

JUDGMENT OF THE COURT (Grand Chamber)

10 February 2009 (\*)

(Action for annulment – Directive 2006/24/EC – Retention of data generated or processed in connection with the provision of electronic communications services – Choice of legal basis)

In Case C-301/06,

ACTION for annulment under Article 230 EC, brought on 6 July 2006,

**Ireland**, represented by D. O'Hagan, acting as Agent, E. Fitzsimons, D. Barniville and A. Collins, SC, with an address for service in Luxembourg,

applicant,

supported by:

**Slovak Republic**, represented by J. Čorba, acting as Agent,

intervener,

v

**European Parliament**, represented initially by H. Duintjer Tebbens, M. Dean and A. Auersperger Matić, and subsequently by the latter two and K. Bradley, acting as Agents, with an address for service in Luxembourg,

**Council of the European Union**, represented by J.-C. Piris, J. Schutte and S. Kyriakopoulou, acting as Agents,

defendants,

supported by:

**Kingdom of Spain**, represented by M.A. Sampol Pucurull and J. Rodríguez Cárcamo, acting as Agents, with an address for service in Luxembourg,

**Kingdom of the Netherlands**, represented by C. ten Dam and C. Wissels, acting as Agents,

**Commission of the European Communities**, represented by C. Docksey, R. Troosters and C. O'Reilly, acting as Agents, with an address for service in Luxembourg,

**European Data Protection Supervisor**, represented by H. Hijmans, acting as Agent,

intervenors,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, J. N. Cunha Rodrigues (Rapporteur), R. Silva de Lapuerta, K. Schiemann, J. Klučka, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2008,

after hearing the Opinion of the Advocate General at the sitting on 14 October 2008,

gives the following

### **Judgment**

- 1 By its action, Ireland requests the Court to annul Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), on the ground that it was not adopted on an appropriate legal basis.

#### **Legal framework**

##### *Directive 95/46/EC*

- 2 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 1995 L 281, p. 31) lays down rules relating to the processing of personal data in order to protect the rights of individuals in that respect, while ensuring the free movement of those data in the European Community.
- 3 Article 3(2) of Directive 95/46 provides:

‘This Directive 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,
- by a natural person in the course of a purely personal or household activity.’

##### *Directive 2002/58/EC*

4 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) (OJ 2002 L 201, p. 37) was adopted with a view to supplementing Directive 95/46 by provisions specific to the telecommunications sector.

5 Under Article 6(1) of Directive 2002/58:

‘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 paragraphs 2, 3 and 5 of this Article and Article 15(1).’

6 Article 15(1) of Directive 2002/58 states:

‘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) and (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 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.’

*Directive 2006/24*

7 Recitals 5 to 11 in the preamble to Directive 2006/24 provide as follows:

- ‘(5) Several Member States have adopted legislation providing for the retention of data by service providers for the prevention, investigation, detection and prosecution of criminal offences. Those national provisions vary considerably.
- (6) The legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences present obstacles to the internal market for electronic communications, since service providers are faced with different requirements regarding the types of traffic and location data to be retained and the conditions and periods of retention.
- (7) The Conclusions of the Justice and Home Affairs Council of 19 December 2002 underline that, because of the significant growth in the possibilities afforded by electronic communications, data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention, investigation, detection and prosecution of criminal offences, in particular organised crime.

- (8) The Declaration on Combating Terrorism adopted by the European Council on 25 March 2004 instructed the Council to examine measures for establishing rules on the retention of communications traffic data by service providers.
- (9) Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everyone has the right to respect for his private life and his correspondence. Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, inter alia, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. Because retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the ECHR is therefore a necessary measure.
- (10) On 13 July 2005, the Council reaffirmed in its declaration condemning the terrorist attacks on London the need to adopt common measures on the retention of telecommunications data as soon as possible.
- (11) Given the importance of traffic and location data for the investigation, detection and prosecution of criminal offences, as demonstrated by research and the practical experience of several Member States, there is a need to ensure at European level that data that are generated or processed, in the course of the supply of communications services, by providers of publicly available electronic communications services or of a public communications network are retained for a certain period, subject to the conditions provided for in this Directive. ’

8 Recital 21 in the preamble to Directive 2006/24 states:

‘Since the objectives of this Directive, namely to harmonise the obligations on providers to retain certain data and to ensure that those 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, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the [EC] Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.’

