The pillars of the European Union still exist?

European Court of Justice (Grand Chamber), Judgment of 6 May 2014, Case C-43/12, *Commission* v *European Parliament and Council*

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Introduction

On 6 May 2014, the Court of Justice ruled that Directive 2011/82/EU facilitating the cross-border exchange of information on road safety related traffic offences[1] was invalid. The main point of the dispute between the European Commission on the one side and the European Parliament and the Council on the other was the legal basis of this act. While the Commission based the proposal on Article 71(1)(c) TEC (now Article 91 TFEU) concerning transport policy, the European Parliament and the Council adopted Directive 2011/82/EU on the basis of Article 87(2) TFEU concerning police cooperation.

This ruling thus in fact concerns the intersection between 'internal market policy'[2] (transport policy) and the Area of Freedom, Security and Justice (police cooperation). The choice of legal basis between these two different areas of EU competences, namely internal market and Area of Freedom, Security and Justice, may have important systemic and horizontal consequences for the constitutional order of the EU.

In this particular case, the alternative legal bases – Articles 91(2) and 87(2) TFEU – both envisaged the ordinary legislative procedure, so the adoption of this Directive on a dual legal basis could be considered. Even if the legislative procedures in the AFSJ are subject to specific modifications in comparison to the

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[1] OJ L 288, 5.11.2011, pp. 1-15.

[2] Before the entry into force of the Treaty of Lisbon we would apply the term 'Community policy' meaning one of the policies pursued under the Treaty establishing the European Community. In the present state of EU law it is proposed to use the term 'internal market policies' to underline the EC provenence of EU competences.

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classic Community method,[3] none of them was applicable in the context of Article 87(2) TFEU. However, such a dual legal basis could not be adopted for a different reason. Due to the opt-outs accorded under the EU primary law, it was not applied to the United Kingdom, Ireland[4] and Denmark[5]. If the Directive had been adopted on the basis of Article 91(1)(c) TFEU it would be applied to all 28 member states. Thus, depending on the legal basis for this EU act, the scope of its application as well as its *effet utile* may be significantly different.

For these reasons, the choice of the legal basis for an EU measure between the internal market policy and the Area of Freedom, Security and Justice policy is of the utmost importance. This ruling of the Court of Justice exemplifies how important it is to establish clear rules governing the choice of the legal basis and to analyse the consequences of this choice. Unfortunately, the commented ruling does not give clear guidance on this subject. Moreover, it raises particular doubts about the consistency of interpretation of EU law. The reasoning employed in the ruling also provokes the conclusion that the Court rehabilitated the old Article 47 TEU (pre-Lisbon, which is no longer in force), which used to give priority to the Community law legal bases before the intergovernmental cooperation in the framework of the TEU.

This article first presents the factual and legal background of the case and provides a brief account of the Advocate General's opinion and the judgment. The commentary is divided into two parts, concerning: first, the interpretation of the notion 'criminal offences' used in Article 87 TFEU, which in practice determines the scope of the police cooperation under this provision; and second, the application of the rules established by the Court concerning the intersection between internal market competences and AFSJ competences.

Factual and legal background

The proposal for a Directive facilitating cross-border enforcement in the field of road safety was presented by the Commission before the entry into force of the Treaty of Lisbon, namely in March 2008.[6] The proposal was based on the former

[3] In particular the Commission shares the right of initiative with a quarter of the member states (Art. 76 TFEU), and the legislative procedures under Arts. 82(3), 83(3), 86(1) and 87(3) TFEU may be suspended in order to discuss a proposal by the European Council; finally, enhanced cooperation may be established without the need of an authorising decision of the Council according to Art. 329(1) TFEU.

[4] Arts. 1 and 2 of the Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and TFEU – *see also* Recital 22 in the Preamble.

[5] Arts. 1 and 2 of the Protocol (No. 22) on the position of Denmark, annexed to the TEU and TFEU – *see also* Recital 2 in the Preamble.

[6] COM (2008)151 final.

