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The President and Members
of the Council of the EU
rue de la Loi 175
B - 1048 BRUXELLES

Case C-301/06

Ireland

v

Council of the European Union
European Parliament

Notification of the application

The Registrar of the Court of Justice of the European Communities encloses a copy of the application initiating proceedings before the Court in the abovementioned case.

The application was lodged at the Registry of the Court on 06/07/2006 and entered in the register of the Court under serial number C-301/06.

In accordance with Article 79 of the Rules of Procedure, the dispatch of the enclosed copy of the application constitutes the service prescribed by Article 39.


Pursuant to Article 40(1) of the Rules of Procedure, the defendant may lodge a defence at the Registry within one month after service of the application. The aforementioned time-limit will be extended on account of distance by the single period of 10 days prescribed in Article 81(2) of the Rules of Procedure.

If the defendant wishes the Court to extend this time-limit, it is asked to submit in good time a properly reasoned request to that effect.

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The Registrar draws your attention to the fact that all the documents in the case must be lodged during the written procedure. Once that procedure is closed, the lodging of pleadings, documents or extracts is permitted only in exceptional cases, after prior notification to the other parties and with the express authorisation of the Court.




Lynn Hewlett
Principal Administrator

C-301/06-1.

To the President and Members of the European Court of Justice of
the European Communities

IRELAND

Ireland represented by Mr. David J. O'Hagan, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8, acting as agent, assisted by Mr. Eoghan Fitzsimons, Senior Counsel and Mr. David Barniville, Barrister-at-Law both of the Bar of Ireland, with an address of service in Luxembourg at the Embassy of Ireland, 28 Route d'Arlon, Luxembourg.

Hereby lodges an application pursuant to Article 230 of the Treaty establishing the European Community

Against

THE COUNCIL OF THE EUROPEAN UNION

and

THE EUROPEAN PARLIAMENT

Having as its object the annulment pursuant to Article 230 of the Treaty establishing the European Community of 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 communication services or of public communications networks and amending Directive 2002/58/EC.

Registered at the Court of Justice under No. <u>754575</u>
Luxembourg - 7 -07- 2006
Fax / E-mail:
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For the Registrar Lynn Hewlett Principal Administrator

1. INTRODUCTION

- 1.1 Pursuant to Article 230 of the Treaty establishing the European Community (the "EC Treaty"), Ireland makes this application for the annulment of 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 (referred to, depending on the context, as the "Directive on Data Retention" or simply the "Directive").¹ The Directive was published on 13 April 2006.
- 1.2 The Directive on Data Retention has as its purported legal basis Article 95 EC. Ireland submits that the selection of Article 95 EC as the legal basis for the Directive is fundamentally flawed. Ireland submits that neither Article 95 EC nor any other provision of the EC Treaty can provide a proper legal basis for the Directive. The sole or, alternatively, the main or predominant purpose of the Directive is the investigation, detection and prosecution of serious crime. In those circumstances, Ireland submits that the only permissible legal basis for the measures contained in the Directive is Title VI of the Treaty on European Union ("TEU"), being the "*Provisions on Police and Judicial Co-operation in Criminal Matters*" and, in particular, Articles 30, 31 and 34 thereof.
- 1.3 It is notable in that regard that the Directive originated from a proposal initiated by a number of Member States for a Council framework decision under Title VI TEU. Ireland maintains that this was the appropriate and only permissible legal basis for the measures now contained in the Directive and that the legal basis pursuant to which it was purportedly adopted, namely, Article 95 EC is fundamentally flawed.

¹ O.J. L 105, 13.4.2006.

