THE CASE C-301/06.
THE RELATIONSHIP BETWEEN EC TREATY AND EU TREATY.
THE NATURE OF THE EUROPEAN UNION.

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Abstract: *The object of this paper is a case law decided by the European Union Court of Justice in which it has evaluated and judged the proper legislative act to be used by the EU legislator.*

The Court has applied the principles of the matters division between EU Treaty and EU Treaty, stating that the chosen legal basis, Article 95 EC Treaty, was correct and the consequent act, the Directive, was the correct act to adopt. In my opinion this case law shows that it's impossible approach to problems by only a point of a view, because in the actual society problems are strictly interconnected. It also shows as the EC judge is still forced to find particular legal argumentation to fill the gap of a legal framework, the European Union legal system, which defines clearly itself.

The reasoning is that if the legal system does not define itself, this non-clarity affect the whole system functioning, also its formal aspects, blocking to deal with problems by different points of views. The integration of the European Union cannot come without understanding that the judicial authority must not be forced to build legal categories, but the Member States agreement is to do it.

Keywords*: European Union Court of Justice, EU legislator, EU Treaty, EU Treaty.*
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CASE LAW
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Judgment of the Court of Justice in Case C-301/06.
Ireland v. Parliament and Council.

The data retention directive is founded on an appropriate legal basis.

In April 2004, France, Ireland, Sweden and the United Kingdom submitted to the Council a proposal for a framework decision based on the articles of the EU Treaty relating to police and judicial cooperation in criminal matters. 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.

The Commission stated that it favored the EC Treaty as the legal basis for part of that proposal. More specifically, it took the view that Article 95 EC, which permits the adoption of measures which have as their object the establishment and functioning of the internal market, was

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the appropriate legal basis for the obligations imposed on operators to retain data for a certain period.

The Commission also found that those measures would affect two existing directives[1] and that Article 47 of the EU Treaty does not allow an instrument based on that Treaty to affect the *acquis communautaire*.

On a proposal from the Commission, the Council opted for the adoption of a directive based on the EC Treaty. On 21 February 2006, the data retention directive[2] was adopted by the Council by qualified majority. Ireland and Slovakia voted against the adoption of that directive.

Subsequently, Ireland, supported by Slovakia, asked the Court of Justice to annul the directive on the ground that it had not been adopted on an appropriate legal basis. Ireland takes the view that the directive cannot be based on Article 95 EC since its 'centre of gravity' does not concern the functioning of the internal market, but rather the investigation, detection and prosecution of crime, and that measures of this kind ought therefore to have been adopted on the basis of the articles of the EU Treating relating police and judicial cooperation in criminal matters.

The Court notes at the outset that the action boughless by Ireland relates solely to the choice of legal basis and not to any possible infringement by the directive of fundamental rights resulting from the interference with the exercise of the right of privacy.

The Court finds that the directive was adopted on an appropriate legal basis.

The Court observes that, prior to adoption of the directive, several Member States had introduced measures designed to impose obligations on service providers in regard to data retention and that those measures differed substantially, particularly in respect of the nature of the data retained and the respective retention periods. Those obligations have significant economic implications for service providers in so far as they may involve substantial investment and operating costs. Furthermore, it was entirely foreseeable that Member States which did not yet have such rules would introduce rules in that area which were likely to accentuate even further the differences between the various existing national measures. Thus, it was apparent that these differences would 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. Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market thought the adoption of harmonized rules.

The Court also notes that the data retention directive amended the provisions of the directive on the protection of privacy in the electronic communications sector, which is itself based on Article 95 EC. In those circumstances, in so far as it amends an existing directive which is part of the *acquis communautaire*, the directive could not be based on a provision of the EU Treaty without infringing Article 47 EU.

Finally, the Court finds that the provisions of the directive 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. The measures provided for by the directive do not, in themselves, involve intervention by the police or law-enforcement authorities of the Member States. Those issues, which fall in principle within the domain covered by police and judicial cooperation in criminal matters, have been excluded from the provisions of the directive. The Court therefore concludes that the directive relates predominately to the functioning of the internal market.

Accordingly, it was necessary to adopt the directive on the basis of Article 95 EC.

