Analysis and Reflections

Wavering between centres of gravity: Comment on Ireland v Parliament and Council

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This article considers the judgment of the ECJ in Ireland v Parliament and Council (C-301/06) [2009] 2 C.M.L.R. 37, which confirmed the appropriateness of art.95 EC as the legal basis for the adoption of the Directive 2006/24 (Data Retention Directive). It examines whether the approach taken by the Court (i.e. that the contested Directive concerns the functioning of the internal market) contributed to the resolution of the “centre of gravity” of ex art.95 EC (now 114 TFEU) and the borderline between the former Community (first) and third pillars. The analysis in the article leads to the conclusion that harmonisation of the length of time that telecom operators and internet providers must retain data, along with other measures regarding the prosecution of crime, entailed a great shift in the balance of competence between the Community and the Member States. This trend has been further complemented by the ratification of the Treaty of Lisbon, which has brought former third pillar provisions under a common general legal framework. Finally, the article focuses upon the fundamental rights implications of the judgment, asking, in particular, whether the use of data in the pursuit of justice entails a disproportionate interference with the right to privacy.

Introduction

A free trade facilitator or a general regulator? The use of ex art.95 EC (now 114 TFEU) throughout the process of European integration has divided academic opinion with reference to the real role the Union has assigned to the EU legislature.1 Prior to the ratification of the Treaty of Lisbon, every piece of judicial rhetoric from the Court has helped us to get closer to the truth of the matter. In Ireland v Parliament and Council,2 the

1 University of Surrey. I am grateful to Natasha Gouseti for her support and to Niamh Nic Shiubhne for her valuable remarks and suggestions.

challenge by the Republic of Ireland concerning the legality of Directive 2006/24 \(^1\) gave the Court an opportunity to clarify the correct use of art.95 EC vis-à-vis the potential erosion of national constitutional guarantees that result from its utilisation. This time, the measure in question went beyond commercial activities. It was predominantly occupied with the facilitation of national action in the field of criminal law and, in particular, data retention. To that effect, the Court was called on to define the boundary between measures coming under the former Community pillar and those related to police and judicial cooperation in criminal matters, which had to be adopted under the then third pillar.

The aim of this article is to evaluate whether the Court in its judgment made use of this opportunity and took any positive steps to resolve the uncertainty over the “centre of gravity” test in internal market harmonisation legislation. The article will also address the question of pillar demarcation, which has in essence been resolved by the constitutional restructuring and de-pillarisation of the European Union introduced by the Treaty of Lisbon. It will start by briefly discussing the Opinion of A.G. Bot and the Court’s judgment. It is argued that, by upholding the validity of the contested measure, the Court dubiously assessed the appropriateness of art.95 EC as a legal basis for the adoption of measures which do not immediately concern the prevention of distortions or obstacles to the internal market. This is currently relevant with reference to the utilisation of art.114 TFEU which, although a modified version of art.95 EC in wording and length, nonetheless remains the same in substance. The article will continue by presenting the broader context of the case, which involved inter-pillar issues, particularly the delimitation of powers and the unavoidable overlapping between the former first and third EU pillars. The outcome of the case suggests that the process of “Communification” of the third pillar had begun long before the ratification of the Treaty of Lisbon. Finally, the prominence of Community law in matters of crime prevention will be assessed in light of the impact of EU-wide harmonisation legislation on data retention upon individual rights, in particular fundamental privacy rights as embedded in the European Convention on Human Rights (ECHR) and national constitutions.

The background to the case

The retention of traffic and location data—generated through citizens’ daily activities using electronic communications networks and services—for the purposes of law enforcement has recently gained pan-European impetus. \(^4\) Following the London bombings on July 7, 2005, the call for national law enforcement agencies to have the necessary legal instruments at their disposal in the prevention, investigation and prosecution of serious crime via the exchange of information between them (e.g. the identification of the user of a service) invited proposals pointing towards a high level of harmonisation with an exhaustive list of categories of data to be retained. \(^5\) This was partly because

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traffic data may not always be stored by operators and hence not available for public authorities to use against criminals whenever there is a legitimate case to do so for the prevention and combating of organised crime and terrorism. What is more, national regulatory differences within domestic legislation on data retention mean that service providers are faced with diverse requirements with reference to the types of data to be retained as well as the conditions for retention.