9 Recital 25 in the preamble to Directive 2006/24 is worded as follows:

‘This Directive is without prejudice to the power of Member States to adopt legislative measures concerning the right of access to, and use of, data by national authorities, as designated by them. Issues of access to data retained pursuant to this Directive by national authorities for such activities as are referred to in the first indent of Article 3(2) of Directive 95/46/EC fall outside the scope of Community law. However, they may be subject to national law or action pursuant to Title VI of the Treaty on European Union.’

Such laws or action must fully respect fundamental rights as they result from the common constitutional traditions of the Member States and as guaranteed by the ECHR. ...'

10 Article 1(1) of Directive 2006/24 provides:

'This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications 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.'

11 Article 3(1) of that directive provides:

'By way of derogation from Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.'

12 Article 4 of Directive 2006/24 states:

'Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.'

13 Article 5 of Directive 2006/24 states:

'Member States shall ensure that the following categories of data are retained under this Directive:

(a) data necessary to trace and identify the source of a communication:

...

(b) data necessary to identify the destination of a communication:

...

(c) data necessary to identify the date, time and duration of a communication:

...

(d) data necessary to identify the type of communication:

...

(e) data necessary to identify users' communication equipment or what purports to be their equipment:

...

(f) data necessary to identify the location of mobile communication equipment:

...

2. No data revealing the content of the communication may be retained pursuant to this Directive.'

14 Article 6 of Directive 2006/24 provides:

'Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.'

15 Article 7 of Directive 2006/24 states:

'Without prejudice to the provisions adopted pursuant to Directive 95/46/EC and Directive 2002/58/EC, each Member State shall ensure that providers of publicly available electronic communications services or of a public communications network respect, as a minimum, the following data security principles with respect to data retained in accordance with this Directive:

...'

16 Under Article 8 of Directive 2006/24:

'Member States shall ensure that the data specified in Article 5 are retained in accordance with this Directive in such a way that the data retained and any other necessary information relating to such data can be transmitted upon request to the competent authorities without undue delay.'

17 Article 11 of Directive 2006/24 is worded as follows:

'The following paragraph shall be inserted in Article 15 of Directive 2002/58/EC:

'1a. Paragraph 1 shall not apply to data specifically required by Directive [2006/24] to be retained for the purposes referred to in Article 1(1) of that Directive''.

### **Background to the dispute**

18 On 28 April 2004, the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland submitted to the Council of the European Union a proposal for a framework decision to be adopted on the basis of Articles 31(1)(c) EU and 34(2)(b) EU. The subject of that proposal was the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data in public communication networks for the purposes of the prevention,

investigation, detection and prosecution of criminal offences, including terrorism (Council Document 8958/04).

- 19 The Commission of the European Communities stated that it favoured the legal basis used in that proposed framework decision with respect to a part of it. In particular, it pointed out that Article 47 EU did not allow an instrument based on the EU Treaty to affect the *acquis communautaire*, in this case Directives 95/46 and 2002/58. Taking the view that the determination of the categories of data to be retained and of the relevant retention period fell within the competence of the Community legislature, the Commission reserved the right to submit a proposal for a directive.
- 20 On 21 September 2005, the Commission adopted a proposal, based on Article 95 EC, for a directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication[s] services and amending Directive 2002/58 [COM(2005) 438 final].
- 21 During its session on 1 and 2 December 2005, the Council decided to seek the adoption of a directive based on the EC Treaty, rather than pursuing the adoption of a framework decision.
- 22 On 14 December 2005, the European Parliament delivered its opinion in accordance with the co-decision procedure under Article 251 EC.
- 23 The Council adopted Directive 2006/24 by qualified majority at its session on 21 February 2006. Ireland and the Slovak Republic voted against the adoption of that directive.

