

EUROPEAN PARLIAMENT

2004



2009

*Committee on Legal Affairs
The Chairman*

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Legal basis of the proposal by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom for the adoption by the Council of a Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism (8958/2004 – C6-0198/2004 – 2004/0813(CNS))¹

Dear Mr Chairman,

By letter of 18 January 2005 your predecessor, Mr Jean-Louis Bourlanges, asked the Committee on Legal Affairs pursuant to Rule 35(2) to consider whether the legal basis of the above proposal was valid and appropriate. The proposal is based on Articles 31 paragraph 1(c) and 34 paragraph 2(b) of the EU Treaty. In this case, by application of Article 39 of the EU Treaty, Parliament need only be consulted.

The Committee considered the above question at its meetings of 3 February and 31 March 2005.

On 25 March 2004 the Council had called for rules to be established on the retention of data generated by service providers, in view of the fact that modern telecommunications opened up new avenues for international crime and terrorism in particular.

In response to the Council's request and to remedy the legal disparities between the Member States, four Member States (France, Ireland, the United Kingdom and Sweden) proposed providing an efficient and harmonised system for retention of data processed and stored in

¹ Not yet published in OJ .

connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism.

It is clear from Court of Justice case-law that the choice of the legal basis is not left to the discretion of the Community legislator, but that it must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure¹.

Article 1 of the draft framework decision sets out the aim of the proposal, which is to facilitate judicial cooperation in criminal matters.

The content of the proposal specifies the means to achieve the declared aim: harmonising the categories of electronic communications data to be covered and determining how long such data must be retained; it also sets out the conditions of access to such data between Member States via the mutual assistance instruments on criminal matters that have already been adopted.

It should be noted that for a definition of traffic data and location data and data protection, the measure refers to Community instruments, Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)² and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data³.

The Community legislation referred to above, based on Article 95 of the EC Treaty, thus already governs issues concerning the processing of data, while the proposal in question aims to harmonise the categories of data to be retained by service providers during a fixed period and to fix the length of this period.

It should be noted that Article 47 of the EU Treaty states:

‘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.’

Thus under Article 47 of the EU Treaty it is not permissible for an act based on the EU Treaty to affect the *acquis communautaire*. Therefore the question arises whether the measures envisaged by the proposal ‘affect’ Community law as expressed in particular by the provisions of Directive 2002/58/EC.

¹ See in particular ECJ, Case C-42/97, Parliament v. Council, paragraph 36

² OJ L 201, 31.7.2002, p.37

³ OJ L 281, 23.11.1995, p.31

In this connection, it should be noted that Directive 2002/58/EC has already established a whole series of obligations with regard to the categories of data to be retained by economic operators and how long they must be retained. It follows that any change in this area, as is intended by the draft framework decision, cannot be made by an instrument based on the EU Treaty. Therefore it could be maintained that adoption of the measure in question could constitute an infringement of Article 47 of the EU Treaty.

At its meeting of 31 March 2005 the Committee on Legal Affairs accordingly decided, by 11 votes with two abstentions¹, that:

- harmonisation of the categories of data and the length of time such data must be retained by service providers is part of the *acquis communautaire* arising from Directive 2002/58/EC;
- a framework decision based on Title VI of the EU Treaty aiming to modify these elements would affect the provisions of that directive and could in consequence constitute an infringement of Article 47 of the EU Treaty;
- with regard to the harmonisation of categories of data and the length of time they must be retained by service providers, the appropriate legal basis is that established by the pre-existing Community framework, Article 95 of the EC Treaty;
- in the light of these considerations, two separate measures could be envisaged: one based on the first pillar (ECT) on harmonisation of categories of data and the length of time such data must be retained, and the other based on the third pillar (TEU) on aspects relating to cooperation on criminal matters, in particular on the subject of access to and exchange of such data.

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the vote: Andrzej Jan Szejna (acting chairman), Manuel Medina Ortega (draftsman, and for Nicola Zingaretti), Alexander Nuno Alvaro (for Antonio Di Pietro), Maria Berger, Marek Aleksander Czarnecki, Bert Doorn, Piia-Noora Kauppi, Kurt Lechner (for Antonio López-Istúriz White), Klaus-Heiner Lehne, Alain Lipietz, Antonio Masip Hidalgo, Aloyzas Sakalas and Jaroslav Zvěřina.