2. THE BACKGROUND TO THE DIRECTIVE ON DATA RETENTION

- 2.1 The Directive started life as a proposal for a framework decision on the retention of data which was introduced by a number of Member States in accordance with the provisions of Title VI TEU. The purpose of the draft framework decision was to ensure that data relating to the use of electronic communications should be available to law enforcement bodies in all the Member States. In that context, specific recognition was given to the fact that such data now constitute a particularly important and valuable tool in the investigation, detection and prosecution of crime and criminal offences, in particular organised crime and terrorism. Accordingly, provision was made for the retention of certain types of data for periods of time in anticipation that they might be required for a future criminal investigation or judicial proceedings.
- 2.2 A major element of the draft framework decision was concerned with the elimination of differences between the legislation on data retention in Member States which could prove to be prejudicial to cooperation between the competent authorities in the investigation, detection and prosecution of crime and criminal offences. To ensure effective police and judicial cooperation in criminal matters, the draft instrument provided for a requirement for all Member States to retain specific data for a length of time within set parameters for the purposes of combating crime.
- 2.3 The retention of telecommunications data has proved to be particularly significant in relation to the prevention and detection of terrorism. The contribution the draft framework decision could make in these areas was fully recognised at EU level and in an Action Plan on combating terrorism, which was adopted in June 2004, the Council called for the adoption of the instrument by June 2005. Subsequently the European Council, also in June 2004, welcomed the Action Plan and urged the Member States to fulfil its commitments.

- 2.4 Although the legal bases involved were different, the Commission proposal for a Directive on data retention bore many similarities to the draft framework decision. Moreover, negotiations continued in parallel on the two instruments for a period.
- 2.5 The final text of the Directive was very close to that of the draft framework decision, as it had developed. This was very much the case in terms of imposing obligations on the Member States to ensure the retention of telecommunications data for law enforcement purposes.

3. RELEVANT PROVISIONS ON THE DIRECTIVE ON DATA PROTECTION

- 3.1 Ireland submits that a consideration of the recitals to and the fundamental provisions of the Directive on Data Retention unquestionably demonstrates that reliance upon Article 95 EC as the legal basis for the Directive is wholly inappropriate and unsustainable.

(a) Directive 2002 / 58 / EC

- 3.2 The Directive on Data Retention seeks to amend Directive 2002/58/EC.² It should be noted that it is clear from Recital (11) of Directive 2002/58/EC that that Directive (and Directive 95/46/EC³) specifically excluded from its scope the processing of personal data in the electronic communications sector in the enforcement of the criminal law.
- 3.3 Recital (11) of Directive 2002/58/EC provides as follows:

"Like Directive 95/46/EC, this Directive does not address issues of protection of fundamental rights and freedoms related to activities

² 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 2002/58/EC").

³ 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.

which are not governed by Community law. Therefore, it does not alter the existing balance between the individual's right to privacy and the possibility for Member States to take the measure referred to in Article 15(1) of this Directive, necessary for the protection of public security, defence, State security (including the economic wellbeing of the State when the activities relate to State security matters) and the enforcement of criminal law. Consequently, this Directive does not affect the ability of Member States to carry out lawful interception of electronic communications, or take other measures, if necessary, for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the rulings of the European Court of Human Rights..."

- 3.4 Notwithstanding the express exclusion of criminal law matters from Directive 95/46/EC and Directive 2002/58/EC, the Directive on Data Retention is clearly and unambiguously directed towards the investigation, detection and prosecution of serious crime. This is clear from the recitals and from a number of provisions of the Directive itself.

(b) Recitals to the Directive on Data Retention

- 3.5 The following recitals clearly demonstrate that the main or predominant purpose of the Directive and, indeed, its sole objective, is the fight against crime. While an attempt is made in the Directive to adopt the terminology required by Article 95(1) EC, it is submitted that this attempt is wholly unconvincing and fails to disguise the true object and purpose of the Directive. This is the case, for example, with Recitals (5) and (6).

3.6 Recital (5) states that:

"(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."

3.7 Recital (6) states that:

"(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."

3.8 Ireland submits that these are mere assertions which are wholly unsupported by any evidence or other material.

3.9 Recital (7) further highlights what Ireland contends is the main or predominant purpose, if not indeed the sole purpose, of the Directive which is the fight against crime. Recital (7) states that:

"(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".⁴

3.10 This is further demonstrated by Recitals (8), (9), (10), (11) and (21).

Those recitals read as follows:

- "(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.*

⁴ Emphasis added.

- (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 the 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 of a public communications network, are retained for a certain period, subject to the conditions provided for in this Directive.*
- (21) *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 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.*⁵

⁵ Emphasis added.