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Article 71(1)(c) TEC, according to which, for the purpose of implementing transport policy, the EU might adopt measures 'to improve road safety'. In the opinion of the Commission, the objective of this proposal was to facilitate the enforcement of sanctions against drivers who committed an offence in another member state than the one where their vehicle was registered by establishing a system of exchange of information. This system was to ensure that enforcement with respect to such offences could take place regardless of where in the EU the offence had been committed and regardless of the place of registration of the vehicle.[7]

The legislative procedure for the adoption of the Directive was long and difficult. On 17 December 2008, the European Parliament adopted its position at first reading (by a very large majority) and accepted the legal basis for the Directive (proposed by the Commission). The discussion in the Council, however, took almost two years. The political agreement on the text of the Directive was reached only on 3 December 2010, after the entry into force of the Treaty of Lisbon. The Council substituted the former transport policy legal basis (which in the meantime had been renumbered to Article 91(1)(c) TFEU) with the new Article 87(2) TFEU concerning police cooperation, which is one of the EU policies in the Area of Freedom, Security and Justice. According to Article 87(1) TFEU, 'The Union shall establish police cooperation involving all the member states' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.' For the purposes of such police cooperation, the EU may establish, inter alia, measures concerning 'the collection, storage, processing, analysis and exchange of relevant information' (Article 87(2) TFEU). The European Parliament adopted the text of the Directive at second reading on 6 July 2011. As the new legal basis was accepted by the European Parliament, the Directive was finally adopted on the basis of Article 87(2) TFEU.

The Commission challenged the Directive before the Court of Justice, requesting its annulment on the ground that it had been adopted on the wrong legal basis. In support of its action the Commission argued that Article 87(2) TFEU, which refers to 'criminal offences', may be used only as a legal basis for measures specifically related to the prevention or detection of 'criminal offences'. It also rejected the material approach to the definition of 'crime' and 'criminal sanction' stemming from the jurisprudence of the European Court of Human Rights and proposed that for the purpose of interpretation of Article 87 TFEU a stricter (formal) definition of 'criminal offence' should be adopted. It must be stressed immediately that such an argument is surprising, as even the Commission noted that road traffic related offences are differently classified in different member states, and such offences may be either administrative or criminal in nature.

[7] Explanatory Memorandum, p. 3.

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The European Parliament and the Council, supported by seven member states, disagreed with this excessively restrictive interpretation of the concept of 'criminal offences'. Both institutions also argued that the Directive pursued principally the objective of establishing a system of exchange of information and was only indirectly related to the objectives of road safety.

The Opinion of Advocate General Yves Bot

Advocate General Bot began his Opinion by outlining the general rules concerning the choice of legal basis for an EU act. He stressed that the choice 'must rest on objective factors amenable to judicial review, which include the aim and content of that measure' and that 'if the examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be found on a single legal basis, namely that required by the main or predominant aim or component'.[8] He then referred to the analysis of the objective of the Directive established in its Article 1 and Recitals 1, 6, 15, and 26 in the Preamble and acknowledged that 'by thus aiming to ensure a high level of protection for all road users in the Union, [the Directive] is without doubt pursuing the objective of improving the safety which those users must enjoy when they take to the roads of the Member States'.[9] The Advocate General did not, however, stop his analysis at this point; he took the view that such a finding was insufficient to bring the Directive within the scope of the transport policy and to exclude it from the scope of police cooperation governed by Article 87 TFEU. He then moved on to an extensive analysis of the aim and content of the Directive from the point of view of police cooperation and also discussed at lenth the arguments of the Commission. The arguments put forward by the Advocate General will be referred in more detail below. Suffice it to note here that, based on the relevant TFEU provisions, the provision of the Directive itself, as well as the jurisprudence of the Court of Justice, he proposed to conclude that the Directive was properly and legitimately based on Article 87 TFEU.

The Judgement of the Grand Chamber

The Court of Justice agreed with the Advocate General only on the general rules concerning the choice of the legal basis for an EU act. For the rest of the ruling, the Court did not follow his reasoning. Moreover, unlike the Advocate General, who

[8] Opinion of AG Bot, para. 15.
[9] Opinion of AG Bot, para. 17.

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concentrated his argument on Article 87(2) TFEU as a proper legal basis, the Court of Justice focused the analysis on Article 91(1)(c) TFEU, almost completely ignoring the scope, context and past practice of police cooperation in the framework of the Treaties.

