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**Deferential dialogues between the Court of Justice and
domestic courts regarding the compatibility of the EU
Data Retention Directive with (higher?) national
fundamental rights standards**

by

Ioana Pelin-Raducu*

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Abstract

This article examines the nature, purpose and effect of constitutional dialogues between the Court of Justice of the European Union and constitutional courts taking as example the difficulty encountered in the implementation of the 2006 Data Retention Directive in several Member States. The cooperative relationship, called “deference”, is based on the autonomy and voluntary willingness of national courts to ask for a preliminary ruling by the Court of Justice. Avenues of “silent” dialogue, as happens when constitutional courts do not send for a preliminary ruling while still following the Court’s precedents, are also explored. The case-law where constitutional courts exercised their competence to indirectly review the validity of EU legislation is discussed in light of the constitutional pluralism paradigm. Finally, in the particular field of personal data retention, the judicial activism of the Luxembourg Court in upholding the validity of EU legislation is heavily criticized in light of the protection of fundamental rights. For the judicial dialogue to function properly, both the Court of Justice and constitutional courts should show “deference” to each other's sensitivities in light of the principle of loyal cooperation entrenched in the EU Treaties.

Key-words

Protection of privacy rights, personal data retention, constitutional dialogue, CJEU, deference, preliminary reference procedure



1. Introduction

For the last years, European integration has faced mostly legitimacy challenges. The constitutional endeavour to set a clear balance of powers between Member States and the European Union (hereinafter, EU) was not successful even if the main institutional changes foreseen by the Treaty establishing a Constitution for the European Union saw the light with the adoption of the Lisbon Treaty. In spite of the efforts deployed to set the division of powers, the current treaties do not contain a clear-cut federal catalogue of competences of Member States and the EU, nor do they clarify the nature of the EU's legal order. The principle of primacy of EU law over national laws applies since the *Costa* decision,^I however the primacy clause has so far not been included in the body of EU Treaties. Instead, a declaration was attached setting out the primacy of the Union but it did not address the key question of European constitutionalism, such as “who has the last word in Europe?”, raised by constitutional courts during the ratification process of the Lisbon Treaty^{II}.

The still disputed claim of EU law primacy and the unsettled division of powers between the EU and its Member States raise legitimacy concerns when the European Union has the competence to adopt legislation concerning data retention that potentially affects the everyday life of millions of European citizens. The issue at stake is that appropriate checks and balances have to be further implemented in order to legitimize the legislation adopted at supranational level, especially concerning restrictions on fundamental rights. Once legislation is enforced, the citizens' only option is to bring action in front of domestic and supranational courts. Thus, the adjudication process has also regulatory power and has gained a considerable influence in the European decision-making process. The Court of Justice of the European Union (hereinafter, CJEU and the Court) has the exclusive competence to review the legality of EU legislation in light of the respect of fundamental rights. The Court is called to strike a balance between the protection of the fundamental right to privacy that data retention by public authorities may affect and the objective pursued, such as the prosecution of a serious crime. However, domestic courts' decisions on the 2006 Data Retention Directive^{III} challenged the CJEU's competence as they indirectly questioned EU legislation by invalidating the transposing acts of several



Member States. Under the pressure of national courts, EU legislation on data protection is currently under revision and the future regulation has to uphold a higher standard of protection of privacy rights.

The present paper assesses the importance of the deferent dialogue between constitutional courts and the Court of Justice and what it can bring in terms of legitimizing supranational legislation, such as the 2006 Directive on Data retention at issue. I discuss how the interactions between courts could bring order into the unsettled relationship of domestic and EU legal orders and will plead in favour of establishing a long-standing and fully-fledged judicial dialogue as the only reasonable choice to address the constitutional question on who has the final authority in the European Union^{IV}. The first part of the paper is theoretical and does not solely address the changes in domestic constitutional settings under the effect of incorporating EU law, but also gives an account of the legitimacy concerns with regard to the CJEU's case-law, raised mainly by constitutional courts. The European multi-level adjudication system, composed of constitutional courts and the Court of Justice, thus remains decisive in accommodating competing interests stemming from different legal orders, that is both domestic and supranational. The value of *dialogue* does not imply an optimistic view of the relationship between courts, but comes with pragmatic advantages for both the EU's and domestic legal orders. Through a dialogue between courts the risk of contradictory jurisprudence and overlapping competencies for the protection of individual rights on the European continent can be significantly reduced.

By taking into account the concerns voiced by constitutional courts, the CJEU injects legitimacy into its decisions in order for EU legislation to be correctly implemented by domestically legitimated courts. The acceptance of the Court's decisions increases the legitimacy of the EU *polity* as a promoter of the respect for human rights, rule of law, and democracy. At the same time, constitutional courts gain influence to shape the supranational adjudication process because the safeguards linked to the respect of national "constitutional identity" are now "listened" to by the Court of Justice of the EU^V. The Luxembourg Court ultimately pretends at upholding the specific, European understanding of constitutional and national identity. The recognition of national constitutional identity operated by the CJEU and the national margin of appreciation operated by the European Court of Human Rights (hereinafter, ECtHR) in light of the European Convention on



Human Rights (ECHR) proves that there is no supranational usurpation of the role that legitimately belongs to national courts: to identify and protect national constitutional identity. By contrast, supranational courts gain influence by safeguarding the level of protection of fundamental rights, the respect for rule of law and the democratic rationale of domestic legal systems. Constitutional arrangements are modified as well, following the ratification of the EU treaties. Thus, the paradigm of deferent dialogue tries at best to accommodate the neuralgic “who decides who decides?” question and brings coherence to the motto “unity in diversity” of the European project.