(c) The Articles of The Directive

3.11 The subject matter and scope of the Directive are defined in Article 1. Article 1(1) provides as follows:

"1. *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.*"⁶

3.12 Ireland submits that on any interpretation of Article 1(1) it is clear that the sole or, in any event the main or predominant purpose, of the Directive is to assist the "*investigation, detection and prosecution of serious crime, as defined by each Member State in its national law*". That being the case, it is submitted that Article 95 EC does not and cannot afford a valid legal basis for the Directive.

3.13 There is nothing in any of the further provisions of the Directive which in any way detracts from what is clearly evident from Article 1(1) and the recitals mentioned above.

3.14 Ireland submits, therefore, that the only permissible legal basis for the measures contained in the Directive on Data Retention is Title VI TEU and, in particular, the combined provisions of Article 30, Article 31(1)(c) and Article 34 (2)(b) TEU.

⁶ Emphasis added.

4. LEGAL ASSESSMENT: CHOICE OF LEGAL BASIS

(a) EC Treaty and TEU : Mutually Exclusive

- 4.1 Ireland submits that there is no rational basis upon which the Parliament and the Council could have selected Article 95 EC or indeed any other provision of the EC Treaty as providing the appropriate legal basis for the Directive on Data Retention. Having regard to the provisions of the Directive outlined above, Ireland submits that the only appropriate legal basis is Title VI TEU and, in particular, Article 30, Article 31(1)(c) and Article 34(2)(b).
- 4.2 It is well established that, having regard to the provisions of Article 47 TEU, there can be no overlap between the first and third pillars. The institutions are not free to choose between the first and third pillars where potentially a measure could fall under the EC Treaty or the TEU.⁷
- 4.3 Article 47 TEU provides that:

"Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

- 4.4 Thus, the Court has sought to ensure that measures which fall within the scope of Title VI TEU do not encroach on the powers conferred by the EC Treaty on the Community.⁸ It is submitted that it is equally the case, and

⁷ See, for example, Wasmeje and Thwaites "The 'battle of the pillars': Does the European Community have the power to approximate national criminal laws?" (2004) 29 E.L.Rev 613 at 619.

⁸ Case C-170/96 *Commission v Council* [1998] ECR I-2763, paragraph 16; Case C-176/03 *Commission v Council*, paragraph 39.

is consistent with Article 47 TEU and with the case law of the Court, that where a measure clearly and unambiguously falls within the third pillar, Title VI TEU, and not the EC Treaty, the Court should be vigilant to ensure that the measure is not incorrectly brought within the EC Treaty, and in particular Article 95, by too broad an interpretation of that Article. That is precisely what Ireland submits has happened in this case.

(c) Article 95 EC

- 4.5 Article 95 EC is designed to ensure the harmonisation of the internal market by the removal of national legislative obstacles thereto. Article 95 (1) empowers the Council, acting in accordance with the procedure referred to in Article 251 EC, and after consulting the Economic and Social Committee, 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"*.
- 4.6 Article 95 EC is a broad and vaguely defined Article. It has been the subject of much judicial interpretation by the Court which has resulted in a narrowing of its scope and a steadfast requirement by the Court that the measures based upon it must have as their "centre of gravity" the harmonisation of national laws to benefit the functioning of the internal market.
- 4.7 The Court in its case law has consistently applied a restrictive approach to the use of Article 95 EC by Community institutions. In Case C-300/89 *Commission v Council* ("Titanium dioxide"),⁹ the Court stated:
- "In the context of the organisation of powers of the Community, the choice of legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued, but must be*

⁹ [1991] ECR I-2867.

based on objective factors which are amenable to judicial review ... Those factors include in particular the aim and content of the measures.¹⁰

4.8 This approach has been consistently adopted by the Court since then.¹¹ These authorities were recently applied by Advocate General Leger in his Opinion in joined cases C-317/04 and C-318/04 **European Parliament v Council of the European Union** and **European Parliament v Commission of the European Communities**¹² to which Ireland will refer later in these Submissions.