After lengthy negotiations, Directive 2006/24 was adopted by the Council and the European Parliament on March 15, 2006 and entered into force on May 4, 2006. The Directive, like previous approximation measures relating to the processing of personal data and the protection of privacy, was adopted by qualified majority voting as an internal market measure on the basis of art.95 EC. The so-called “Data Retention Directive” aimed at harmonising the way in which private providers of electronic communications services or public communications networks are obliged to retain data (telephone calls and internet access), under art.15 of Directive 2002/58. By adopting the Directive, the EU legislature thus aimed at making general the obligation to retain data generated or processed by these operators. Harmonising the Member States’ provisions concerning the obligations of the providers of publicly available electronic communications services or of public communication networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law, was meant to eliminate national regulatory differences deemed to impede the functioning of the internal market for electronic communications. According to recital 5 of the Preamble to the Directive, different requirements and technical differences between national provisions concerning data retention for the abovementioned purposes presented obstacles to the internal market and were to be harmonised in the Community.

On July 1, 2008, the Irish Government sought to annul the Directive on the ground that it was not adopted on an appropriate legal basis. The Republic of Ireland, which along with the Slovak Republic was outvoted when the Council adopted the Directive, argued that the Community was not competent to adopt such a measure, at least not on the legal basis that was chosen, since its centre of gravity did not concern the functioning of the internal market but public safety and crime prevention. The Slovak Republic, supporting the Irish challenge, argued that the extent of data retention required under the Directive amounts to a breach of the right to privacy protected by art.8 of the ECHR. Ireland based its challenge, however, on a contention that the purpose of the Directive was to harmonise the retention of personal data in a manner which goes far beyond commercial

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7 The specified classes of data which can be retained are listed in art.5 of the Data Retention Directive. Article 6 of the Directive sets the limits of the period of retention, which may be between six months and two years form the date of the communication.


9 Ireland’s argument was that the Directive should have been adopted under arts 30, 31(1)(c) and 34(2)(b) TEU.
objectives in order to facilitate national action in the field of criminal law. The Court was, therefore, called to assess the appropriateness of art.95 EC as a legal basis for the adoption of a Directive on data retention as well as to specify the borderline between the different pillars in the EU Treaty (TEU). In particular, the Court was invited to specify whether a third pillar legal instrument (EU Framework Decision) consisted of a more suitable means to proceed to the adoption of a data-retention measure as opposed to a first-pillar instrument (EC Directive).

The Opinion of the Advocate General

A.G. Bot focused on two issues: first, he looked at whether a measure adopted under the former EC Treaty should rather have been adopted on the basis of the TEU and, second, he considered whether the intervention of the Community legislature, on the basis of ex art.95 EC (now 114 TFEU), can, if at all, be justified.

The Advocate General shed some light on the borderline between the first and the third pillars by pointing to ex art.47 TEU (now 40 TFEU11), “which acts as a pivot between matters covered by Community law and those covered by the law of the Union”. He recalled the function of art.47 TEU as a safeguard of the Community pillar against any encroachment by the intergovernmentalism characterising the other two pillars (title V and title VI TEU). He commented that, in the case at hand, the matter was not whether a measure adopted under the TEU should have been adopted under the EC Treaty but vice versa. He nonetheless submitted that the method to be used in order to assess whether a measure was correctly adopted under the EC Treaty—instead of the TEU—is “identical”. The question was, therefore, whether the (hypothetical) adoption of a third pillar measure on data retention would have infringed art.47 TEU and would, as a result, have been improperly adopted. The Advocate General opined that such an assessment necessitated a review of whether the contested Directive fell within the area covered by art.95 EC.14