#### **Forms of order sought by the parties**

- 24 Ireland claims that the Court should:
  - annul Directive 2006/24 on the ground that it was not adopted on an appropriate legal basis, and
  - order the Council and the Parliament to pay the costs.
- 25 The Parliament contends that the Court should:
  - primarily, dismiss the action as unfounded, and
  - order Ireland to pay all the costs of the present proceedings,
  - or, in the alternative, should the Court annul Directive 2006/24, declare that the effects of that directive are to remain in force until a new measure enters into force.
- 26 The Council contends that the Court should:
  - dismiss the action brought by Ireland, and

– order Ireland to pay the costs.

27 By orders of 1 February 2007, the President of the Court granted leave to the Slovak Republic to intervene in support of the form of order sought by Ireland and to the Kingdom of Spain, the Kingdom of the Netherlands, the Commission and the European Data Protection Supervisor to intervene in support of the forms of order sought by the Parliament and the Council.

### **The action**

#### *Arguments of the parties*

- 28 Ireland submits that the choice of Article 95 EC as the legal basis for Directive 2006/24 is a fundamental error. Neither Article 95 EC nor any other provision of the EC Treaty is, in its view, capable of providing an appropriate legal basis for that directive. Ireland argues principally that the sole objective or, at least, the main or predominant objective of that directive is to facilitate the investigation, detection and prosecution of crime, including terrorism. Therefore, the only legal basis on which the measures contained in Directive 2006/24 may be validly based is Title VI of the EU Treaty, in particular Articles 30 EU, 31(1)(c) EU and 34(2)(b) EU.
- 29 Ireland argues that an examination of, in particular, recitals 7 to 11 and 21 in the preamble to Directive 2006/24 and of the fundamental provisions laid down therein, in particular Article 1(1) thereof, shows that reliance on Article 95 EC as the legal basis for that directive is inappropriate and unjustifiable. That directive, it contends, is clearly directed towards the fight against crime.
- 30 Ireland submits that measures based on Article 95 EC must have as their ‘centre of gravity’ the harmonisation of national laws in order to improve the functioning of the internal market (see, inter alia, Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission* [2006] ECR I-4721). The provisions of Directive 2006/24 concern the fight against crime and are not intended to address defects in the internal market.
- 31 If, contrary to its main argument, the Court were to hold that Directive 2006/24 is indeed intended, inter alia, to prevent distortions or obstacles to the internal market, Ireland submits in the alternative that that objective must be regarded as being purely incidental to the main or predominant objective of combating crime.
- 32 Ireland adds that Directive 2002/58 could be amended by another directive, but the Community legislature is not competent to use an amending directive adopted on the basis of Article 95 EC in order to incorporate into Directive 2002/58 provisions falling outside the competence conferred on the Community under the first pillar. The obligations designed to ensure that data are available for the investigation, detection and prosecution of criminal offences fall within an area which may only be the subject of a measure based on Title VI of the EU Treaty. The adoption of such an instrument would not affect the provisions of Directive 2002/58 within the meaning of Article 47 EU. If the verb ‘affect’, which is used in that article, were to be properly construed, it would be necessary to interpret it as not precluding a random or incidental overlap of unimportant and secondary subject matter between instruments of the Community and those of the Union.