After describing the established case law on the choice of the legal basis of an EU act, the Court analysed the objective and the content of the Directive. First, the Court referred to Article 1 of Directive and Recitals 1, 2, 7 and 26 in its Preamble to conclude that 'it follows clearly from the above that the main aim of Directive 2011/82 is to improve road safety which, as stated in Recital 1 in the Preamble to that Directive, is a prime objective of the European Union's transport policy' and that 'while it is certainly true that that directive sets up a system for the cross-border exchange of information on road safety related traffic offences, the fact remains that the precise aim of establishing that system is to enable the EU to pursue the goal of improving road safety'.[10]

Second, with regard to the content of the Directive, the Court acknowledged that this act set up a procedure for the exchange of information between member states in relation to eight identified road safety related traffic offences, that the operation of the information exchange procedure was governed by Article 4 and 5 of the Directive and that according to Article 11 of the Directive the Commission was obliged to submit the report to the European Parliament and the Council on the application of that Directive.[11] Based on these considerations, the Court concluded that 'the examination of the content of the provisions of Directive 2011/82 undertaken above confirms that the system for the exchange of information between the competent authorities of the Member States set up by the directive provides the means of pursuing the objective of improving road safety referred to in paragraphs 32 to 43 and enables the EU to attain its aim'.[12] To support this conclusion, the Court quoted its earlier judgment in joined cases C-184/02 and C-223/02, *Spain and Finland* v *Parliament and Council*, in which it had ruled that measures seeking to improve road safety form part of transport policy and may therefore be adopted on the basis of Article 91(1)(c) TFEU in so far as they are 'measures to improve transport safety' within the meaning of that provision.[13] Applying the above considerations, the Court stated that 'since, both in respect of its aims and its content, Directive 2011/82 is a measure to improve transport safety within the meaning of Article 91(1)(c) TFEU, it should have been adopted on the basis of that provision'.[14]

[10] Judgment, paras. 32-37.

[11] Judgment, paras. 38-41.

[12] Judgment, para. 42.

[13] ECJ 9 September 2004, Case C-184/02 and C-223/02, *Spain and Finland* v *European Parliament and Council* EU:C:20004:497, para. 30; cited in para. 43 of the commented ruling.

[14] Judgment, para. 44.

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Only then did the Court proceed to a very concise analysis of Article 87(2) TFEU, which was the actual legal basis of the contested Directive. It is quite astonishing that the Court merely invoked in this context the wording of two provisions of the Treaty: namely Article 87 TFEU and Article 67 TFEU, without any further explanation or interpretation. As to the scope of police cooperation, the Court noted that it still concerned, even after the entry into force of the Lisbon Treaty, 'the competent authorities of the Member States, 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"'.[15] As to the aim of police cooperation, which forms part of the Area of Freedom, Security and Justice, the Court quoted *in extenso* the wording of Article 67(2) and (3) TFEU. Then, without any further explanation, the Court concluded that 'a measure such as Directive 2011/82, in the light of its aim and content, as described in paragraphs 32 to 43 above, is not directly linked to the objectives' referred to in Article 67(2) and (3). This resulted in the general conclusion of the Court that the Directive could not have been validly adopted on the basis of Article 87(2) TFEU and had to be annulled.[16]

Commentary

The definition of 'criminal law' in the European Union law – a step back?

To support its view that Article 87(2) TFEU could not have been a valid legal basis for the Directive, the Court of Justice contended that the police cooperation under this provision concerned the competent authorities of the member states 'in relation to the prevention, detection and investigation of criminal offences'. As there is no further explanation in the judgment as such, it may be assumed that the Court acknowledged that Article 87 TFEU encompassed the cooperation only in cases when such offences are classified as criminal in the national legal orders of the member states. Thus, as long as the criminal offences and sanctions had not been harmonised on an EU level, the police cooperation could not be validly based on Article 87 TFEU.

The Court seems to have adopted a formal approach to the definition of 'criminal offence' which used to be commonly accepted before the Treaty of Lisbon. The earlier formal definition of 'criminal offence' allowed a dividing line to be drawn between the competences of the Communities in the first pillar (governing administrative infringements and sanctions) and the cooperation of the member states under the third pillar (concerning crimes and criminal sanctions).

[15] Judgment, para. 47.
[16] Judgment, paras. 48-51.

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This also meant that the scope of criminal law was defined by the reference to the criminal systems of the member states, determining the limits of criminal law (codified in national criminal codes).

Such a formal approach stands, however, in opposition to the recent case law of the Court of Justice concerning the notions of 'criminal offence' and 'criminal procedure'. After the entry into force of the Treaty of Lisbon, which brought about the 'depillarisation' of the Union, the Court of Justice moved on to modify the understanding of the 'criminal offence/sanction' and 'criminal procedure', from formal to material. The material definition of these notions means their autonomous and uniform interpretation across the EU, which is important for setting the limits of EU criminal law, independent from the actions of member states.