With reference to the utilisation of art.95 EC as the legal basis for Community action, the Advocate General commented that the Court’s established case law confirms that although the existence of mere disparities in national legislation does not suffice for recourse to the Treaty’s harmonisation provision, the issue is different when such disparities have a direct effect upon the functioning of the internal market. Thus, a Community act “intended to improve the conditions for the establishment and functioning of the internal market” via the prevention of future obstacles to trade arising from diverse national laws was justified in this case.15 The Advocate General agreed that, in the present case, the legislative and technical disparities between the national provisions relating to data retention by

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10. It is important to note that the action brought by Ireland related solely to the choice of legal basis and not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy contained in Directive 2006/24. See to that effect, Ireland v Parliament and Council [2009] C.M.L.R. 37 at [57] of the Court’s judgment.

11. Current art.40 TBU stipulates the subsidiarity of the Common Foreign and Security Policy only as against the other competences set out in the treaties.


service providers were capable of affecting the establishment and functioning of the internal market. Hence, Community harmonisation under art.95 EC was appropriate in order to facilitate the development of an internal market for electronic communications by providing common requirements for service providers. Moreover, the strong links of the Directive with the fight against terrorism and organised crime within the internal market corresponded with the overriding requirements of public interest, including a high level of protection of security, that had to be taken into account within a harmonisation measure adopted under art.95 EC.

The Advocate General was clearly convinced that the Directive contributed to a high level of security within the internal market. Therefore, its criminal aspects (essentially, its reference to the investigation, detection and prosecution of serious crime) were not sufficient for it to constitute a third-pillar measure. The Advocate General emphasised the Passenger Name Records (PNR) case in order to highlight the dividing line between the first and third pillars. In that case, the Court annulled two Decisions enabling the transfer of passenger name records of air passengers from the Community to the US Bureau of Customs and Border Protection (CBP). The Court shared the European Parliament’s view that the transfer of PNR data to the CBP constitutes,

"processing operations concerning public security and the activities of the State in areas of criminal law … That decision therefore does not fall within the scope of the Directive [95/46]."

Thus, the Court held that measures on data processing with the purpose of safeguarding public security and law enforcement constitute objects of the third pillar. In Ireland v Parliament and Council, in contrast, the Advocate General concluded that since Directive 2006/24 did not aim at harmonising the conditions for accessing data and their use for state-related activities (and was therefore unrelated to individual activities), it did not fall within the scope of the Third Pillar. It was therefore correctly adopted under art.95 EC. Accordingly, had an equivalent measure been adopted under title VI, it would have led to an infringement of art.47 TEU.

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18 In Ireland v Parliament and Council [2009] C.M.L.R. 37 at [103], A.G. Bot comments: "In summary, Directive 2006/24 contains measures which relate to a stage prior to the implementation of police and judicial cooperation in criminal matters. It does not harmonise either the issue of access to data by the competent national law-enforcement authorities or that relating to the use and exchange of those data by such authorities, for example in the context of criminal investigations. Those matters, which come, in my view, within the area covered by Title VI of the EU Treaty, were properly excluded from the provisions of Directive 2006/24."

The judgment of the Court

In its judgment, the Court stressed that legislative and technical disparities between the national provisions governing the retention of data by private undertakings in the course of their normal economic activities were liable to impede the provision of electronic communications services and, therefore, carried the potential of distorting competition within the internal market. In chorus with the Advocate General, the Court was satisfied that the conditions for recourse to art.95 EC had been fulfilled since the Directive had a direct impact on the economic activities of service providers and, as such, it contributed to the prevention of present or future distortions or obstacles to the internal market. In line with the Parliament's argument, the Court submitted that, although crime prevention influenced the legislative choice made in the Directive, reliance on art.95 EC as the legal basis for its adoption was not invalidated by the importance attributed to an objective other than the harmonisation of internal market obstacles. This was especially likely here since, according to the Court, the obligations relating to data retention carry significant economic implications for service providers in so far as they involve substantial investment and operating costs.