- 33 The Slovak Republic supports Ireland's position. It takes the view that Article 95 EC cannot serve as the legal basis for Directive 2006/24, since the latter's main objective is not to eliminate barriers and distortions in the internal market. The directive's purpose, it submits, is to harmonise the retention of personal data in a manner which goes beyond commercial objectives in order to facilitate action by the Member States in the area of criminal law and, for that reason, it cannot be adopted under Community competence.
- 34 According to the Slovak Republic, the retention of personal data to the extent required by Directive 2006/24 amounts to an extensive interference in the right of individuals to privacy as provided for by Article 8 of the ECHR. It is questionable whether such far-reaching interference may be justified on economic grounds, in this case the enhanced functioning of the internal market. The adoption of an act outside the scope of Community competence, the primary and undisguised purpose of which is the fight against crime and terrorism, would be a more appropriate solution, providing a more proportionate justification for interference with the right of individuals to protection of their privacy.
- 35 The Parliament submits that Ireland is being selective in its interpretation of the provisions of Directive 2006/24. Recitals 5 and 6 in the preamble thereto, it argues, make it clear that the main or predominant purpose of that directive is to eliminate obstacles to the internal market for electronic communications services, while recital 25 confirms that the access to and use of the retained data for law-enforcement purposes fall outside the scope of Community competence.
- 36 The Parliament submits that, following the terrorist attacks of 11 September 2001 in New York (United States), 11 March 2004 in Madrid (Spain) and 7 July 2005 in London (United Kingdom), a number of Member States adopted divergent rules on the retention of data. Such differences were liable to impede the provision of electronic communications services. The Parliament takes the view that the retention of data constitutes a significant cost element for the providers of publicly available electronic communications services or of public communications networks ('service providers') and the existence of different requirements in that field may distort competition within the internal market. It adds that the main purpose of Directive 2006/24 is to harmonise the obligations imposed by the Member States on service providers in regard to data retention. It follows that Article 95 EC is the correct legal basis for that directive.
- 37 The Parliament also argues that reliance on Article 95 EC as the legal basis is not invalidated by the importance attributed to combating crime. While crime prevention has clearly influenced the choices made in Directive 2006/24, that concern does not invalidate the choice of Article 95 EC as the legal basis for that directive.
- 38 Furthermore, Article 4 of Directive 2006/24 provides, in a manner consistent with the view expressed in recital 25 in the preamble thereto, that the conditions for access to and processing of retained data must be defined by the Member States subject to the legal provisions of the Union and international law, in particular the ECHR. That approach differs from that adopted for the measures which were the subject of the judgment in *Parliament v Council and Commission*, a case in which airline companies were obliged to grant access to passenger data to a law-enforcement authority in a non-member country. Directive 2006/24 thus respects the separation of areas of competence between the first and third pillars.

- 39 According to the Parliament, although the retention of an individual's personal data may in principle constitute interference within the meaning of Article 8 of the ECHR, that interference may be justified, in terms of that article, by reference to public safety and crime prevention. The issue of justification for such interference must be distinguished from that of the correct choice of the legal basis within the legal system of the Union, that being an unrelated matter.
- 40 The Council submits that, in the years following the adoption of Directive 2002/58, national law-enforcement authorities were becoming increasingly concerned about the exploitation of developments in the area of electronic communications for the purpose of committing criminal acts. Those new concerns led the Member States to adopt measures to prevent data relating to those communications from being erased and to ensure that they were available to law-enforcement authorities. Those measures, the Council continues, were divergent and began to affect the proper functioning of the internal market. Recitals 5 and 6 in the preamble to Directive 2006/24 are explicit in that regard.
- 41 That situation obliged the Community legislature to ensure that uniform rules were imposed on service providers with regard to the conditions under which they carried out their activities.
- 42 For those reasons, during 2006 the Community legislature considered it necessary to put an end to the obligation to erase data imposed by Articles 5, 6 and 9 of Directive 2002/58 and to provide that, in future, the data referred to in Article 5 of Directive 2006/24 would have to be retained for a certain period. That amendment obliges the Member States to ensure that such data are retained for a minimum period of six months and a maximum of two years from the date of the communication. The purpose of that amendment was to establish precise and harmonised conditions with which service providers must comply in respect of the erasure or non-erasure of the personal data referred to in Article 5 of Directive 2006/24 by thus introducing common rules in the Community with a view to ensuring the unity of the internal market.
- 43 The Council takes the view that, while the need to combat crime, including terrorism, was a determining factor in the decision to amend the scope of the rights and obligations laid down in Articles 5, 6 and 9 of Directive 2002/58, that circumstance did not prevent Directive 2006/24 from having to be adopted on the basis of Article 95 EC.
- 44 Neither Articles 30 EU, 31 EU and 34 EU nor any other article in the EU Treaty can serve as the basis for a measure which, in substance, has the objective of amending the conditions under which service providers carry out their activities or of making the system established by Directive 2002/58 inapplicable to them.
- 45 Rules relating to the categories of data to be retained by service providers and the retention period for those data which amend the obligations imposed on the latter by Directive 2002/58 cannot be the subject of an instrument based on Title VI of the EU Treaty. The adoption of such an instrument would affect the provisions of that directive, in breach of Article 47 EU.
- 46 According to the Council, the rights protected by Article 8 of the ECHR are not absolute and may be subject to restrictions under the conditions laid down in Article 8(2) thereof. As provided in Directive 2006/24, the retention of data serves a legitimate public interest,