First, the Court of Justice adopted the material definition of 'criminal offence' in its rulings in the cases *Bonda*[17] and *Åkerberg Fransson*[18]. The *Bonda* case concerned the possibility of accumulation of administrative penalties and criminal prosecution of a Polish farmer who contravened EU agricultural provisions concerning direct payments. In order to answer the question of the Polish Supreme Court, the Court of Justice adopted the material definition of a 'criminal offence'. It referred to the established case law of the European Court of Human Rights in such cases as *Engel*[19] and stated that three criteria were relevant in the context of the criminal nature of an offence: 'the first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur'.[20] The Court of Justice confirmed this material definition of a criminal offence in the *Åkerberg Fransson* case, concerning the possibility of accumulation of administrative penalties and criminal prosecution in the context of tax frauds.[21] It is worth emphasising that both cases concerned the enforcement of criminal sanctions by the member states for the infringements of EU provisions constituting the core of the former European Community law – namely Common Agricultural Policy (*Bonda*) and VAT harmonisation (*Åkerberg Fransson*), and not the provisions concerning judicial cooperation in criminal matters or police cooperation. The legal context of both cases did not discourage the Court of Justice from adopting the material approach to the definition of 'criminal offence' and so the rulings in the cases of *Bonda* and *Åkerberg Fransson* mark an important step in the evolution of the EU criminal law. In the context of the above-mentioned earlier jurisprudence of the Court, the commented ruling

[17] ECJ 5 June 2012, Case C-489/10, *Bonda* EU:C:2012:319.

[18] ECJ 7 May 2013, Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson* EU:C:2013:280.

[19] Series A no. 22, 8 June 1976, *Engel and Others* v *the Netherlands*, paras. 80-82.

[20] ECJ 5 June 2012, Case C-489/10, *Bonda*, para. 37.

[21] ECJ 7 May 2013, Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson* EU:C:2013:280, para. 35.

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may be seen as a return to the formal approach to the notion of 'criminal offence' and a step back from the autonomous and uniform interpretation of this notion.

Second, the Court of Justice adopted the material definition of 'criminal procedure' in its ruling in *Baláž*,[22] which concerned the interpretation of Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.[23] It is interesting to note in this context that this Framework Decision introduced the principle of mutual recognition of judicial decisions, inter alia in respect of financial penalties imposed for road traffic offences, so it concerns in part the same scope of offences as Directive 2011/82. In the case *Baláž,* the Court was asked to interpret the term 'court having jurisdiction in particular in criminal matters' used in Article 1(a)(iii) of Framework Decision 2005/214/JHA for the purpose of defining which decisions of national courts are covered by this EU act (and the principle of mutual recognition). In its ruling, the Court once again adopted the approach of supporting the autonomous and uniform interpretation of EU law. It stated that the term 'court having jurisdiction in particular in criminal matters' could not be left to the discretion of each member state, because the need for autonomous and uniform application of EU law required that where the Framework Decision made no reference to the law of the member states in this respect, the term required autonomous and uniform interpretation throughout the Union, having regard to the context of the provision of which it formed part and the objective pursued by that Framework Decision.[24] The Court then admitted that the Framework Decision was adopted on the basis of Article 31(1)(a) and Article 34(2)(b) TEU, in the context of judicial cooperation in criminal matters. It acknowledged, however, that the scope of this Framework Decision included offences relating to 'conduct which infringes road traffic regulations', which are not subject to homogenous treatment in the various member states. Such offences are classified as administrative in some member states and as criminal in others. For that reason the Court opined that 'in order to ensure that the Framework Decision is effective, it is appropriate to rely on such an interpretation of the words "having jurisdiction in particular in criminal matters", in which the classification of offences in national orders of Member States is not conclusive' and that a court 'must apply a procedure which satisfies the essential characteristics of criminal procedure, without, however, it being necessary for that court to have jurisdiction in criminal matters alone'.[25]

It is interesting to see that in the context of the same category of offences, namely infringements of road traffic regulations, the Court's views alter depending

[22] ECJ 14 November 2013, Case C-60/12, *Baláž* EU:C:2013:733.
[23] OJ L 76, 22.3.2005, pp. 16-30.
[24] *Baláž*, para. 25-26.
[25] *Baláž*, paras. 34-36 and 42.

