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Advocate General's Opinion in Case C-301/06

Ireland v Parliament and Council

**ADVOCATE GENERAL BOT CONSIDERS THAT THE DIRECTIVE ON DATA
RETENTION IS FOUNDED ON AN APPROPRIATE LEGAL BASIS**

According to the Advocate General, the directive was correctly adopted on the basis of the EC Treaty, since it does not contain any provision relating to police and judicial cooperation in criminal matters which is liable to be covered by the EU Treaty.

In April 2004, France, Ireland, Sweden and the United Kingdom submitted a draft of a framework decision to the Council based on articles of the EU Treaty relating to police and judicial cooperation in criminal matters. The draft concerned the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data transmitted via public communication networks for the purposes of the prevention, investigation, detection and prosecution of criminal offences, including terrorism.

The Commission stated that it was in favour of the EC Treaty and, more specifically, Article 95 EC, which authorises the adoption of measures which have as their object the establishment and functioning of the internal market, as a legal basis for part of the draft framework decision, namely the part relating to the obligations on operators to retain data for a certain length of time.

In December 2005, the Council opted for a directive based on the EC Treaty and on 21 February 2006 the Data Retention Directive¹ was adopted by the Council by qualified majority. Ireland and the Slovak Republic voted against it.

Subsequently, Ireland, supported by the Slovak Republic, asked the Court to annul the directive on the ground that it had not been adopted on an appropriate legal basis. Ireland takes the view that the only legitimate legal basis for the measures contained in the directive is to be found in the provisions of the EU Treaty concerning police and judicial cooperation in criminal matters.

In his Opinion, Advocate General Yves Bot invites the Court to dismiss the action, taking the view that the directive was correctly based on the EC Treaty.

¹ 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)

The Advocate General recalls that an act adopted on the basis of Article 95 EC must be intended to improve the conditions for the establishment and functioning of the internal market. In that regard, he notes that several Member States had legislated on data retention by service providers and that those national provisions varied substantially, particularly in regard to the retention period required and the types of data to be retained. Such disparities could therefore make it necessary to harmonise national provisions.

Mr Bot notes that the retention of data by the providers of electronic communications services represents a significant financial burden on them which is proportionate to the amount of data to be retained and the retention period. It follows that, in the absence of harmonisation, a provider of electronic communications services would be faced with costs related to the retention of data which differ according to the Member State in which he wishes to provide those services. Such differences may constitute barriers to the free movement of electronic communications services and may create obstacles to the establishment and functioning of the internal market in electronic communications.

Therefore, the Advocate General takes the view that the adoption of the directive on the basis of Article 95 EC is justified.

As regards Ireland's argument that the sole or main purpose of the directive is the investigation, detection and prosecution of serious crime, the Advocate General accepts that there is no doubt that the rationale of the obligation to retain data lies in the fact that it facilitates that objective. Nevertheless, he considers that the mere fact that the directive refers to such an objective is not sufficient for a finding that it is an act falling within the area covered by police and judicial cooperation in criminal matters.

The Advocate General considers that the obligation to retain data does not correspond to any of the types of action provided for in that area. In that regard, the Advocate General states that the measures laid down by the directive do not involve any direct intervention by the law-enforcement authorities of the Member States. The directive contains measures which relate to a stage prior to the implementation of police and judicial cooperation in criminal matters. It does not harmonise either the issue of access to data by the competent national law-enforcement authorities or that relating to the use and exchange of those data by such authorities, for example in the context of criminal investigations. Those matters, which, in his view fall within the area covered by police and judicial cooperation in criminal matters, were properly excluded from the provisions of the directive.

The Advocate General concludes that, in so far as the directive does not contain any provisions harmonising the conditions for access to data and their use for activities specific to the State or to State authorities and unrelated to the fields of activity of individuals and, in particular, does not contain any provisions liable to come within the notion of 'police and judicial cooperation in criminal matters', it could not have been adopted on the basis of the EU Treaty.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: DE EN EL ES FR IT NL PL SK

*The full text of the Opinion may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-301/06>*

It can usually be consulted after midday (CET) on the day of delivery.

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*Pictures of the delivery of the Opinion are available on EbS "Europe by Satellite",
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