recognised in Article 8(2) of the ECHR, and constitutes an appropriate means by which to protect that interest.

- 47 The Kingdom of Spain and the Kingdom of the Netherlands submit that, as is apparent from recitals 1, 2, 5 and 6 in the preamble to Directive 2006/24, the main purpose of that directive is to eliminate obstacles to the internal market generated by existing legal and technical differences between the national provisions of the Member States. That directive, in their view, regulates the retention of data with the aim of eliminating that type of obstacles, first, by harmonising the obligation to retain data and, second, by specifying the criteria relevant to that obligation, such as the categories of data to be retained and the retention period.
- 48 The fact that, under Article 1, Directive 2006/24 effects such harmonisation ‘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’ is a separate matter. Directive 2006/24 does not regulate the processing of data by the public or law-enforcement authorities of the Member States. On the contrary, that harmonisation relates only to the aspects of data retention which directly affect the commercial activities of service providers.
- 49 In so far as Directive 2006/24 amends Directive 2002/58 and has a connection with Directive 95/46, the amendments which it contains may be properly implemented only by means of a Community instrument and not by an instrument based on the EU Treaty.
- 50 The Commission recalls that, prior to the adoption of Directive 2006/24, several Member States had adopted national measures on data retention pursuant to Article 15(1) of Directive 2002/58. It highlights the significant divergences which existed between those measures. For example, the retention periods varied from three months in the Netherlands to four years in Ireland. The obligations relating to data retention have significant economic implications for service providers. Divergences between those obligations could lead to distortions in the internal market. In that context, it was legitimate to adopt Directive 2006/24 on the basis of Article 95 EC.
- 51 Furthermore, Directive 2006/24 limits, in a manner harmonised at Community level, the obligations laid down by Directive 2002/58. Since the latter was based on Article 95 EC, the legal basis of Directive 2006/24 cannot be different.
- 52 The reference to the investigation, detection and prosecution of serious crime in Article 1(1) of Directive 2006/24 falls under Community law because it serves to indicate the legitimate objective of the restrictions imposed by that directive on the rights of individuals with regard to data protection. Such an indication is necessary in order to comply both with the requirements of Directives 95/46 and 2002/58 and with those of Article 8 of the ECHR.
- 53 The European Data Protection Supervisor submits that the subject-matter of Directive 2006/24 is covered by Article 95 EC because, first, that directive has a direct impact on the economic activities of service providers and may therefore contribute to the establishment and functioning of the internal market and, second, had the Community legislature not intervened, a distortion of competition in the internal market might have occurred. The aim of combating crime is not the sole, or even the predominant, objective

of that directive. On the contrary, it was intended in the first place to contribute to the establishment and functioning of the internal market and to the elimination of distortions of competition. The directive harmonises the national provisions on the retention by private undertakings of certain data in the course of their normal economic activities.

- 54 Furthermore, Directive 2006/24 amends Directive 2002/58, which was adopted on the basis of Article 95 EC, and ought for that reason to be adopted on the same legal basis. Under Article 47 EU, the Community legislature alone is competent to amend obligations arising from a directive based on the EC Treaty.
- 55 According to the European Data Protection Supervisor, if the EC Treaty could not serve as the basis for Directive 2006/24, the provisions of Community law relating to data protection would not protect citizens in cases where the processing of their personal data would facilitate crime prevention. In such a situation, the general system of data protection under Community law would apply to data-processing for commercial purposes but not to the processing of those data for purposes of crime prevention. That would give rise to difficult distinctions for service providers and to a reduction in the level of protection for data subjects. Such a situation should be avoided. The need for consistency justifies the adoption of Directive 2006/24 under the EC Treaty.