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on the context of the case, even if both *Baláž* and the commented judgment concerned Area of Freedom, Security and Justice policies (judicial cooperation in criminal matters and police cooperation). It is indisputable that road traffic offences are not harmonised at EU level and that the legal classification differs from one member state to another. This differentiation between administrative and criminal liability for road traffic offences was acknowledged by the Court in the *Baláž* case, as well as by the Commission it its initial proposal for Directive 2011/82[26] and the European Parliament and the Council in Recital 8 in the Preamble to the Directive.[27] Still, by adopting the material definition of the term 'court having jurisdiction in criminal matters' in the *Baláž* case in the context of mutual recognition of criminal decisions, the Court accepted that such recognition will have a much wider scope of application, extending also to administrative decisions under national law, which for the purposes of judicial cooperation in criminal matters should be treated as criminal decisions in the light of Framework Decision 2005/214/JHA. A comparison of the *Baláž* case and the commented judgment leads to the conclusion that for some reason the Court adopted two different views when asked about the scope of the Framework Decision and about the scope of Article 87(2) TFEU: in the *Baláž* case, the material approach to the definition of criminal law was preferred, while in the second case, the formal understanding of criminal law was adopted. This raises doubts about the consistent interpretation of EU law and brings us back to the situation when the application of EU law depends on the classification of offences on a national level.[28]

The ruling of the Court is even more astonishing when one considers that regardless of the classification of road traffic offences in the national systems of the member states, such categories of offences (and in particular the ones listed in Article 2 of Directive 2011/82/EU) are mostly detected by the road police (police being one of the bodies explicitly mentioned in Article 87(1) TFEU). From this point of view, the legal classification of such offences would be immaterial in this context, as long as the exchange of information is exercised between police bodies.

[26] COM (2008)151, p. 3.

[27] 'The road safety related traffic offences covered by this Directive are not subject to homogenous treatment in the member states. Some member states qualify such offences under national law as "administrative" offences while other qualify them as "criminal" offences. This Directive should apply regardless of how those offences are qualified under national law.'

[28] As AG Bot put it: 'formal interpretation raises a number of problems. First, it runs counter to the requirement that European Law should be applied uniformly, by introducing a heterogenous element to the substantive an temporal scope of police cooperation procedures such as that provided for by the directive. In fact, the application of such a procedure would then depend on the classification given at national level to each of the offences to which Article 2 of the Directive refers', para. 61 of the Opinion.

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The intersection between internal market competences and Area of Freedom, Security and Justice competences – an objective analysis of the aim and content of the measure?

Before the entry into force of the Treaty of Lisbon, the intersection between the first pillar (EC law) and third pillar of the Union (intergovernmental cooperation) was governed by Article 47 TEU, under which nothing in the Treaty on European Union was to affect the EC Treaty. The Court applied this rule in well-known rulings concerning the validity of Framework Decisions encroaching upon the powers of the European Community: Case C-176/03, *Commission* v *Council*[29] and Case C-440/05 *Commission* v *Council*,.[30] In both cases the Court confirmed that the objectives of the EU as a whole should be attained by exercising the Community's competences in the first place, and only when this is impossible may the rules enshrined in TEU be used as a legal basis for an EU action. In addition, in order to give priority to the exercise of EC's powers before the application of the TEU provisions, the Court acknowledged the existence of the EC's implied powers to harmonise criminal offences (but not criminal sanctions) under Article 175 TEC (Article 192 TFEU) and Article 80(2) TEC (Article 100(2) TFEU).

However, since the entry into force of the Treaty of Lisbon, the rule mentioned above (Article 47 TEU (old))[31] is no longer in force. Now that the Union has been depillarised, the general rule concerning the choice of legal basis applies. As was stressed by Advocate General Bot[32] and by the Court itself,[33] the choice of the legal basis of an act must rest on objective factors, in particular the aim and the content of that act. Still, the reasoning of the Court in this respect deserves further attention in two respects: of the aim and of the content of the Directive.

First, when identifying the aim of the controlled measure, the Court ignored its provisions referring to the objective of enforcement of sanctions and establishing the deterrent effect of the system of exchange of information. While citing Article 1 of the Directive, the Court ignored that this article states *in fine*: 'and thereby the enforcement of sanctions, where those offences are committed with a vehicle registered in a Member State other than the Member State where the offence took place'. While citing Recitals 2, 6 and 7 of the Preamble, the Court also failed to

[29] ECJ 13 September 2005, Case C-176/03, *Commission of the European Communities* v *Council of the European Union*, concerning the Framework Decision 2003/80/JHA on the protection of the environment through criminal law (OJ L 29, 5.2.2003, pp. 55-58).