4.9 As the Court held in Case C-42/97 **Parliament v Council**¹³, in order to establish the correct legal basis for a measure, it is necessary to ascertain the true “*centre of gravity*” of the measure.¹⁴ The Court has consistently held that measures adopted under Article 95(1) EC must be

*“intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition”.*¹⁵

4.10 The Court has also repeatedly held that while recourse to Article 95 EC as a legal basis is possible

¹⁰ Paragraph 10 (emphasis added).

¹¹ See for example: Case C-84/95 **United Kingdom v Council** [1996] ECR I-5755, paragraph 25; Joined Cases C-164/97 and C-165/97 **Parliament v Council** [1999] ECR I-1139, paragraph 12; Case C-269/97 **Commission v Council** [2000] ECR I-2257, paragraph 43; Case C-336/00 **Hober** [2002] ECR I-7699, paragraph 30; Case C-338/01 **Commission v Council** [2004] ECR I-4829, paragraph 54; and Case C-176/03 **Commission v Council** [2005] ECR I-0000, paragraph 45.

¹² Opinion of Advocate General Leger delivered on 22 November 2005 paragraph 126.

¹³ [1999] ECR I-869.

¹⁴ Paragraphs 36 – 38 and 43.

¹⁵ Opinion of Advocate General Leger in Joined Cases C-317/04 and C-318/04, paragraph 143 (emphasis added); Case C-376/98 **Germany v Parliament and Council** [2000] ECR I-8419, paragraphs 83, 84 and 95 and Case C-491/01 **British American Tobacco (Investments) and Imperial Tobacco** [2002] ECR I-11453, paragraph 60.

".. if the aim is to prevent the emergence of future obstacles to trade resulting from divergent development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them."¹⁶

4.11 Thus, in Case C-376/98 **Germany v Parliament and Council**¹⁷, the Court annulled the Tobacco Advertising Directive, Directive 98/43/EC. In doing so, the Court reaffirmed its position that measures adopted under Article 95 EC must genuinely have as their objective the improvement of conditions for the establishment and functioning of the internal market.

4.12 In his Opinion in that case, Advocate General Fennelly commented:

"... the conferral of competence to pursue its establishment and functioning, under both Article 95 and more specific provisions such as Article 57(2), cannot, in my view, be equated with creation of a general Community regulatory power. These competences are conferred either to facilitate the exercise of the four freedoms or to equalise the conditions of competition."¹⁸

4.13 The Court held in that case that the express wording of the measures in question and the principle of attributed powers prevented Article 95 EC from conferring a general power on the Community to regulate. In that regard the Court stated:

"84. Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and

¹⁶ Opinion of Advocate General Leger at paragraph 143 (emphasis added); See also to that effect: Case C-350/92 **Spain v Council** [1995] ECR I-1985, paragraph 35; Case C-376/98 **Germany v Parliament and Council** [2000] ECR I-8419, paragraph 86; Case C-377/98 **Netherlands v Parliament and Council** [2001] ECR I-7079, paragraph 15; Case C-491/01 **British American Tobacco (Investments) and Imperial Tobacco** [2002] ECR I-11453, paragraph 61; and Case C-434/02 **Arnold Andre** [2004] ECR I-11825, paragraph 31.

¹⁷ [2000] ECR I-8419.

¹⁸ Opinion of Advocate General Fennelly in Joined Cases C-74/99 and C-376/98 **Germany v Parliament and Council** [2000] ECR I-8419, paragraph 83.

functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty.

85. *So, in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature (see, in particular **Spain v Council**, cited above, paragraphs 26 to 41, and Case C-233/94 **Germany v Parliament and Council** [1997] ECR I-2405, paragraphs 10 to 21).*
86. *It is true, as the Court observed in paragraph 325 of its judgment in **Spain v Council**, cited above, that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them ...*¹⁹

4.14 Subsequently, in Case C-491/01 **The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and**

¹⁹ Paragraphs 84 – 86 (emphasis added).