In the second part of this article, the question of the compatibility of the 2006 Data Retention Directive with higher domestic constitutional standards of the protection of human rights is discussed as an important example of the risk of clashes between the EU and domestic legal systems. The path of collaborative dialogue between courts shall be thus tested.

2. The normative value of dialogue between the Court of Justice and constitutional courts

This chapter deals with the ability of judicial dialogue to bring coherence and solve conflicts between different levels of the European multi-level system. The interpretation of the notion of “constitutional identity” enshrined in Article 4 §2 of the TEU is directly linked to the jurisdictional policy deployed between constitutional courts and the Court of Justice. Behind the question of the CJEU’s competence lies the concern to secure a proper level of protection of human rights and to ensure the access to justice and incorporate standards for judicial review. The EU’s respect for the autonomy of the national constitutional identity, as stated in article 4 §2 of the TEU, testifies of the constant negotiations between national and European levels over “Who has the final word?” in view of avoiding the clash of overlapping authorities.

For that reason, even if a comparison with constitutional-federal arrangements such as the US can be drawn in some respects, the manner in which the competences of each level is allocated in the EU does not fully satisfy the characteristics of a federal system^{VI}. In the European multi-level system, the Court of Luxembourg is *together with* the national courts called to accommodate competing sources of authority stemming from both



national and EU legal orders. The monist/dualist constitutional theories have sought, without widespread success so far, to address the question of who is the last owner of sovereignty^{VII}. The major dilemma is to find the proper level of review in order to achieve the “unity in diversity” goal, namely to preserve the coherence of the European legal order and at the same time to preserve the constitutional and national identity wherein the specificity of each national legal order is anchored.

The underlying question is whether the CJEU has the authority to review the national constitutional identity that enters within the scope of EU law or whether it is up to the courts of last instance at national level and/or constitutional courts to protect what belongs to the core of domestic constitutional issues. Some constitutional courts have already interpreted the substantive constitutional conditions for participation in the European Union with regard to ratification of the European treaties. Thus, the Italian Constitutional Court (*Corte costituzionale*) developed a doctrine of fundamental principles that the European Union should respect, called the doctrine of *contro-limiti*^{VIII}. Furthermore, the jurisprudence of the German and Czech constitutional courts concerning the ratification of the Lisbon Treaty puts into light the need for a comprehensive constitutional theory applied to the relationship between the EU and Member States' legal orders.

The revision of constitutions allows for the incorporation of EU law in the national legal orders. Also, the EU treaty constitutionalized the national reservations related to national identity, the protection of human rights, the democratic system etc. Some constitutional principles are thus revised as a consequence of the membership in the EU, for example in the case of Italy,^{IX} and are inserted like clauses of openness of the national constitutional system (Albi 2007, Sadurski 2008). However there are core principles of the Constitution, such as the protection of fundamental rights or democracy^X inserted therein that cannot in any way be violated. In terms of adjudication, the CJEU deals with competing claims over who the last owner of sovereignty is; every claim is derived from constitutional sources and each of them enjoys equal normative value. The relationship between the EU treaties and national constitutions is not solved in favour of one or another source of authority, but the latter also become sources of EU law, by means of mutual recognition. The constitutional pluralism theory is not about the *Kompetenz-Kompetenz* question: the answer to “who decide who decides?” remains open, the tension between competing sovereignties is not to be solved. Dialogue is thought to take place



between equally autonomous partners, so the paradigm of dialogue leaves open the “who decides who is the final authority?”-question. The unsettled nature of hierarchy within the EU is to be preserved as such according to these ideas of “constitutional pluralism”^{XI}, “multi-level constitutionalism”, “composed constitutionalism” or “co-operative constitutionalism”. In legal terms, this structure translates into a relationship of heterarchy between the domestic courts of last instance and the CJEU, corresponding to the constitutional pluralism theory according to which there is no formal hierarchy between the domestic and the EU's legal orders.

The interface between the national and the EU legal orders is ensured mainly by the dialogue between judges. As such, the domestic courts of last resort, especially constitutional courts, which usually have the power to review statutory legislation under national law, can reconcile the imperative to ensure the application and supremacy of EU law over national legislation with “the desire to keep integration under control by preserving an at least hypothetical last word for the Member States and, thereby, the notion of national sovereignty” (Dyevre 2013). In this vein the German Constitutional Court stated that it would refrain from reviewing secondary EU legislation as long as EU law does not transgress the boundaries fixed by the TEU^{XII}. Similar concerns with regard to the protection of fundamental rights by the EU were raised by constitutional courts with regard to the implementation of the Framework-Decision on European arrest warrant in Member States. The Polish Tribunal^{XIII} and the Czech Constitutional Court^{XIV} proved not as reluctant as the German Constitutional Court^{XV} to the creation of a European criminal space, thus constitutional amendments lifted the prohibition of extradition of Member State citizens. And it was the Belgian Court who raised concerns regarding the application of the Framework-decision of the European arrest warrant^{XVI}, so that the CJEU had the opportunity to deal with these concerns raised by different courts regarding the legality of the European arrest warrant.