[30] ECJ 23 October 2007, Case C-440/05, *Commission of the European Communities* v *Council of the European Union* EU:C:2007:625, concerning the Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ L 255, 30.9.2005, pp. 164-167).

[31] It was replaced by a 'two way street' type of rule in the current Art. 40 TEU, which furthermore only deals with Common Foreign and Security Policy.

[32] Opinion of AG Bot, para. 15.

[33] Judgment, para. 29.

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take into account that these provisions referred to 'enforcement of sanctions' and the deterrent effect of the system of exchange of information. Such notions as 'enforcement' and 'deterrence' directly refer to the wording of Article 87(1) TFEU, which covers police cooperation involving all the member states' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

Thus the conclusion in the ruling that 'the precise aim of establishing that system [of exchange of information] is to […] pursue a goal of improving road safety' is surprising, to say the least. From the cited recitals in the preamble one could rather draw the conclusion that while the improvement of road safety is a general aim, the enforcement of sanctions and prevention is the precise goal of the system of exchange of information. As Advocate General Bot put it, Recitals 6 and 7 express the main aim of the Directive, namely to enable more effective enforcement in relation to road traffic offences through the creation of a police cooperation process, which is based on the exchange of information. According to him: 'improved road safety is the ultimate aim, the desired effect, and more effective enforcement in relation to road traffic offences the most immediate and direct aim, the two objectives being, of course, closely linked'.[34]

The Court focused instead on the objective of the Directive in the framework of the transport policy. Then the presumption that improving road safety is a prime objective of the EU's transport policy enabled the Court of Justice to conclude that the precise aim of the Directive came into the scope of the transport policy (and not policy cooperation).

This conclusion raises serious doubts also from the perspective of the objectives of the Area of Freedom, Security and Justice. The Court of Justice merely stated that the aim of the Directive was not linked to the objectives enshrined in Article 67(2) and (3) TFEU.[35] Let us recall that according to Article 67(2) TFEU the Union 'shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control', while Article 67(3) TFEU states that the EU 'shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws'.[36] As the ruling contains no explanation of this point, it may be assumed that the Court relied on a formal

[34] Opinion of AG Bot, paras. 32-33.
[35] Judgment, para. 49.
[36] Judgment, paras. 47-48.

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distinction between the notion of 'security' used in Article 67(3) TFEU and the notion of 'safety' used in Article 91 TFEU. As a consequence, because the measures undertaken in the framework of the Area of Freedom, Security and Justice should aim at ensuring 'security', the Directive aiming at ensuring 'safety' could not have been validly adopted under Article 87 TFEU.

If this assumption is correct, then it must be remembered that eight categories of offences were listed in Article 2 of the Directive, namely: a) speeding, b) non-use of a seat-belt, c) failing to stop at a red traffic light, d) drink-driving, e) driving under influence of drugs, f) failing to wear a safety helmet, g) use of a forbidden lane, h) illegally using a mobile telephone or any other communication devices while driving. While the categories of offences under b) and f) may be connected with the safety of the driver or the passenger, all the remaining categories are more connected with the public security of all road traffic participants – not only the person who drives a car but also all other drivers as well as pedestrians, motorcyclists and cyclists, who would be endangered by the behaviour of an irresponsible driver. To put it another way, a system which makes it possible to track an irresponsible driver contributes not as much to road transport safety (in the meaning of Article 91(1)(c) TFEU) as to public security against transnational road traffic criminality, which in fact is a negative result of the freedom to move and reside freely in the Union.[37] From this point of view it may be argued that preventing road traffic related offences serves in fact one of the objectives of the Area of Freedom, Security and Justice, namely combating and preventing serious transnational crime, which is in part a result of the freedom to move and reside freely in the EU. This conclusion can be supported by the explicit wording of Article 1 of the Directive, according to which its objective is 'a high level of protection for all road users in the Union', thus not only the safety of the driver himself, but mostly the security of all road users.