*Imperial Tobacco Limited*²⁰ the Court upheld the use of Article 95 EC as the valid legal basis for the measure in question, namely, a modified Tobacco Labelling Directive. However, the Court repeated and re-emphasised the general principle outlined in the earlier cases as follows:

"94. *If examination of a Community act shows that it has a twofold purpose or twofold component and if one of those is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component (see, inter alia, Case C-42/97 **Parliament v Council** [1999] ECR I-869, paragraphs 39 and 40 and Case C-36/98 **Spain v Council**, cited above, paragraph 59). Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondly and indirect in relation to the other, such an act may be founded on the various corresponding legal bases (Opinion 2/00 [2001] ECR I-9713, paragraph 23)".²¹*

4.15 It is clear, therefore, that, in order to determine whether the correct legal basis has been relied upon in respect of a measure, reference must be made to the "*main or predominant purpose or component*" of the measure. For the reasons outlined earlier in this Application, Ireland contends that not only is the "*main or predominant purpose or component*" of the Directive on Data Retention the fight against crime (to use that term as a shorthand for what is described in Article 1(1) of the Directive) but that is in fact the sole purpose.

²⁰ Case C-491/01.

²¹ Paragraph 94 (emphasis added).

4.16 The Court has recently annulled a Community measure having Article 95 EC as its purported legal basis on the grounds that that Article was not an appropriate legal basis for the measure. The Court so decided in joined cases C-317/04 and C-318/04 *Parliament v Council* and *Parliament v Commission*.²² In those cases, following the terrorist attacks of 11 September 2001, the United States adopted legislation to the effect that airlines carrying passengers to, from or across US territory are required to give the American authorities electronic access to the data contained in their system for controlling and monitoring departures. This data is described as Passenger Names Records (i.e. "PNR"). The Parliament requested the Court to annul a Council Decision of 17 May 2004 on the conclusion of the agreement between the European Community and the United States 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 (CBP) and a Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the PNR of air passengers transferred to the CBP. The stated legal basis for the impugned Council Decision was Article 95 EC. It was contended by the Parliament that that Article did not provide the appropriate legal basis for the Decision as the aim and content of the Decision was not the establishment and functioning of the internal market but rather to legalise the processing of personal data imposed by US law on airlines established in Community territory. Nor, the Parliament contended, did the content of the Decision justify the use of Article 95 as a legal basis as what the Decision did was to establish the right of the CBP to access airlines' reservations systems within Community territory, with a view to the operation of flights between United States and Member States in accordance with US. law, in order to prevent and combat terrorism. It was

²² Opinion of Advocate General Leger delivered on 22 November 2005; Judgment of the Court (Grand Chamber) delivered on 30 May 2006.

contended that the achievement of those objectives did not fall within the scope of Article 95 of the EC Treaty. Finally, it was contended that Article 95 EC was not capable of providing a legal basis for the measure in question since the agreement related to data processing operations which were carried out for the purpose of public security and were therefore excluded from the scope of Directive 95/46/EC which was based on Article 95 EC.²³

4.17 In his Opinion, Advocate General Leger analysed the Decision in detail in order to determine whether Article 95 EC provided a valid legal basis for the measure in the light of the settled case law of the Court. In this regard he stated:

"139. I would point out, in reply to certain arguments put forward by the Commission, that it therefore seems to me to be difficult to claim that the objective of combating terrorism and other serious crimes is being pursued unilaterally and solely by the United States, the Community's sole aim being to protect airline passengers personal data. In fact, I am of the opinion that from the point of view of each Contracting Party, the aim and content of the agreement are reconciliation of the objective of combating terrorism and other serious crimes with that of protecting airline passengers' personal data. The agreement thereby establishes co-operation between the contracting parties which is specifically intended to achieve that twofold objective in simultaneous fashion.

²³ See paragraphs 116 – 118 of the Opinion of Advocate General Leger.

140. In light of the aim and content of the agreement as described above, I am of the view that Article 95 EC is not an appropriate legal basis for the Council Decision.²⁴

4.18 While noting that the Council had contended that the Decision was validly adopted on the basis of Article 95 EC on the grounds that either removal of any distortion of competition between Member States' airlines and between those airlines and airlines of third countries, the agreement with the United States helped to prevent serious harm from being inflicted on the unity of the internal market, Advocate General Leger concluded that:

"... such an objective of preventing distortions of competition, to the extent that it is actually pursued by the Council, is incidental in character to the two main objectives of combating terrorism and other serious crimes and protecting passengers' personal data, which, as we have seen, are expressly mentioned and actually implemented in the provisions of agreement".²⁵

4.19 Advocate General Leger continued as follows:

"149. I would point out that, as the Court has already held, 'the mere fact that an act may affect the establishment or functioning of the internal market is not sufficient to justify using that provision as the basis for the act'.²⁶

150. Above all, it is apparent from the Court's settled case-law that when examination of a Community measure reveals that it pursues more than one purpose or that it has more than one component, and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single

²⁴ Paragraphs 139 and 140 of the Opinion of Advocate General Leger.