The “deal” between constitutional courts and the CJEU if the former were to recognise EU law supremacy was for the EU to ensure the same level of protection of human rights, rule of law and democratic principles as in domestic legal orders. This deal conveys a presumption of the equivalence of protection of fundamental principles between EU law and national law which can however be reversed. Thus, constitutional courts see this agreement with the CJEU as the best way to keep the final word if EU law no longer



respects domestic constitutional principles. In case of a contradiction between national and European norms, domestic courts should operate a “test of reason” or a “balancing act” between two competing principles, protecting the legal certainty of the national legal order or award precedence to EU principles.

The CJEU’s deference shown towards national courts implies that the latter are afforded more discretion to protect national interests. It implies that the interpretation of EU law, in light of its compatibility with national measures, is in fact not the Court’s task but “a joint exercise of the Court of Justice and the national courts”^{xvii}. The CJEU has shown more deference insofar as, in some cases, it left the task to decide if a measure aims to protect a fundamental right that is given constitutional importance at national level to the national courts that had referred the preliminary questions^{xviii}. This attitude invests in the Court of Justice with the image of respecting national constitutional values even if such norms harm EU law.

In order to face the challenges of the EU legal system, deference is presented as a paradigm of collaboration between courts. This model of judicial deference overcomes the shortcomings of other classical constitutional theories that try to settle, once and for all, the question of “who decides who decides?”. Thus, the idea of judicial dialogue does not necessarily translate into conflicts between courts, nor does it invalidate either of the courts’ authority. Deference implies more than an “interpretative” dialogue, it means a procedural way of judicial dialogue via the preliminary ruling procedure. M. Maduro proposed four principles of “contrapunctual law” in order for the Court of Luxembourg to take into consideration the concerns of other legal orders (Maduro 2003). J. Baquero Cruz also acknowledges the advantages of the “Discursive European Pluralism” that takes the position of other actors into account (Baquero Cruz 2008). However, the theory of deference goes one step further than the arguments used by courts in their decisions: through the characteristics of autonomy, voluntariness and interdependence, deference builds up the procedural constitutive aspects of judicial dialogue in a step-by-step manner. Besides, as explained further on, the theory of deference is based on a specific understanding of the principle of sincere cooperation that integrates judicial dialogue, through the preliminary ruling procedure, in every internal constitutional system of remedies. It shall also be noted that the word “deference” is not a reference to the margin of appreciation doctrine or to theories of judicial restraint, but is instead based on a specific



understanding of European loyal cooperation. This theory of deference can also be applied to the relationship between the ECtHR and the CJEU, instead of using the presumption of «equivalent protection» of human rights^{XIX}. Deferent dialogue also potentially applies to the relationship between national courts and other international adjudicative bodies^{XX}.

A “deferent dialogue” in practice really means for national courts to interpret national law in a consistent manner with EU law while observing the substantive and procedural constraints originating from their own legal order. One court's practice to make cross-references to another court's decisions does not always imply that the latter has really taken into consideration the concerns of the other legal system. At the same time, a “silent”^{XXI} dialogue, such as a substantial respect of the other court's case-law without quoting it in the reasoning of the decision, can be more relevant for a deferent judicial dialogue than a formal reference to another court's jurisprudence. Moreover, from the point of view of constitutional courts, the *comity* towards EU case-law should not result in a reduction of the protection of an individual's rights. The underlying principle of the deferent dialogue is the specific and autonomous understanding of the principle of loyal (sincere) cooperation between judicial authorities under the Article 4 §3 of the EU Treaty^{XXII}. The respect of the principle of sincere cooperation should solve conflicts over competing claims of authority from constitutional courts and the CJEU. According to this principle, neither a national authority nor the Court of Justice can unilaterally decide to change the nature of their relationship but they are bound to decide together.

Deference facilitates the cooperation between courts and does not invalidate the authority of last instance domestic courts. Deference is based on the structural convergence of values and principles between legal orders and the willingness of procedural collaboration amongst courts. The relationship between courts is not characterised by a competitive principle but by mutual recognition and reciprocal dependence (interdependence) (Canivet 2003). Yet, what happens if there is no deference between courts and the EU jurisdictional system is faced with extreme cases of non-compliance with EU law by judicial actors? Judicial liability is difficult to place at the right level as the jurisdictional system faces, in practice, a dissolution of liability jurisprudence for non-compliance with EU law. In other words, the liability doctrine for courts' non-compliance with EU provisions is not satisfactory. The CJEU stated that national courts are responsible for enforcing EU law, however practice shows that in order to achieve



better EU implementation, the Court of Justice of the EU has to endeavour a cooperative relationship, triggering the voluntary commitment of domestic courts toward its position. So far, the dialogue between courts can be classified as follows: direct, implying the use of the preliminary ruling procedure by some Constitutional Courts (Belgian, Austrian, Spanish), but also indirect (with references to the CJEU's jurisprudence) and silent (no direct follow-up of the Court's case-law), such as the Polish Tribunal or the *BverfGe*. In view of this contrasting constitutional situation in the Member States, it is indeed preferable that at least the national courts of last resort make fair use of the preliminary ruling procedure.

The paradigm of deference also relies on the integration of the procedure laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU) in domestic legal orders that might help to put an end to the patent conflicts between supreme courts of different legal orders. In addition, the ratification of the EU Treaties by Member States implies the obligation to integrate into the domestic legal orders the duty of sincere cooperation laid down in Article 4 §3 of the TEU. The obligation to send a preliminary reference to the Court becomes a legal domestic requirement to be respected by every national judiciary. Thus the preliminary ruling procedure is integrated in every internal constitutional system of remedies that has to respect Article 19 §1, second sentence, of the TEU^{XXIII}. For instance, the Spanish, German, Czech and Austrian Constitutional Courts have already sanctioned the decision of non-referral for preliminary rulings by their respective courts of last resort as a consequence of the violation of the domestically protected right to access to justice^{XXIV}. The Slovak and Romanian Constitutional Courts have also declared themselves ready to function as *de facto* enforcers of the last instance ordinary courts' duty to submit a request for a preliminary ruling.