Second, when analysing the content of the Directive, even the Court itself acknowledged that it was mostly dedicated to the operation of the system of exchange of information. But then, to support its conclusion that the Directive provided the means of pursuing the objective of improving road safety, the Court invoked its ruling in joint cases C-184/02 and C-223/02, *Spain and Finland* v *European Parliament and Council*, in which it had stated that measures seeking to improve road safety could have been validly adopted on the basis of Article 91(1)(c) TFEU in so far as they were 'measures to improve transport safety'. This ruling, however, concerned the validity of Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities.[38] According to Article 1 of this Directive, its aim is 'to establish

[37] *See also* the arguments of AG Bot in para. 35 of his Opinion.
[38] OJ L 80, 23.03.3002, pp. 35-39.

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minimum requirements in relation to the organisation of working time in order to improve the health and safety protection of persons performing mobile road transport activities and to improve road safety and align conditions of competition'. This act contains provisions concerning *inter alia* maximum weekly working time, breaks, rest periods and night work, thus it is more strongly connected with the social dimension of the transport policy than with anything else. It is difficult to understand how the Court could make a parallel between such an act and Directive 2011/82/EU which did not contain any material provisions, but only regulations concerning the institutional cooperation between enforcement bodies of member states.

On the other hand, the Court ruled contrary to its earlier jurisprudence concerning the scope of judicial cooperation in criminal matters and police cooperation in the context of the proper legal basis of an EU act. As Advocate General Bot stressed in his opinion,[39] the Court in the case *Ireland* v *European Parliament and Council*[40] had stated that: 'Directive 2006/24[41] 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.' Then, in case *United Kingdom* v *Council*,[42] the Court ruled that: 'With regard to the purpose of Decision 2008/633,[43] Recitals 2, 3, 4 and 6 in its Preamble and Articles 1 and 5(1) make clear that its aim is to permit access to the Visa Information System by the member state authorities responsible for internal security and by Europol, for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. On this ground, the decision pursues objectives which, as such, fall within the scope of police cooperation.' In this case, the Court

[39] Opinion of AG Bot, paras. 47-48.

[40] ECJ 10 February 2009, Case C-301/06, *Ireland* v *European Parliament and Council* EU:C:2009:68, para. 83.

[41] 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 L 105, 13.4.2006, pp. 54-63.

[42] ECJ 26 October 2010, Case C-482/08, *United Kingdom* v *Council* EU:C:2010:631, paras. 50-51.

[43] Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of member states and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13.8.2008, pp. 129-136.

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took into account that Decision 2008/633 concerning access to VIS related 'both to the rules on designation, by the Member States, of the authorities responsible for internal security which are authorised to consult the VIS and to the conditions governing access, communication and keeping of data used for the above-mentioned purposes. In so doing, the provisions of that decision may, in principle, be regarded as setting up a form of police cooperation.' In the light of these rules it should be obvious that the Directive, merely establishing the system of exchange of information between police bodies, falls in the scope of Article 87(2) TFEU.

The Court's ruling also contradicts the previous practice of police cooperation before the Treaty of Lisbon. First, according to Article 4(4) of the Directive the member states – for the purposes of the procedure for the exchange of information – were obliged to use 'as far as possible (…) existing software applications such as the one especially designed for the purposes of Article 12 of Decision 2008/615/JHA,[44] and amended versions of those software applications, in compliance with Annex I to this Directive and with points 2 and 3 of Chapter 3 of the Annex to Decision 2008/616/JHA'.[45] Also, searches on the data were to be conducted in compliance with the procedures described in the above provisions (Article 4(2) of the Directive). Therefore, as pointed out by Advocate General Bot, 'this is an indication that the Directive constitutes a further development, in respect of road traffic offences, of other police cooperation instruments, such as the Prüm decisions, which are designed inter alia to combat terrorism and cross-border crime'.[46] Second, for the purposes of the customs union (a core internal market policy) the Customs Information System was established in 1995 under a third-pillar convention, namely the Convention of 26 July 1995 on the use of information technology for customs purposes.[47] It was replaced just before the entry into force of the Treaty of Lisbon, by Council Decision 2009/917/JHA on the use of information technology for customs purposes,[48] adopted on the basis of the former Article 30(1)(a) TEU and Article 34(2)(c). Under Article 1 of this Decision the objective of the Customs Information System is to assist in preventing, investigating and prosecuting serious contraventions of national laws by making information available more rapidly, thereby increasing the effectiveness of the cooperation and control procedures of the customs administrations of the member states. Thus, even if the Decision covers 'contraventions' and not only

[44] Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008, pp. 1-11.

[45] Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008, pp. 12-72.

