could be

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40 P Craig and G de Búrca, EU Law Text, Cases and Materials (5th edition, OUP) p205

41 Case 321/05 *Hans Markus Kofoed v Skatteministeriet*, (Judgment of the Court (First Chamber), 5 July 2007)

42 Case 321/05 *Hans Markus Kofoed v Skatteministeriet*, (Judgment of the Court (First Chamber), 5 July 2007)

43 Joined cases *Balkan and Sea Properties ADSITs* (C-621/10), *Provadinvest OOD* (C-129/11) OJ C-174/15

44 The Regulation of Investigatory Powers Act 2000

45 Directive on Privacy and Electronic Communications 2003 art 5(1)

46 Regulation of Investigatory Powers Act 2000

47 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 communication sector OJ L201/37 art 5(1) (Directive on privacy and electronic communications)

48 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h), 24 and 28.

49 Case C129/94 *Rafael Ruiz Bernaldez* [1996] ECR I-1847

50 Directive on Privacy and Electronic Communications 2003 art 5(1) and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h), 24 and 28.

construed as including the requirement for intent and the defence found under s3(1) of the Act, which taken together have the effect of exempting most natural and legal persons from criminal liability.

- The final option for a national law judge could be to strike out the offending provisions of s1(1) of the Regulation of Investigatory Powers Act 2000, and then impose a civil liability, ie damages rather than a fine, in line with the decision in *Centrosteeel*<sup>51</sup>. It is perhaps worth noting that under the revised rules relating to interception, found in SI 2011/1340<sup>52</sup>, which aims to implement the provisions of the Directive on Privacy and Electronic Communications<sup>53</sup>, a fine of £50,000 may be payable for each offence of a person intercepting communications without lawful authority.
- In relation to the civil claims being brought under s1(2) of the Regulation of Investigatory Powers Act 2000, the same process of striking out the offending provisions could occur, given that in civil claims a national court judge is under a duty to apply the principle of harmonious interpretation, and the constraints that apply to criminal cases are not present in relation to civil claims.

In this paper we have examined various possible options that could be considered, but ultimately the decision on how best to discharge this obligation rests purely with the national law judge.

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51 Case C-456/98 *Centrosteeel v Adipol* [2000] ECR-I 6007, Opinion of AG Jacobs

52 The Electronic Communications Postal Services - The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 SI 2011/1340

53 Directive on Privacy and Electronic Communications 2003 art 5(1)

The net effect of the UK government's failure to correctly implement s5(1) of Directive 2002/58/EC and the provisions of the Data Protection Directive<sup>54</sup> is that under European law, the legal framework for dealing with unlawful interception of communications claims is arguably different to that hitherto presumed. The requirement, laid in down RIPA<sup>55</sup>, to show intent is removed, as is the defence that the person intercepting the communication believed they had implied consent to do so. This would appear to suggest that under EU law, phone tapping could be construed as being a strict liability offence, which would also change the legal principles that apply to corporate liability in such cases.

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54 Directive on Privacy and Electronic Communications 2003 art 5(1) and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 art 2(h), 24 and 28.

55 Regulation of Investigatory Powers Act 2000