#### *Findings of the Court*

- 56 It must be noted at the outset that the question of the areas of competence of the European Union presents itself differently depending on whether the competence in issue has already been accorded to the European Union in the broad sense or has not yet been accorded to it. In the first hypothesis, it is a question of ruling on the division of areas of competence within the Union and, more particularly, on whether it is appropriate to proceed by way of a directive based on the EC Treaty or by way of a framework decision based on the EU Treaty. By contrast, in the second hypothesis, it is a question of ruling on the division of areas of competence between the Union and the Member States and, more particularly, on whether the Union has encroached on the latter's areas of competence. The present case comes under the first of those two hypotheses.
- 57 It must also be stated that the action brought by Ireland relates 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.
- 58 Ireland, supported by the Slovak Republic, contends that Directive 2006/24 cannot be based on Article 95 EC since its 'centre of gravity' does not concern the functioning of the internal market. The sole objective of the directive, or at least its principal objective, is, it is contended, the investigation, detection and prosecution of crime.
- 59 That argument cannot be accepted.
- 60 According to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see Case C-440/05 *Commission v Council* [2007] ECR I-9097, paragraph 61 and the case-law cited).

- 61 Directive 2006/24 was adopted on the basis of the EC Treaty and, in particular, Article 95 EC.
- 62 Article 95(1) EC provides that the Council is to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
- 63 The Community legislature may have recourse to Article 95 EC in particular where disparities exist between national rules which are such as to obstruct the fundamental freedoms or to create distortions of competition and thus have a direct effect on the functioning of the internal market (see, to that effect, Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, paragraph 37 and the case-law cited).
- 64 Furthermore, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from the divergent development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (*Germany v Parliament and Council*, paragraph 38 and the case-law cited).
- 65 It is necessary to ascertain whether the situation which led to the adoption of Directive 2006/24 satisfies the conditions set out in the preceding two paragraphs.
- 66 As is apparent from recitals 5 and 6 in the preamble to that directive, the Community legislature started from the premiss that there were legislative and technical disparities between the national provisions governing the retention of data by service providers.
- 67 In that connection, the evidence submitted to the Court confirms that, following the terrorist attacks mentioned in paragraph 36 of this judgment, several Member States, realising that data relating to electronic communications constitute an effective means for the detection and prevention of crimes, including terrorism, adopted measures pursuant to Article 15(1) of Directive 2002/58 with a view to imposing obligations on service providers concerning the retention of such data.
- 68 It is also clear from the file that the obligations relating to data retention have significant economic implications for service providers in so far as they may involve substantial investment and operating costs.
- 69 The evidence submitted to the Court shows, moreover, that the national measures adopted up to 2005 pursuant to Article 15(1) of Directive 2002/58 differed substantially, particularly in respect of the nature of the data retained and the periods of data retention.
- 70 Finally, it was entirely foreseeable that the Member States which did not yet have rules on data retention would introduce rules in that area which were likely to accentuate even further the differences between the various existing national measures.
- 71 In the light of that evidence, it is apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time.