However, the German, Czech, Polish, Slovak and Romanian Constitutional Courts themselves, with a few notable exceptions, repeatedly refused to ask for a preliminary ruling of the CJEU. The constitutional courts' justification for their non-referral is the fact that matters of European law are to be dealt with by ordinary judges in concrete disputes^{XXV}. The Czech Constitutional Court thus upheld the "decentralised" review of compatibility of national law with EU law, stating it to be a matter for the ordinary courts which, if necessary, will declare void national law. However, a number of Constitutional courts, such as the Austrian, Italian^{XXVI} and Spanish Constitutional ones as well as the



French *Conseil Constitutionnel*^{XXVII}, realised that the constitutional judge encountered the risk of being left aside by the evolving process of EU law, thus they have sent preliminary questions to the Court of Luxembourg.

For that reason, the deference model subsists in both of the two types of dialogue between constitutional courts and the Court of Justice: in the “silent” one, because most often there is no direct communication between constitutional courts and the CJEU: and in the “direct” dialogue, when a preliminary ruling is lodged by the highest domestic courts. Thus even if no preliminary question was asked, this does not necessarily mean that judicial deference no longer exists. Deference disappears only when it lacks a common ground for dialogue. When there is no such dialogue between courts, one may choose to use the remedy of judicial liability in case of the non-respect of EU law^{XXVIII}. Engaging such liability represents the extreme case of an interrupted dialogue. It also might represent an *in extremis* attempt to bring harmony between contradicting legal orders.

The “constitutional conversations”^{XXIX} between domestic courts and the CJEU are a key part of the deferent dialogue that can be observed at different stages of preliminary ruling procedure: does the constitutional court refer for a preliminary ruling and/or does it wait for the Court of Luxembourg to pronounce itself upon the question? By answering this first question in the affirmative, one can observe whether a direct dialogue has been established. In order to conclude if there is a deferent dialogue, one has to wait for the end of the procedure as to analyse the final wording of the domestic court. The second step of the dialogue implies answering the preliminary question: does the Luxembourg Court allow the preliminary question and does it take into consideration, in the answer provided, domestic concerns expressed by the constitutional court? The third step concerns the behaviour of national courts after the Court of Justice has rendered its preliminary ruling: do constitutional courts, even if not always the ones to have referred the question for a preliminary ruling in the first place, respect the position of the CJEU? Only if all of these questions receive an affirmative answer can we conclude that a deferent dialogue has been established. As mentioned before, that even a “silent”^{XXX} dialogue can be established between courts does not reverse the conclusion according to which a deferent dialogue was put into place.



The principles of deference are laid down as follows: the *autonomy*, the *voluntary* principle and the *interdependence* of the judicial function. These characteristics shall briefly be explained in the following lines.

The *autonomy*^{XXXI} of courts reflects their power of choice with regard to their collaboration with EU judges. As previously explained, there is no effective legal remedy in order to constraint national courts to send for preliminary rulings. Indeed, the CJEU held that national courts are responsible for enforcing EU law in spite of the fact that the case-law on the liability doctrine for the non-compliance of national courts with EU provisions has not been duly implemented in all legal orders (Coutron 2014). The autonomy of the judicial function is upheld by the empowerment of ordinary courts and the CJEU's interpretations that have stimulated their desire to enforce the supremacy and direct effect of EU law. The various levels are thus intertwined: ordinary judges have emancipated themselves from the authority of the supreme courts that usually dictate the precedent to follow^{XXXII}.

Second, the *voluntary* principle implies the willingness of domestic courts to collaborate with the CJEU, as well for the latter to take into account the place and concerns voiced by domestic courts. Several legal and political science studies have already tackled the effect of the CJEU's institutional action upon national legal orders and the reasons behind national judges' willingness to collaborate with supranational courts.

Third, the *interdependence* principle, or the mutual dependency of courts on one another, coexists with the characteristics of the autonomy of the judicial function (not only of the supreme courts but also of the ordinary judges) and the voluntary principle. Interdependence relies on the extent and scope of the devolution of adjudication between national judges and EU courts. The decentralisation of the latter is often asymmetrical: the Luxembourg Court decentralises the competence of “abstract” as well as of “concrete” review of the compatibility of national laws with EU law, but the intensity of review differs from one country to another. Deciding to what extent national courts take into consideration EU jurisprudence was usually considered a question that depended on the degree of the intervention of the CJEU into the domestic legal order. The Court's maximum approach, or what is called the “judicial activism” doctrine, is to strengthen the principle of effectiveness of EU law^{XXXIII} and enhance the protection of EU rights in domestic procedures.