²⁵ Paragraph 147 of the Opinion of Advocate General Leger.

²⁶ Case C-426/93 *Germany v Council* [1995] ECR I-3723, paragraph 33.

legal basis, namely that required by the main or predominant purpose or component.²⁷ Only in exceptional cases, if it is established that the measure simultaneously pursues several objectives which are indissociably linked, without one being secondary and indirect in relation to the others, will such a measure have to be founded on the relevant different legal bases.²⁸ That is not, in my view, the case here.

151. Furthermore, even if the three objectives were to be regarded as being pursued indissociably by the agreement, the fact would nevertheless remain that the Council's choice to found its decision on Article 95 EC as its sole legal basis would, according to that case law, have to be considered inappropriate.²⁹

4.20 Thus, having examined the aim and content of the measure in question, Advocate General Leger concluded that Article 95 EC was not the appropriate legal basis for the measure. In its judgment delivered on 30 May 2006, the Court reached the same conclusion.

4.21 Ireland submits that, having regard to the clear aim and content of the Directive on Data Retention, it is abundantly clear that Article 95 EC can afford no legal basis for the measure. Ireland has outlined earlier in this Application the provisions of the Directive which it contends demonstrate clearly that the sole or at the very least, the main or predominant purpose of the Directive is the fight against crime. This is evident from Article 1(1) which defines the subject matter and scope of the Directive and makes a

²⁷ See, (inter alia), Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraphs 19 and 21, Case C-42/97 *Parliament v Council* [1999] ECR I-869, paragraphs 39 and 40, Case C-36/98 *Spain v Council* [2001] ECR I-779, paragraph 59; and Case C-281/01 *Commission v Council* [2002] ECR I-12049, paragraph 34.

²⁸ See, inter alia, Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraphs 13 and 17; Case C-42/97 *Parliament v Council* [1999] ECR I-869, paragraphs 38 and 43; Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 31; and Case C-281/02 *Commission v Council* [2002] ECR I-12049, paragraph 35.

²⁹ Paragraphs 149 – 151 of the Opinion of Advocate General Leger.

claim that the object of purporting to harmonise Member States' provisions concerning the obligations of providers of publicly available electronic communication services or of public communications networks with respect to the retention of data generated or processed by them is

"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".

- 4.22 That, it is submitted, is the purpose or objective of the Directive on Data Retention. This is supported by the recitals to which reference has been made earlier in this Application and is not in any way undermined by the other provisions of the Directive. There is, with respect, nothing in the Data Retention Directive to justify the use of Article 95 EC as its legal basis. While Recital (5) of the Directive asserts that 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 and that those national provisions vary considerably, the Directive contains no analysis, or indeed indication, as to the significance of those national provisions or how they are alleged to be appreciable. Similarly, while Recital (6) asserts that *"legal and technical differences between national provisions concerning the retention of data for the purpose of the prevention, investigation, detection and prosecution of criminal offences"* present obstacles to the internal market for electronic communications and that service providers are faced with *"different requirements regarding the types of traffic and location data to be retained and the conditions and periods of detention"*, there is no analysis or indication as to how that is allegedly so or how significant (if at all) (which Ireland does not accept) such obstacle could possibly be. Ireland submits that these recitals cannot, by themselves, affect the fact that Article 95 EC can provide no legal basis for the Directive when having

regard to the clear purpose of the Directive which is to assist the investigation, detection and prosecution of serious crime which, as stated by Article 1(1), is defined by each Member State in its national law.