- 72 Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.
- 73 Furthermore, it must also be noted that, by laying down a harmonised level of retention of data relating to electronic communications, Directive 2006/24 amended the provisions of Directive 2002/58.
- 74 Directive 2002/58 is based on Article 95 EC.
- 75 Under Article 47 EU, none of the provisions of the EC Treaty may be affected by a provision of the EU Treaty. That requirement appears in the first paragraph of Article 29 EU, which introduces Title VI of the EU Treaty, entitled ‘Provisions on police and judicial cooperation in criminal matters’ (Case C-440/05 *Commission v Council*, paragraph 52).
- 76 In providing that nothing in the EU Treaty is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them, Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire* (Case C-91/05 *Commission v Council* [2008] ECR I-0000, paragraph 59).
- 77 It is the task of the Court to ensure that acts which, according to one party, fall within the scope of Title VI of the Treaty on European Union and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community (Case C-91/05 *Commission v Council*, paragraph 33 and the case-law cited).
- 78 In so far as the amendment of Directive 2002/58 effected by Directive 2006/24 comes within the scope of Community powers, Directive 2006/24 could not be based on a provision of the EU Treaty without infringing Article 47 thereof.
- 79 In order to determine whether the legislature has chosen a suitable legal basis for the adoption of Directive 2006/24, it is also appropriate, as follows from paragraph 60 of this judgment, to examine the substantive content of its provisions.
- 80 In that connection, the provisions of Directive 2006/24 are essentially limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States.
- 81 More specifically, the provisions of Directive 2006/24 are designed to harmonise national laws on the obligation to retain data (Article 3), the categories of data to be retained (Article 5), the periods of retention of data (Article 6), data protection and data security (Article 7) and the conditions for data storage (Article 8).
- 82 By contrast, the measures provided for by Directive 2006/24 do not, in themselves, involve intervention by the police or law-enforcement authorities of the Member States. Thus, as is clear in particular from Article 3 of the directive, it is provided that service providers are to retain only data that are generated or processed in the course of the

provision of the relevant communication services. Those data are solely those which are closely linked to the exercise of the commercial activity of the service providers.

- 83 Directive 2006/24 thus regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that relating to the use and exchange of those data between those authorities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of that directive, as is stated, in particular, in recital 25 in the preamble to, and Article 4 of, Directive 2006/24.
- 84 It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty.
- 85 In light of that substantive content, Directive 2006/24 relates predominantly to the functioning of the internal market.
- 86 Against such a finding, Ireland argues that, by the judgment in *Parliament v Council and Commission*, the Court annulled Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ 2004 L 183, p. 83, and – corrigendum – OJ 2005 L 255, p. 168).
- 87 In paragraph 68 of the judgment in *Parliament v Council and Commission*, the Court held that that agreement related to the same transfer of data as did Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection (OJ 2004 L 235, p. 11).
- 88 The latter decision concerned the transfer of passenger data from the reservation systems of air carriers situated in the territory of the Member States to the United States Department of Homeland Security, Bureau of Customs and Border Protection. The Court held that that the subject-matter of that decision was data-processing which was not necessary for a supply of services by the air carriers, but which was regarded as necessary for safeguarding public security and for law-enforcement purposes. In paragraphs 57 to 59 of the judgment in *Parliament v Council and Commission*, the Court held that such data-processing was covered by Article 3(2) of Directive 95/46, according to which that directive does not apply, in particular, to the processing of personal data relating to public security and the activities of the State in areas of criminal law. The Court accordingly concluded that Decision 2004/535 did not fall within the scope of Directive 95/46.
- 89 Since the agreement which was the subject of Directive 2004/496 related, in the same way as Decision 2004/535, to data-processing which was excluded from the scope of Directive 95/46, the Court held that Decision 2004/496 could not have been validly adopted on the basis of Article 95 EC (*Parliament v Council and Commission*, paragraphs 68 and 69).
- 90 Such a line of argument cannot be transposed to Directive 2006/24.

- 91 Unlike Decision 2004/496, which concerned a transfer of personal data within a framework instituted by the public authorities in order to ensure public security, 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.
- 92 It follows that the arguments which Ireland draws from the annulment of Decision 2004/496 by the judgment in *Parliament v Council and Commission* cannot be accepted.
- 93 Having regard to all of the foregoing considerations, Directive 2006/24 had to be adopted on the basis of Article 95 EC.
- 94 The present action must accordingly be dismissed.

### **Costs**

- 95 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful parties' pleadings. Since the Parliament and the Council have applied for Ireland to be ordered to pay the costs and Ireland has been unsuccessful, Ireland must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in this case are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders Ireland to pay the costs;**
- 3. Orders the Kingdom of Spain, the Kingdom of the Netherlands, the Slovak Republic, the Commission of the European Communities and the European Data Protection Supervisor to bear their own respective costs.**

[Signatures]