Practically, the argument of *interdependence* relies upon the application of the proportionality principle which guides the intensity of EU law review. This implies the extent of margin of discretion left by the CJEU to national authorities. It ranges from a strict judicial review to a very broad one^{xxxiv}. This approach might irremediably affect the sensitive equilibrium between courts reached through the “test of reason” or “balancing act” between two competing principles. Thus the deference of the CJEU towards national courts implies that national courts are afforded more discretion to protect national interests. That means that the interpretation of EU law is in fact not the CJEU's job alone, but that it is “a joint exercise of the Court of Justice and the national courts”^{xxxv}. The CJEU has shown more deference if a measure aimed to protect a fundamental right that is given great importance at national level^{xxxvi}. This leads to the Court's respect of national constitutional values even if such a norm harms EU law. The respect of the principle of deference implies an overlapping of jurisdictional functions: for example, domestic judges are stepping in by applying their “reality” filter in cases involving European norms. Therefore, the distinction between interpretation and application of EU law becomes blurred.

The use of the proportionality principle is thus necessary. The usual analysis of the European case-law is that the Court of Justice analyses, for instance, whether a national measure that contradicts EU law is allowed in light of a legitimate aim pursued by the State, or if the State could achieve the same aim by taking a measure that is more respectful of EU law. Thus, the Court of Luxembourg has to make a choice: to operate the proportionality test itself, which implies a direct and an active intervention in the national legal order, or to leave the proportionality tests entirely up to national judges. By this second choice, the CJEU merely assists the national judges in the process of interpretation of EU law. It is thus for the national judge to translate EU legal requirements into their respective national legal orders^{xxxvii}.

Considering the singularity of the EU jurisdictional system that is integrating national procedures, the relationship between the CJEU and national courts exerts a heavy influence on the functions of the latter as gatekeepers for their legal order and on their position within the domestic judicial hierarchy. In conclusion, it should be underlined that deference is based on the mutual trust between judges operating in different systems as



they enjoy the confidence that each legal system shares a similar standard of access to justice and a similar standard for securing rights to individuals^{xxxviii}.

3. The deferent dialogue applied to the case-law regarding the 2006 Data Retention Directive

In this part I analyse whether the paradigm of deference still applies with regard to the contested case-law of domestic courts, raised by the implementation of the 2006 Data Retention Directive. The **comity** or **deference** of constitutional courts towards EU objectives relies on the use of the method of “consistent interpretation” of EU law (Komarek 2007:16). In the Evaluation Report on the 2006 Data Retention Directive (Directive 2006/24/EC) sent to the Council and the European Parliament,^{xxxix} the Commission evaluated the implementation of the Member States’ obligations for providers of publicly available electronic communications services or public communication networks (hereafter, ‘operators’) to retain traffic and location data for a period of between six months and two years for the purpose of the investigation, detection and prosecution of serious crime.

The Czech^{xl}, German^{xli} and Romanian Constitutional Courts^{xlii} annulled the law transposing the Data Retention Directive as unconstitutional. The courts framed the conflict of authority in a manner to protect themselves against allegations that they had overstepped the CJEU's competences by pronouncing upon the legality of the Data Retention Directive. If constitutional courts were to openly acknowledge that they enjoyed the competence to strike down incompatible national implementing measures with regard to EU law, they would *de facto* have become bound by EU law and, subsequently, by the case-law of the Court of Justice. Hence, the Czech, German, Polish^{xliii} and Romanian Constitutional Courts stated that they were only competent to review the compatibility of domestic laws with the national Constitution. On the one hand, they thus preserved their competence to review the legality of domestic acts, while, on the other hand, this makes cases of a similar sort unpredictable in terms of whether or not the constitutional courts will review the transposition acts.

In its decision 1258 of 8th October 2009, the Romanian Constitutional Court decided that the provisions of Law 298/2008 concerning the obligation of telecommunication



companies to retain the private character-data generated or processed by the public electronic communications service providers for six month were unconstitutional. That Law implemented the controversial Directive 2006/24/EC on Data Retention. Thus, the Constitutional Court considered that the implementing domestic law on the duty of data retention was not in conformity with the right of protection of private life and family under Article 26 of the Constitution and Article 8 of the ECHR and the freedom of expression guaranteed by Article 30 of the Constitution and Article 10 of the ECHR. Personal Data Retention is not automatically unconstitutional. However, it is not structured in a manner adapted to the principle of proportionality used for the limitation of fundamental rights by the ECHR. Data-retention does not extend to the contents of the communications, however connex-data may be used to draw content-related conclusions that trespass on the private sphere. The direct and continuous use and collection of the data is also unconstitutional regardless of whether the persons are under any serious suspicion for having committed a criminal act. The safeguards for opening the criminal prosecution against suspected persons are not sufficient; the legislation under scrutiny no longer confines itself to the use of data to prosecute serious criminal offences, but goes far beyond in the collection of personal data. The Romanian Constitutional Court was thus using a balance test between two contradictory interests: defending the public interest or restricting individual rights. However, the Court applied ECtHR case-law stating that any measure of surveillance taken without proper legal guarantees destroyed the aim of protecting the democratic rule of law. In the same line, the Romanian Constitutional Court clearly indicated that the control of constitutionality of any domestic act should take due account of the ECtHR's case-law^{XLIV}. The provisions of the Constitution were interpreted in a way corresponding to the ECHR's analogous provisions^{XLV}. It was not the first time Constitutional Courts accepted to examine the compatibility of domestic law implementing EU measures with ECHR provisions^{XLVI}. The Romanian Constitutional Court did not base its reasoning solely on ECtHR judgements either, it also made reference to domestic constitutional provisions. Thus the Romanian Constitutional Court indirectly reviewed the Directive's provisions with regard to its own Constitution and ECtHR jurisprudence. The interpretation of the Court's decision reveals a clash with the CJEU's competence to review secondary EU law. Along with the question of conflict between courts it is also important to mention that in case of a conflict between rights stemming from the EU/ECHR, the



ECHR takes precedence in the domestic legal order. Indeed, the manner used by national judges to interpret national law in a matter consistent with EU law clearly showed the pattern of deference towards the ECHR. National judges are also under the duty of consistent interpretation of national procedures and norms as regards EU law^{XLVII}. The Czech Constitutional Court invalidated national provisions that failed to safeguard the integrity and confidentiality of the retained data and to prevent access by (non-state) third parties. Domestic law has failed to clearly and precisely define the purpose to retain data and particularly to rectify the vague *serious crimes* language of Directive 2006/24/EC. Such failure contradicts the requirements laid down in both the Charter of Fundamental Rights and in the national Constitution.