- 4.23 Furthermore, Ireland would point out that at the time of adoption of the Directive a number of Member States had no laws of any kind in the area of data retention. In that regard, Ireland submits that no issue relating to the internal market could justify the imposition upon a Member State of an obligation to require telecommunications operators to retain data, for the purposes of the prevention and combating of crime, where no such obligations previously existed under the law of that State. Ireland further submits that third pillar considerations alone could explain the imposition, *de novo*, of obligations of that nature upon the Member States in question.
- 4.24 In the alternative, even if, contrary to Ireland's fundamental submission, the Directive does have as one of its objectives the prevention of distortions of competition or obstacles to the internal market, that objective must be regarded as being purely "*incidental in character*" to the main or predominant objective which is the fight against crime.³⁰
- 4.25 As the Court made clear in Case C-426/93 **Germany v Council**:³¹
- "the mere fact that an act may affect the establishment or functioning of the internal market is not sufficient to justify using that provision (i.e. Article 95 EC) as the bases for the act."*
- 4.26 Here, Ireland submits that, having regard to its clear object and purpose, the Directive does not affect and is not intended to address any alleged defects in the establishment or functioning of the internal market.

³⁰ See paragraph 147 of the Opinion of Advocate General Leger in Joined Cases C-317/04 and C-318/04 delivered in 22 November 2005.

³¹ [1995] ECR I-3723 at paragraph 33.

- 4.27 In those circumstances, Ireland respectfully submits that Article 95 EC affords no adequate legal basis for the Directive on Data Retention.

5. CORRECT LEGAL BASIS FOR DIRECTIVE ON DATA RETENTION

- 5.1 For the reasons outlined earlier in this Application, Ireland submits that Article 95 EC does not provide an adequate legal basis for the Directive on Data Retention. While it is not strictly speaking necessary for Ireland to demonstrate what would be the appropriate legal basis for a measure addressing the subject matter of the Directive, as has been stated earlier in this Application, Ireland is firmly of the view that the appropriate legal basis for such a measure is Title VI TEU, in particular, Articles 30, 31(1)(c) and Article 34(2)(b) TEU. The Directive started life as a proposal for a Council Framework Decision and Ireland is convinced that this is the appropriate instrument for the measures provided for.
- 5.2 Title VI TEU is part of the third pillar of law and is entitled "Police and Judicial Co-Operation in Criminal Matters". Article 29 TEU provides as follows:

"Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing an action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- *closer co-operation between police forces, customs authorities and other competent authorities in the*

Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,

- *closer co-operation between judicial and other competent authorities of the Member States including co-operation through the European Judicial Co-operation Unit (Eurojust) in accordance with the provisions of Articles 31 and 32,*
- *approximation, where necessary, of rules on criminal matters in Member States, in accordance with the provisions of Article 31(e)."*

5.3 Article 30(1) identifies areas of common action in the field of co-operation including:

- "(a) *Operational co-operation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;*³²
- (b) *The collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular, through Europol, subject to appropriate provisions on the protection of personal data'.*

5.4 Article 31 TEU identifies areas of common action on judicial co-operation in criminal matters including

³² The similarity of terms between Article 30(1)(a) TEU and Article 1(1) of the Directive on Data Retention is striking. Article 1(1) of the Directive uses the term "*the investigation, detection and prosecution of serious crime ...*".

"(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation".

5.5 Article 34(2) requires the Council to take measures to promote co-operation contributing to the pursuit of the objectives of the Union and to that effect the Council may *"acting unanimously on the initiative of any Member State or of the Commission"*(inter alia)

"(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authority the choice of form and methods. They shall not entail Directives."

5.6 Ireland submits that, having regard to the clear object and purpose of the Directive (as stated in Article 1(1) thereof), namely *"the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law"*, the third pillar and, in particular, the provisions of Title VI TEU identified above represent the only appropriate legal basis for enacting the measures which are now contained in the Directive on Data Retention.

5.7 Ireland further submits that there is no conceivable basis upon which it could be contended that the subject matter of the Directive falls equally between the EC Treaty and the TEU for the reasons already outlined. However, should the Court take the view that the measures could fall equally between the two Treaties, it is submitted that the measures are more appropriate to be dealt with under Title VI TEU.