With reference to the separation of areas of competence between the first and the third pillars, the Court briefly revisited its rhetoric on the inter-pillar demarcation of legal basis, stressing that, under art.47 TEU, second and third-pillar powers should not encroach upon Community powers. The Irish Government urged the Court to follow the approach adopted in the PNR case, discussed earlier. The Court distinguished its line of argument from its previous decision in the PNR case, however, where the internal market objective allegedly pursued by the contested Decision 2004/496 adopted under art.95 EC was found to be purely incidental. As already noted, in the PNR case, the Court held that the real objectives of the agreement between the Community and the United States were the prevention of terrorism and organised crime and the protection of privacy. It was established that such objectives were objectives of the TEU and not the EC Treaty. Hence, art.95 EC was deemed to be inadequate as a legal basis. The Court located the difference between the case at hand and the PNR case in the fact that Decision 2004/496 concerned a transfer of personal data within a framework instituted by the public authorities in order to ensure public security, while Directive 2006/24 covers the activities of service providers in the internal market and does not contain any rules governing the activities of public authorities for law-enforcement purposes. In short, the Data Retention Directive imposes data protection obligations on private companies and not on national law-enforcement authorities.

In light of these considerations, the harmonisation (by Directive 2006/24) of the means in accordance with which private electronic communications operators are obliged to retain data, under art.15 of Directive 2002/58, could not be based on title VI of the TEU without

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infringing art.47 TEU. The mere fact that the retention of data by private operators did not constitute a Community law subject matter was not sufficient to imply that the EU legislature had to look at the third pillar in order to find an adequate legal basis. Besides, the aim of the Data Retention Directive was independent of the implementation of any third pillar legal instrument. It follows that Community regulation of developments in the area of electronic communications for the purpose of preventing the commission of criminal acts could not constitute the subject of an instrument based on title VI of the EU Treaty.

Comment

This judgment is significant for a number of reasons. Although it is still too early to assess the implementation and application of the Directive by the Member States, certain preliminary conclusions can be made with reference to the Court’s decision. These comments entail, in order of presentation and not significance, the scope of art.95 EC as a general regulatory competence; the judgment’s contribution to the tension between the former first and third pillars; and the risk of fundamental rights infringements stemming from implementation of the Data Retention Directive.

The scope of article 95 EC

A first observation relates to the remarkable breadth of the scope of art.95 EC and the ambiguous assessment of the potentiality or likelihood of serious impediments on the functioning of the internal market undertaken by the Court. It shall be recalled that the constitutional aftermath of the notorious Tobacco Advertising Judgment I 26 established that the Treaty’s core harmonisation provision had not been designed as a general regulatory competence with the aim to harmonise national provisions or to introduce total prohibitions on particular products or services. It covered, instead, measures aiming at the removal of obstacles to the exercise of Community fundamental freedoms or the removal of appreciable distortions of competition.

Against that, the raison d’etre stemming from the succeeding Tobacco Advertising Judgment II illustrated that the Court has enthusiastically approved, through the application of art.95 EC, the deliberate adoption of Community legislation beyond its constitutional competence. 27 In Tobacco Advertising Judgment II, it was established that in cases where a harmonising measure serves a genuine internal market approximation aim as well as pursuing health objectives, the Court considers the measure as being adopted within the legitimate limits of art.95 EC. This undermined the spirit of consistency and complementarity of supranational action in the area of public health. Article 152(4) EC, in particular, made it explicit that the Community cannot directly adopt secondary legislation in the form of harmonising measures aimed at the protection of human health. By resorting, however, to art.95 EC, the EU legislature stayed within its competence since

the contested measure (Directive 2003/3328) was considered necessary for the completion and proper operation of the internal market. Therefore, the implications of Directive 2003/33 for national health policy did not raise an issue of legality. This was despite public health constituting a decisive factor for recourse to art.95 EC.