The Austrian Constitutional Court sent a preliminary question to the CJEU asking about the compatibility of the 2006 Data-Retention Directive with Articles 7, 8 and 11 of the European Union Charter of Fundamental Rights^{XLVIII}. Furthermore, the Constitutional Court underlined the importance of interpreting the provisions of the Directive 2006/24 on data retention in light of the ECHR, considering that the latter had the rank of a federal constitutional law in the domestic legal order. One of the questions asked by the Austrian judges concerned the interpretation of Article 52.3, paragraph 5 of the Preamble, as well as the comments on Article 7 of the Charter, corresponding to the rights set up in Article 8 of the ECHR. The Court of Justice will have to provide an interpretation of the Charter in conformity to the ECHR while also protecting the Austrian constitutional interest with regard to the protection of personal data. The High Court of Ireland also challenged the validity of Articles 3, 4 and 6 of the 2006 Directive on Data Retention with regard to the limitation of the rights of the applicant with regard to mobile telephony and its compatibility with Article 5(4) TEU, Article 21 TFEU and with Articles 7, 8, 11 and 41 of the Charter of Fundamental Rights^{XLIX}. In the same vein, the Spanish Constitutional Tribunal, in a decision of 30 November 2000, quoted Article 8 of the Charter of Fundamental Rights as an essential element for the existence of the fundamental right of the protection of personal data.

Before that, the CJEU had already answered a similar preliminary question regarding the interpretation of Directive 95/47/CE^L in *Österreichischer Rundfunk e.a.*^{LI} sent by Austrian Constitutional Court. Austria had transposed the Directive on Data Protection through a Federal Act concerning the Protection of Personal Data^{LII} that entered into force on 31st



December 1999. The Court of Luxembourg answered the question in the same terms as the ECHR with regard to the justifications allowed for derogations from the right to a private life, set in Article 8 §2 of the ECHR. The Court of Luxembourg left a margin of appreciation to national authorities. It is for domestic judge to operate the proportionality test between a State's interest to guarantee an optimum use of public funding and the gravity of the threat to the right of private life of concerned persons. Thus, the deferent dialogue between the European Courts (the CJEU and the ECtHR) and domestic (constitutional) courts is challenged by the cases related to the implementation of the Data Retention Directive^{LIII}.

Austria is under close monitoring of the European Commission for the non-transposition of the 2006 Data Retention Directive. The CJEU has found both Austria and Sweden in violation of their obligations under EU law for the non-transposition of the Data Retention Directive and an infringement procedure for failure to transpose the Directive in question is also pending against Germany^{LIV}. Other Member States have also considered how to re-transpose the Directive in a manner consistent with domestic constitutional law: Bulgaria revised the transposing national act following the Supreme Administrative Court's decision; and so did Cyprus and Hungary^{LIV}. European institutions, especially the Commission, will take due account of the concerns raised by domestic case-law in the Member States when drafting the proposal for revising the EU legislation on Data Protection.

As a general conclusion on the relationship between supranational and national adjudication processes, what should however be underlined is the increased judicial deference of domestic courts towards the jurisprudence of supranational courts, both the CJEU and the ECtHR. This trend considerably changed the traditional legal approach to the integration of International/European law into domestic legal orders. In terms of adjudication, the CJEU deals with competing claims over who is the last owner of sovereignty; every claim is derived from constitutional sources and each of them enjoys equal normative value. For the time being, the paradigm of deference, based upon a specific understanding of the European principle of loyal cooperation, offers the most pragmatic solution to solve conflicts between norms stemming from different legal orders. The devolution of the judicial function to interpret EU law from the Court of Justice towards domestic courts is a notorious reality, since domestic judges are acting as the EU's



first instance court. In view of the crucial role played by the national courts in the EU adjudication system, the case-law of several domestic courts that have delayed or even invalidated the transposition of the 2006 Data Retention Directive in light of (higher) constitutional safeguards related to human rights protection, also in light of the ECHR's obligations, poses serious legitimacy concerns as regards the EU decision-making process. Once the European Union ratifies the Convention, the EU institutions might be liable (also, possible jointly with Member States) for the non-respect of human rights by EU law. The relationship between the CJEU and the ECtHR still needs to be clarified in terms of contradictory obligations arising for national courts^{LV1}. The key to a deferent dialogue lies in the hands of domestic courts. Normative values underlying the principle of sincere cooperation between judicial authorities at both the national and European level should be at the heart of the dialogue between courts. The most important idea emerging from this study is that conflicts between norms, stemming from different constitutional sources, do not necessarily translate in conflicts between courts. The deference paradigm, through the wise use of the preliminary ruling procedure, is likely to be the most effective path to addressing conflicts between norms from different legal orders - in this way it is also possible to leave aside the question of who is the final legal authority inside Europe.