5.8 Criminal law and policies concerning the protection of public security remain a cornerstone of national sovereign identity. Moreover, as a general rule, neither criminal law nor the rules of criminal procedures falls

within the Communities' competence.³³ Equally, it is submitted that the prevention of crime, including combating terrorism, falls outside the scope of Community competence.³⁴

- 5.9 While it is anticipated that the Council and/or the Parliament may seek to rely on the decision of the Court in EC/176/03 *Commission v Council*³⁵, Ireland submits that that case is not relevant and provides no support for the selection of Article 95 EC as the legal basis for the Directive on Data Retention. In that case, the Court annulled a Council Framework Decision based on Title VI TEU and, in particular, Articles 29, 31(e) and 34(2)(b) EU by a way of response to an increase in offences posing a threat to the environment. The Framework Decision laid down a number of environmental offences for which Member States were required to prescribe criminal penalties. The Court annulled the Framework Decision as infringing Article 47 EU as it encroached on powers which were conferred on the Community by Article 175 EC in the area of the environment. Having analysed the aim and content of the Framework Decision, the Court concluded that the provisions of the Framework Decision had as their main purpose the protection of the environment and could, therefore, have been properly adopted on the basis of Article 175 EC. The Court further concluded that it was not possible to infer from Article 135 EC and 280(4) EC that "*for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as*

³³ See Case C-203/80 *Cassati* [1981] EC R 2595, paragraph 27 and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19.

³⁴ See, to that effect, the article by Y. Poullet and M.V. Peres Asinan, 'Données des voyageurs aériens: le débat Europe – États-Unis', JTDE, 2004, No 113, p. 274 cited in fn. 57 of Advocate General Leger's Opinion in cases C-317/04 and C-318/04. According to those authors, '*whatever solution is found to legitimise these cross-border flows of a very particular type must ensure the validity of the transfer of data to foreign public authorities carried out with a view to combating terrorism ..., an activity which is known to go beyond the scope of a first-pillar directive*'. They add that '*[t]his corresponds, at European level, to a third-pillar matter, which calls into question the Commission's competence to act in that connection ...*'.

³⁵ Judgment delivered on 13 September 2005.

limited as that resulting from the Framework Decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law”³⁶

- 5.10 It is clear, therefore, that, unlike in the present case, the main purpose of the relevant provisions of the Framework Decision was identified as being the protection of the environment and the Court concluded that the provisions could, therefore, have been properly adopted on the basis of Article 175 EC. In the present case, for the reasons outlined earlier in this Application, Ireland submits that the sole purpose, or at least, the main or predominant purpose, of the matters contained in the Directive on Data Retention is to assist in the “*investigation, detention and prosecution of serious crime, as defined by each Member State in its national law*” and that, as a consequence, the matters in question could not have been properly adopted on the basis of any provision of the EC Treaty and, in particular, could not have been properly adopted on the basis of Article 95 EC. The adoption of the measures contained in the Directive on Data Retention in the form of a Framework Decision under Title VI TEU would not infringe Article 47 EU (as was the position in Case C-176/03) but would be the only lawful basis for enacting those measures.
- 5.11 Ireland submits, therefore, that the Court should follow the approach adopted in its decision in Joined Cases C-317/04 and C-318/04 and hold that Article 95 EC cannot justify Community competence to adopt the measures contained in the Directive on Data Retention. The Court should further conclude that the only basis upon which the measures could lawfully have been enacted was pursuant to Title VI TEU. A conclusion by the Court to that effect would have the effect of ensuring the clear demarcation of competences between the Community and the Union which is required by Article 47 TEU.

³⁶ Paragraph 52 of the Judgment.

6. CONCLUSION

6.1 For these reasons, Ireland respectfully requests the Court to:

- (1) 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 on the grounds that it was not adopted on an appropriate legal basis.
- (2) Order the Council and the Parliament to pay the costs of these proceedings.

Dated this 5th day of June 2006

Signed: David J. O'Hagan **Certified Copy of Original**

David J. O'Hagan

The Chief State Solicitor

Agent of Ireland

Acting as Agent with an address for service at the Embassy of Ireland, 28 Route d'Arion, Luxembourg.