In the same fashion, in Ireland v Parliament and Council, the Court interpreted Community competences broadly, allowing a wide margin of manoeuvre to the EU legislature. The choice of art.95 EC as the appropriate legal basis for the adoption of a Directive principally aimed at combating crime raised constitutional questions of legitimacy with regards to the regulation of the socio-economic and political choices of the Member States.29 The outcome of the judgment reminds one of Wyatt’s comment that the EU legislature enjoys, under art.95 EC, a broad competence to regulate the internal market and the Court is acquiescing, ignoring national interests.30 The decision also demonstrates that the principle of subsidiarity, enshrined in ex art.5 EC (now 5 TEU), although well intended, was rather weak in preventing the Community from assuming new competences related to criminal matters.31 This was also well depicted in the Third Money-Laundering Directive, adopted under art.95 EC and art.47(2) EC (now 53 TFEU). The Directive not only introduced a risk-based approach to the fight against dirty money but, more significantly, also included in its scope terrorism-financing that had traditionally been an object of the third pillar.32

From the above, it can be contended that the expansion of the scope of art.95 EC rendered complicated the construction of a clear account of the nature of Community competence. It remains to be seen whether the utilisation of art.114 TFEU will produce similar results. A lot will depend on how efficiently the newly-in-force Treaty of Lisbon will resolve past inter-pillar ambiguity and help to clarify the extent of the Union’s power over criminal law and its legal effect upon national regulatory autonomy. This is particularly relevant in relation to the effects that legislation under title V TFEU will produce and the extension of the former first pillar system of effective judicial protection to police and judicial co-operation in criminal matters.

Inter-pillar demarcation and the delimitation rule of article 47 TEU

The Court’s contribution to past inter-pillar tension cannot be overlooked.33 Perhaps to a greater degree than the Court, A.G. Bot embarked on an analysis of these questions in Ireland v Parliament and Council in order to resolve the constitutional anomaly and

overlapping of objectives arising out of the Union’s pillarised structure. He attempted to clarify the demarcation of the dividing line between the former first and third pillars by distinguishing between:

"Measures which harmonise the conditions under which providers of communications services must retain traffic and location data which are generated or processed in the course of their commercial activities ...34

[and]

... measures harmonising the conditions under which the competent national law-enforcement authorities may access, use and exchange retained data in the discharge of their duties."35

While the former measures belonged to the first pillar, the latter came within the scope of the third pillar. Hence, the processing of data for public security reasons and state activities in relation to the fight against terrorism could not be based on internal market harmonisation measures. This was to ascertain that a mere reference to a public interest objective was insufficient in itself to bring an area within the scope of Community law.

Both the Advocate General’s and the Court’s attention to ex art.47 TEU (now 40 TEU) was remarkable. It shall be recalled that ex art.47 TEU was intended to establish a clear delimitation of competences between the first and third pillars. Specifically, its task was to ensure that acts which fell within the scope of title VI of the TEU did not encroach upon the powers conferred by the EC Treaty on the Community. It emerged from the judgment that art.47 TEU constituted a hierarchy rule giving priority to the EC Treaty and guaranteeing that nothing in the TEU shall affect it. Thus, a joint legal basis solution was not possible across the EU pillars. This is reminiscent of the Court’s decision in ECOVAS,36 which is now most relevant given that current art.40 TEU stipulates the subsidiary character of the CFSP as against the other competences set out in the Treaties,

"under Article 47 EU, such a solution is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within development cooperation policy, as conferred by the EC Treaty on the Community, and within the CFSP, and where neither one of those components is incidental to the other".37

In ECOVAS, the Court employed art.47 TEU as a delimitation rule, governing the allocation of legal basis in order to preserve the autonomy of the Community pillar where there are overlapping objectives, such as the preservation of peace and international security (second pillar) and development co-operation (first pillar).38 Equally, a legal basis in the EC Treaty and a legal basis in title VI of the TEU could not coexist and therefore be used together for the adoption of the same measure.