* PhD from the University of Geneva, Post-Doctoral Researcher at the Faculty of Law, University of Luxembourg. I wish to express my gratitude to Dr Giuseppe Martinico and to the anonymous referees for their comments and suggestions. All remaining errors are my own.

^I *Flaminio Costa v ENEL* [1964] ECR 585 (Case 6/64).

^{II} See for example the famous distinction between 'supremacy' and 'primacy' of EU law made by the Spanish Constitutional Tribunal, case 1/2004 *Constitutional Treaty*, declaration of 13 December 2004, with case note by Castillo de la Torre 2005; BVerfG, 2 BvE 2/08, judgment of 30 June 2009, http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html; Czech CC, case Pl ÚS 29/09 Treaty of Lisbon II, judgment of 3 November 2009. For an English translation of the most important sections see Komárek 2009: 345.

^{III} Directive 2006/24/EC 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. The Directive is currently under revision by EU institutions together with 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 on privacy and electronic communications as the EU intends to harmonize the level of protection of personal data including by amending the information exchanges based on the principle of availability set out in the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data in the framework of police and judicial cooperation in criminal matters, OJ L350 60-71, December 30, 2008.

^{IV} For the purposes of this paper, the model of deferent dialogue between courts has a specific focus on constitutional courts. For a more extensive study on the dialogue between ordinary courts and the CJEU, see Raducu (forthcoming).



^V Article 4 paragraph 2 of the TEU entrenches the recognition that the EU must respect the national identities inherent in Member State's political and constitutional fundamental structures, see CJEU, *Giersch* (2013), Case C-20/12, not yet reported.

^{VI} See “constitutional heterarchy” in Halberstam 2009: 326.

^{VII} Grimm (2012), 275.

^{VIII} ICC, decision n° 170, *Granital*, 5 June 1984. The Italian Court's position was nuanced over time as when it accepted to analyse the compatibility of a regional law with a European directive, making as such small steps to a more integrated multi-level legal order in Europe, see CCI, decision n° 406, 24 October 2005.

^{IX} According to Article 11 and Article 117 of the Italian Constitution [State and Regional Legislative Power] “Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations”. This provision resulted from the 2001 Italian constitutional reform that was depicted as paving the way for the constitutional acceptance of European law primacy and led to the change into a deferential position of the Italian Constitutional Court towards the CJEU, see more on the context of the decision in Martinico and Fontanelli 2008: 14.

^X Article 23 of the German Constitution provides for the transfer of powers to the European Union, subject to the approval by the national Parliament, but these provisions do not allow for the absolute primacy of the Treaties. According to constitutional courts, EU law must be interpreted in light of the Constitution, which determines the limits of the possible transfer or limitation of EU powers.

^{XI} See N. MacCormick and Walker's definition of “constitutional pluralism” (Maduro 2003: 504).

^{XII} *Solange II* (22 October 1986) *BVerfGE* 73, 339 2 BvR 197/83, Headnotes pt.2. Later on, in *Honeywell* the Federal CC has set up important procedural and substantive limits to the exercise of *ultra vires* review in Germany, Case 2 BvR 2661/0, order of 6 July 2010, paras 58.

^{XIII} *Trybunał Konstytucyjny* (Polish Constitutional Court), ruling 27 April 2005 (P 1/05). The Polish Tribunal has suspended the application of the law waiting for the revision of the Constitution, however it did not repeal the law taking due account of international obligations of Poland towards EU treaty. The Polish Tribunal could not establish a dialogue with the CJEU directly via a preliminary ruling as its country did not accept the Court's jurisdiction in the former third pillar.

^{XIV} The Czech Constitutional Court did not find national implementing measures incompatible with the national Constitution, Pl. ÚS 66/04, 3 May 2006.

^{XV} *BverfGE*, 18 July 2005 (2236/04) repealed the national law implementing the arrest warrant as a whole. The Court did not ask for a preliminary ruling.

^{XVI} *Advocaten voor de Wereld* Case C- 303/05 [2007] ECR I-03633.

^{XVII} Claes 2006: 141.

^{XVIII} Case C-36/02, *Omega* [2004] ECR I-9609, 14.

^{XIX} The ECtHR has already stated that a State will be presumed not to have departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of an international organisation which provides equivalent protection to that afforded by the Convention. The Court has thus found that, where they implement EU law without being left any margin of discretion, Member States comply with the Convention in so far as the EU legal order ensures a level of human rights protection that is “equivalent” to their obligations under the Convention as regards both the substantive guarantees offered and the mechanisms controlling their observance, ECtHR, *Bosphorus c Irlande*, 30 June 2005, n 45036/98, 165. However, deference ceases where human rights protection at EU level is “manifestly deficient” (in which case the presumption is rebutted) or where Member States do in fact benefit from a margin of appreciation when they implement EU law (in which case the presumption is simply not applicable). Recent jurisprudence shows the will of the ECtHR to limit the presumption of «equivalent protection» between the EU and the ECHR systems. In *Porse v Austria*, 18 June 2013, n 3890/11, Article 8 was not infringed by Austria as the Court reiterated that the contracting State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion, and the presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. Austrian courts had not been exercising any discretion when they ordered the enforcement of the return orders in contrast with the position of national authorities in *M.S.S. v. Belgium and Greece*. Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in European Union law by asking the CJEU for a preliminary ruling (contrast the position in *Michaud v. France*, 6 December 2012, no. [12323/11](#), §114). A receiving State might be obliged to cooperate “blindly” under EU law, while the Strasbourg approach would prescribe an individual assessment followed by a refusal to cooperate if it appears that the Member State of



origin cannot be presumed to comply with its conventional obligations.