[46] Opinion of AG Bot, para. 44, indicating also Recitals 2, 9 and 10 in the Preamble.

[47] CIS Convention, OJ C316, 27.11.1995, p. 33.

[48] OJ L 323, 10.12.2009, pp. 20-30.

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criminal offences, it was adopted in the framework of the police cooperation under the former Article 30(1) TEU.

All the above arguments notwithstanding, the Court acknowledged in practice that cooperation between the enforcement bodies of the member states may be established in the framework of the 'internal market policy'. The Court admitted that the competence of the Union in this domain may be inferred from any internal market competence such as the competence to adopt measures to improve transport safety (Article 91(c) TFEU). This ruling may be as important as the Court's decisions concerning the implied powers of the European Community in criminal law,[49] because it may result in a spill-over effect to other internal market policies.

The reasoning of the Court in the commented ruling, focusing on transport policy and ignoring the police cooperation context, means also that in practice, internal market policies may still have priority before the policies of the Area of Freedom, Security and Justice, in particular police cooperation. This would mean that the choice of legal basis of an act would be affected more by this 'unwritten' rule of priority than by the objective aim and content of the given EU measure.

Conclusion

The most important consequence of the commented ruling is that the new Directive facilitating cross-border exchange of information on road safety related traffic offences will be adopted under transport policy.[50] Even if the aspect of the *effet utile* of the Directive, depending on its legal basis, was not mentioned in the ruling itself, this could be the most important concern of the Court in the commented ruling. The *effet utile* was achieved, however, at the price of consistent interpretation and autonomous application of EU law, as well as of further implications for the scope of police cooperation under Article 87 TFEU and the rules for the intersection between the internal market and the Area of Freedom, Security and Justice.

First, the formal approach to the notion of 'criminal offence' used in Article 87 TFEU seems to run counter to the previous jurisprudence of the Court of Justice, which has preferred autonomous interpretation of the EU law. This may bring us back to the situation when the scope of EU law will depend again on the activities undertaken by the member states. This formal approach of the Court restricts the scope of police cooperation under Article 87 TFEU only to such offences that are formally recognised as criminal by the member states. This means that in order to apply Article 87 TFEU for the establishment of the cooperation between

[49] C-176/03 and C-440/05. *See* n. 31 and n. 32 respectively.

[50] COM (2014)476 final.

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enforcement bodies of the member states, they must either make sure that the offences concerned are criminal in nature in all of them or the EU must undertake criminal harmonisation under Article 83 TFEU. This may considerably weaken the effectiveness of Article 87 TFEU.

Second, the ruling of the Court results in a spill-over effect of implied powers, stemming from the internal market competences. Even if there is an explicit competence for the EU to regulate the cooperation of enforcement bodies in the domain of offences covered by the Treaties, the Court preferred to establish the implicit competence to regulate such cooperation, stemming from the 'internal market' policy. The Court gave priority to the internal market policy, stating that the Directive was able to realise the objective of the transport policy, but without giving further thought to whether, viewed objectively, the policy cooperation could attain this objective as well. It thus seems that even if Article 47 TEU no longer applies, it still underlies the reasoning of the Court – in the name of *effet utile.* Such a ruling, evidently contrary to the will of the member states, may be most important for the constitutional order of the EU, because it implies that the EU would be competent to establish cooperation between police and enforcement bodies in each possible internal market policy without the need for recourse to Article 87 TFEU. In addition, the ruling further limits the scope of police cooperation under Article 87 TFEU and questions the previous practice of the EU in this domain, where the systems of exchange of information were established under police cooperation (the classification of the offences was immaterial in this context).

Last but not least, the ruling of the Court seems to imply that police cooperation under Article 87 TFEU is not treated as a policy complementary to any internal market policy but rather as an autonomous policy in the Area of Freedom, Security and Justice. This results in the acknowledgment that police cooperation under Article 87 TFEU is not complementary to other 'internal market policies'. It seems that police cooperation is treated by the Court rather as an autonomous policy of the EU, like the policy to harmonise serious crimes under Article 83(1) TFEU, rather than as subsidiary to other policies, as, for example, the policy to harmonise criminal law for the effectiveness of the EU law under Article 83(2) TFEU. This also would run contrary to the previous practice in the context of the cooperation of competent enforcement bodies as well as in the context of harmonisation of criminal offences. The future will tell whether the price for the *effet utile* of the Directive was not too high.

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