37 Commission v Council (C-91/05) [2008] E.C.R. I-3651 at [76].
38 In Commission v Council (C-91/05) [2008] E.C.R. I-3651, the Court held that the Council had infringed art.47 TEU by adopting the contested Decision 2004/833 on the basis of title V of the EU Treaty. See C. Hillion and R. Wessel, "Competence Distribution in EU External Relations after ECOVAS: Clarification or Continuous Fuzziness" (2009) C.M.L. Rev. 551.
Resorting to a joint legal basis between the first and the third pillars entailed practical complications, which reached beyond the preservation of national control over criminal law. It should be recalled that the EC–EU distinction carried significant constitutional and institutional divergence. The third pillar, for instance, encompassed different legislative forms of diverse nature. For instance, the principles of direct effect and primacy of EC law were never extended to third pillar acts. Notwithstanding the lack of direct effect of EU law provisions, however, the Court’s jurisprudence was indicative of a trend towards approximation between the Community and the third pillar. This owes much to the Court’s rhetoric pointing to the obligation on national courts to construe national law in accordance with secondary EU law provisions. The EC–EU dividing line was crossed for the first time when the Court extended in Pupino the supranational principle of loyal co-operation based on ex art.10 EC (now art.4(3) TEU), allowing for the indirect effect of framework decisions. This did not, however, assimilate framework decisions to directives, especially since their adoption was characterised by different procedures—unanimity as opposed to qualified majority.

The practical impossibility of marrying an EC with an EU legal basis stemmed also from the unanimity requirement that characterised the two intergovernmental pillars as opposed to qualified majority, which constituted the norm within the Community method. The Court’s reasoning in Titanium Dioxide reminds us that when the procedures for adoption of a measure did not coincide, the goal of harmonising any subject area that involved overlap was problematic even within the same (EC) pillar. Certainly, this was more problematic when contemplating the possibility of resorting to a joint inter-pillar legal basis. Furthermore, the third pillar provided for a limited jurisdiction of the Court to give preliminary rulings on the validity and interpretation of the acts referred to in art.35 TEU. Finally, with regard to enforcement, neither the Commission could take action against a Member State before the Court for failure to implement a framework decision nor could individuals or groups resort to direct actions against the former Community, alleging that the EU institutions acted in breach of their obligations under the Treaty.

Since the coming into force of the Treaty of Lisbon, the EC–EU dichotomy is no more. It follows that, under title V of the TFEU, measures in the area of police and judicial co-operation in criminal matters take the form of Regulations and Directives and therefore may confer directly effective rights upon individuals, justiciable before their national courts. Equally, the principle of primacy applies to the former third pillar. It is, of course, unlikely that all former third pillar measures will be repealed and readopted or automatically transposed as Regulations and Decisions. What is more, according to the Treaty’s transitional protocol (Protocol No.36 art.10), the preliminary reference jurisdiction of the Court regarding the validity and interpretation of EU law will be available only after a five-year transitional period. Similarly, following this transitional period, effective and uniform implementation of EU law and pre-existing third pillar acts by the Member States will be controlled by the Commission and the Court via the normal infringement procedure under art.258 TFEU. Yet, the depolarisation introduced by the Treaty of Lisbon...

41 Since the TEU does not lay down the form in which a national court must present its reference to the Court for a preliminary ruling, Member States can refer directly to art.267 TFEU (ex 234 EC). See Dell’Orto (C-167/05) [2007] E.C.R. I-5537 at [34].

will not remove all complexity. The extension of the former Community pillar system of judicial protection has already incited criticism vis-à-vis the potential uncertainty that may arise in relation to the manner in which measures under title V TFEU will be treated by both European and national courts. National courts are under a duty to ensure that both criminal and civil proceedings are determined fairly and within a reasonable time, in accordance with art.6 ECHR. The Court of Justice, on the other hand, needs to engage in the practice of self-restraint. This is vital given that the rules of criminal procedure still do not fall within the competence of the Union. EU law cannot, for instance, presume absolute authority over the type and level of sanctions to be imposed against persons who have committed one of the prescribed offences referred to in a Directive.