Violation of the legal basis

It's dutiful to remember that one of the motivations of annulment. ex Art. 230 EC Treaty is surely the *violation of the substantive forms*, vice that includes the justification's fault, as can be the non-consultation of another institution or of a EC body when it's expressly provided, as well as the mistaken specification of the *legal basis*, every time it could have an immediate effect on the conditions to adopt the act. On the contrary, it's a merely formal vice the mistaken choice of a legal basis, whenever the latter doesn't produce immediate effects on the procedure to adopt the act[3].

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[1] Directive 45/96/EC on data protection and Directive 2002/58/EC on the protection of privacy in the electronic communications sector.

[2] 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 (OJ 2006 L 105, p.54).

[3] See Case 165/87, *Commission v. Council*, 28 September 1988.

The hypothesis of the act's pathology for violation of the legal basis is very important and it often offers general views, which include the institutional balance of the EC.

For example, we think to an act that could be adopted on the basis of a rule which provides a passage of a law with majority and instead it was adopted with unanimous vote; or alternatively a Council's act adopted without the mandatory advice of the Parliament; or an unnamed Commission's act that, even though it falls in its competence, should have been based on another and more relevant provision of the Treaty, in the name of the certainty of law[4].

Point of interest.

Really the institutional balance of the Community takes prominence in this sentence, where the Court at the paragraph 56 specifies: "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."

On this point it's necessary to state the matter as really is, asking a fundamental question: What does the Court want to say whether lays down the division of areas between issues accorded to European Union and issues accorded to European Community?

It's undeniable in this case that the competences can overlap, because as sure as the issue of the data retention affects the functioning of the internal market, as the directive absolutely gives itself the aim to prevent (if not repression) mentioned crimes, otherwise it would has not existed. In fact the Court worries to underline that the directive "relates *predominately* to the functioning of the internal market", not exclusively.

Moreover the Court legal reasoning is mainly based on the Article 47 UE Treaty, which does not allows an instrument based on that Treaty to affect the *acquis communautaire*; that is a forced choice adopting a directive rather a framework decision.

Question

So can we ascertain what European Union relatively to European Community is and what is its nature?

The Court already laid down on this kind of connection between EC Treaty and EU Treaty, in the Case C-176/03, *Commission v. Council*, and sentence 13 September 2005, paragraph 47-48:

"*As to the content of the framework decision, Article 2 establishes a list of particularly serious environmental offences, in respect of which the Member States must impose criminal penalties.*

Article 2 to 7 of the decision do indeed entail partial harmonization of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 Casati [1981] ECR 2595, paragraph 27, and Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 19).

However, the last mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relates to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective".

Why is in the final dispositions provided a rule as the Article 47 EU Treaty?

Has been favored a principle of certainty of law, protecting the *acquis communautaire*, or is there also a reason of non-definition of the EU Treaty?

Out and away of the modifications produced to the other existing Treaties and out and away of the Monetary and Economic Union, which are very important news but here not relevant,

[4] See *France v. Commission* Case 325/91, p. 26-27.

the real innovation introduced in Maastricht was in what are usually defined the second and third pillars. These led on a different plane, no more exclusively national, some issues as foreign policy, justice, domestic affairs (today, police and judicial cooperation in criminal matters), where yet the keyword is “cooperation” .

It’s not easy to try to qualify in legal terms the European Union, neither it’s easy to try to define it.

It’s only assured the European Union is based on the three Communities integrated by policies and cooperation’s forms established in the EU Treaty (Article 1 EU Treaty). For this reason are often used definitions per images, as that a temple with three columns: the pillars are the three Communities, recitals are the fronton and the final dispositions represent the plinth.

It takes note of the way the general framework of the European Union, as prefigured in Maastricht, is a *cooperation* among the Member States outside the Community, but closely connected to it, and inspired by the international cooperation model in the proper sense, rather than inspired by the integration model, Community’s quality and pride.

On the other hand, it can’t either underrate the circumstance that the whole disposition provided in the EU Treaty does not belie the proper reasoning of the European Treaties, that are characterized by a real development potential in the direction of a more and more accentuated integration; and that in any case the Article 2 EU Treaty expressly states the objective to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

Comparing the European Union with European Community in terms of diversity of the legal systems, created by both Treaties, we can note that whereas the principles of independency, autonomy and supremacy of European law find their *locus standi* in the EC Treaty dimension, in the EU Treaty they cannot be evicted.