The abovementioned considerations aside, it is obvious that the judgment in Ireland v Parliament and Council contributed vigorously to the “Communitarisation” of policy areas previously characterised by looser intergovernmental co-operation. It is argued that such a development partly derived from the increasing tendency of the EU institutions to use qualified majority voting in the Council under the first pillar and partly from the Court’s incremental case law. Indeed, the Community method appeared preferable to the EU legislature compared to the deadlock arising from the unanimity requirement in the adoption of third pillar framework decisions. Against the democratic deficit of the third pillar consultation process, the application of the Community method appeared more attractive. It ensured the engagement of the European Parliament in supranational legislation by having MEPs as equal partners alongside national executives. Hence, it can be submitted that Community involvement in the area of criminal law contributed to the furtherance of Community actions and objectives while alleviating concerns about the lack of democratic legitimacy in the third pillar. Such an involvement has gained particular relevance with the coming into force of the Treaty of Lisbon, which provides for the extension of the co-decision procedure to the whole of the former third pillar.

Despite the lack of a general competence in criminal law under the former EC Treaty, the Community’s ability partially to harmonise substantive criminal law flourished after a series of incremental judgments of the Court with reference to the division of competence in criminal law matters between the Community and the Member States. For instance, in the Environmental Offences cases, the Court confirmed that the EU legislature was competent to enact harmonisation measures related to the criminal law of the Member States in order to ensure that the rules on environmental protection are fully effective. Such competence did not, however, encompass any express restriction limiting Community harmonisation of substantive criminal law to environmental protection only.

44 See art.83 TFEU.
47 See Criminal Proceedings against Pupino (C-105/03) [2005] E.C.R. I-5285 at [36], [43].
As criminal matters have now moved from the periphery to the core of the Union’s activities, it is not difficult to imagine further attempts leading to fundamental reforms. At this point, it should be stressed that the trend that began prior to the ratification of the Treaty of Lisbon was complementary to (but not dependent upon) the reforms introduced by the new Treaty. The Advocate General’s argument in Ireland v Parliament and Council that if every measure pursuing a criminal objective was brought under the third pillar, the scope of title VI TEU would have been unduly extended, although hardly convincing, was indicative of the drift towards the supranationalisation of the third pillar.

The risk of fundamental rights infringements: the right to a private and family life

Above and beyond legal basis and inter-pillar problems, the Data Retention Directive entails issues more proximate to the citizen. Such issues are interwoven with the consequences stemming from the facilitation of national counterterrorist investigations. Prior to the Court’s judgment in Ireland v Parliament and Council, the transposition of the Data Retention Directive into domestic law was met with scepticism. The impending fear of a “database state” resulting from the adoption of measures aimed at a pan-European regime of data retention has brought to the fore arguments about the risk of fundamental rights infringements resulting from security breaches by Member States. According to art.8 ECHR, public authorities may only interfere with the right to a private and family life in narrowly defined circumstances. The provision protects individuals against arbitrary interference by public authorities.[9] It has been argued that the Directive does not satisfy these circumstances and that it “clearly infringes individuals’ privacy by giving unprecedented levels of access to information about their communications” to “competent national authorities”, which remain unspecified in the Directive.

Transposition difficulties stemming from certain Member States’ constitutional requirements made the implementation phase of the Data Retention Directive thorny. The first blow came from Lithuania. The Lithuanian President initially vetoed the amendments to the Law on Electronic Communications 2004, which would have transposed the requirements of the Directive. The transposition of the Directive under the Electronic Communications Act 2007 was also initially declared unconstitutional in Bulgaria. The decision of the Bulgarian Supreme Administrative Court echoed the Slovak Republic’s

arguments as to the legality of the Directive in *Ireland v Parliament and Council*. It concerned the effect of data retention measures upon the right to privacy, which is recognised under domestic law, art.8 ECHR, and the general principles of Community law. Moreover, the German Constitutional Court heard complaints by citizens against the amended law on telecommunications. It highlighted the severe and irreparable interference of the obligation on providers to transmit information (which it limited to cases of serious crimes) with the right to privacy of communication under art.10(1) GG.56