In fact which independency, autonomy and supremacy of the Union legal system can be found in the second and third pillars? In other wards, which autonomous and independent regulation of the second and third pillars can be directly realized by the EU bodies, out and away of sovereignty of the Member States?

The negative answer to the second and third pillars communitarization relatively to the surely more integrated issues in the domestic legal systems causes that the principles of autonomy, applicability and direct effectiveness of the EC law cannot be provided in the sphere of the EU legal system.

In fact, every action led in the issues of the second and third pillars, except for some matters included in the EC Treaty, is the result of a cooperation or intergovernative decision.

So, if *we define the European Union as a external structure, but connected to the Community, we understand the reason of the Article 47 EU Treaty existence*.

Because the matters included in the EU Treaty are not “communitarized”, this Treaty, through its own standard acts as the framework decision, cannot affect the dispositions previously “communitarizated” and formalized through one of the European Community standard acts, in this case the previous Directives.

The claim put forward by Ireland does not seem totally devoid of reason, on the contrary the decision of the Court surely seems at least forced, even if it finds a very important support in the Article 47 EU Treaty; all the more that the Court itself underlines insists on the point that the Directive relates *predominately* to the functioning of the internal market.

In the period of reflection in which the process of European integration is, it not takes worries there are specifications about certain detail points or about the way functioning of the in internal market, particularly when it is necessary to remove usefully some flaw of the jurisprudence or to make it more coherent. Instead it takes worries there are reflections and hesitations about some institutional aspects, the EC judge temptation (more and more frequently) of enlarging the variety of the exceptions, rather than consolidating the rules. In fact the EC judge is somehow obliged to take forced decisions by a vague legal system, which is suffering from a lack of own and real legal categories and which is more and more difficult makes it functioning.

We cannot attribute to the judicial authority the responsibility to make communitarian some external rules, as the EU ones, through artful juridical argumentations. This does not seem the most appropriated way to achieve an integration that has necessarily to involve every EU system.

It is well-known what the EC judge has been doing for this aim, since the various decisions to declare the originality[5] and the supremacy[6] of the European law, but it is not presumable that integration can be realized by the production of more and more decisions, that bind the Member States as the Treaty.

This is not an exclusively technical or only theoretic topic, but this is the plane where we can decide whether and how make functioning the European system overall considered, without centrifugal temptations or other nostalgias.

Actually, what we call European Union does not represent a Federation of States nor creates it. Neither has it represented a kind of international organization or an association of States.

European Union, missing the elements of autonomy and independency in the explication of its own powers, takes is place in a meta-juridical position that can be at most defined supranational.

So, it seems necessary a reflection, whose main aim is the redefinition clearly and precisely of the European Union and European Community legal framework.

The main reason of this reflection should start from the fact that it becomes more and more difficult to stem the EC competences in a society where the problems result interdependent and this case-law shows that a problem influencing the internal market (according to judgment of the Court) can and has to affect other matters as the prevention of crimes.

In my opinion, this could happen only with a solemn act that ensures a balance of powers among the EC bodies, which is inspired more by the principle of representative democracy than by the cooperation and agreement logic, including in itself the constitutional traditions of its Member States.

In this paper I voluntarily omitted the Lisbon Treaty, because it was rejected by Ireland and France constitutional referendum.

Bibliography:

- www.eur-lex.europa.eu
- Giuseppe Tesauro “Diritto Comunitario” CEDAM 2003.
- “Profili di diritto dell'Unione Europea: storia, istituzioni, aspetti giuridici dell'integrazione europea” di Alessandro Zanelli, Giuseppe Romeo edited by Rubbettino Editore srl, 2002.

[5] Judgment of the Court of 5 February 1963. *NV Algemane Transport – en Expeditie Ondermneming van Gend & Loose v. Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: Tariefcommissie – Pays-Bas. Case 26/62.

[6] Judgment of the Court of 15 July 1964 *Flaminio Costa v. E.N.E.L*. Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. Case 6/64.