The Directive has also been subject to fierce opposition by several civil liberties groups. At the same time that the Irish Government sought to annul the Data Retention Directive, the advocacy group, “Digital Rights Ireland”, brought a case before the High Court of Ireland arguing that the measure was in breach of Irish and EC data protection law and therefore unconstitutional.57 Moreover, the Court of Justice’s judgment in *Ireland v Parliament and Council* has added momentum to the number of complaints made by civil rights and privacy activists, the most prominent being the German Working Group on Data Retention (Arbeitskreis Vorratsdatenspeicherung).58 The Working Group, with the support of 34,000 plaintiffs, has applied to the German Constitutional Court in order to seek a separate ruling by the Court of Justice on the compatibility of data retention with human rights.59

It is worth repeating at this stage that in *Ireland v Parliament and Council*, the Court stated explicitly that the action brought by the Irish Government was solely related to the choice of legal basis and not to any possible infringement of fundamental rights.60 Sooner or later, the Court will have to rule on whether or not the retention of and access to data constitutes an invasion of the right to a private life.61 This will entail an assessment of the necessity and effectiveness of the Directive, which has been criticised as “unlikely to prevent any terrorist attacks”.62 Member States will lay all hope on their national courts to guarantee that any restriction on fundamental rights should be in accordance with the law63 and necessary in a democratic society for a legitimate purpose.64 Such a
guarantee is considered to be essential, given that neither the wording of the preamble nor the wide discretion left to the Member States under the Directive for interpretation and implementation satisfy the requirements under art.8 ECHR and art.7 of the EU Charter of Fundamental Rights, which is now binding under the revised art.6 TEU via the Treaty of Lisbon.

Conclusions: The scope of the former Community system of data protection

It is imperative to highlight that in Ireland v Parliament and Council, the Court ascertained the competence of the Community to harmonise the rules regarding the processing of personal data as a corollary of the functioning of the internal market. According to the Court, the obligations on private electronic communication operators could not be detached from the first pillar without jeopardising the coherence and effectiveness of the data protection system in Europe. The case has added to the scope of the Community system of data protection; it has not only confirmed its limitations, as per PNR, but has established that such limitations should not harm its effectiveness. This is particularly significant since an equivalent system of data protection or retention did not exist under the third pillar.

The ramifications of the ruling are uncertain. Although the pillar fuzziness resulting from the ongoing Communitarisation of the third pillar has now been determined, the boundaries of harmonisation legislation under art.114 TFEU are yet to be resolved. Undoubtedly, the “centre of gravity” of the Data Retention Directive clearly lay in the context of the “war on terror”. It would seem that this is not enough, however, to pigeonhole such a harmonisation measure as one that comes automatically under the scope of application of the former third pillar in the same fashion as the PNR Agreement. It is not accidental that, before its rejection by the European Parliament, the Data Retention Directive first came to life as an initiative by France, Ireland, Sweden and the United Kingdom in the form of a draft framework decision. Yet, Community encroachment on EU competence is one thing; Community exercise of a non-existent competence is another.

Former title VI TUE may have provided a legal basis for activities of public authorities relating to law enforcement, but that ceased to be relevant in relation to private companies (providers of communications services; airlines, etc.). The Court’s PNR judgment resembled Tobacco Advertising I, for its subsidiarity-friendly attributes. Indeed, in PNR,

the Court denounced any potential competence under the former first pillar. Yet, the processing of data by airlines for law enforcement purposes—as much as the conditions under which providers of communications services must retain data—not only lacked a legal framework under the third pillar but also had no competence “teeth”.

To this end, one could argue that the Court’s decision in Ireland v Parliament and Council was pragmatic and that the Court was prudent not to follow its PNR rhetoric. The remaining question is whether this is the Court’s final word or a variation of its approach as it now lingers between the centre of gravity in internal market harmonisation legislation and the borderline between the pillars’ remains.