^{xx} This issue will not however be dealt with in the present contribution, Cassese 2010.

^{xxi} On the “silent” dialogue, see Sarmiento 2012.

^{xxii} “3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

^{xxiii} Article 19 § 2, second sentence of the TEU imposes to Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

^{xxiv} VfSlg, 14.390/1995, according to Austrian judge the refusal to send a preliminary question constitutes a violation of the domestic competencies of the ordinary judge that includes the observance of the Article 267 TFEU; Ústavní soud, 08.01.09, II. ÚS 1009/08, www.nalus.usoud.cz.

^{xxv} Bobek 2008.

^{xxvi} Ord. 103/2008, the Italian Constitutional Court partially gave up its well-established jurisprudence by admitting that it is a last instance court under Article 267 TFEU for reviewing direct (*principaliter*) proceedings and thus bound to send for a preliminary ruling, however in case of an indirect constitutional review of norms (*incidenter proceedings*) the Italian constitutional judge remains the only one to review the case. The technique of “dual preliminary” allows the Italian Constitutional Court to maintain both its dialogue with the CJEU as well as its authority over ordinary judges, see more in Cartabia 2007 and Martinico and Fontanelli 2008.

^{xxvii} 4 April 2013, Decision 2013-314P QPC of *Conseil Constitutionnel*: the question was referred during the priority constitutional review (*Question prioritaire de constitutionnalité*) regarding the transposition in national law of the Arrest-Warrant Decision. Article 88-2 of French Constitution regards the conformity of transposition with EU law. However, the constitutional judge still holds the right to examine the conformity of national legislation with fundamental rights that constitute part of French constitutional core (“bloc de constitutionnalité”).

^{xxviii} Case C-224/01, *Köbler* [2003], ECR I-10239. Bernard Hofstötter shows how “the barking dog of State liability for judicial acts does not bite in the instant case, which should ensure acceptance in the Member States”, Hofstötter 2005.

^{xxix} See more on this concept in Claes et al 2012.

^{xxx} For a wider overview of the techniques used by the ICC to open a ‘hidden dialogue’ with the CJEU, see Martinico and Fontanelli 2008.

^{xxxi} This is a specific feature of preliminary ruling procedure as a court-to-court procedure that do not impose to take into account the parties’ opinions. On the limits of the principle of party autonomy, see Meij 2011: 263.

^{xxxii} On the ‘empowerment’ of ordinary judge and the reticence of superior courts linked to the doctrine of direct effect and supremacy of EU law, see Slaughter, Stone and Weiler 1998; Claes 2006; Mattli and Slaughter 1996: 10.

^{xxxiii} Tridimas 2006: 422.

^{xxxiv} Canivet 2007.

^{xxxv} Claes 2006: 141.

^{xxxvi} In *Omega*, the CJEU acknowledged that there is no European definition on the principle of human dignity so it left it to national court to decide on the necessity and appropriateness of a particular national measure.

^{xxxvii} For an example of judicial restraint, see case C-391/09, *Runevič-Vardyn* (2011), ECR I-03787, whereas the CJEU upheld the respect for the constitutional statute of language of Member States.

^{xxxviii} CJEU, Case C-101/08, *Audiolux* (2009), ECR I-0982.

^{xxxix} Brussels, 18.4.2011, COM (2011) 225 final.

^{xl} Judgment of the Czech Constitutional Court of 22 March 2011 on the provisions of section 97 paragraph 3 and 4 of Act No. 127/2005 Coll. on electronic communications and amending certain related acts and Decree No 485/2005 Coll. on the data retention and transmission to competent authorities. See also, *Ústavní soud*, 31.01.2012, ÚS 5/12 (Slovak Pensions XVII – application of the Agreement between the CR and the SR on Social Security, obligations in international and EU law), the Constitutional Court ruled that it will not apply a CJEU judgment because the Court has exceeded the scope of the powers transferred to the EU and



hence acted *ultra vires*.

^{XL.I} *BVerfGE*, 2 March 2010, 1 *BvR* 256/08. the German law was declared unconstitutional and void by the German Constitutional Court as the implementing law was contrary to the constitutional right of privacy and the restriction of freedoms was not proportional to the objectives declared.

^{XL.II} Decision no 1258 from 8 October 2009 of the Romanian Constitutional Court, Romanian Official Monitor No 789; 23 November 2009.

^{XL.III} The Polish Constitutional Tribunal goes further in reviewing the conformity of the EU regulation with human rights enshrined in the Polish Constitution. *Trybunał Konstytucyjny*, 16.11.2011, Ref. No. SK 45/09, <http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf>, which led to an ambiguous result that goes beyond the German CC's statement: any future complainant would thus have to "make probable that the challenged act of EU secondary legislation causes considerable decline in the standard of protection of the rights and freedoms" in the EU.

^{XL.IV} ECtHR, *Rotaru v. Romania* 2000, *Sunday Times v. UK* 1979 and *Prince Hans-Adam of Liechtenstein v. Romania* 2001.

^{XL.V} In case of a clash of competence between domestic norms and supranational norms protecting human rights, the Constitution settles the superiority of interpretation in favor of the ECHR, see Article 20, par. 1 of Romanian Constitution: "Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to".

^{XL.VI} See in a comparative perspective the Polish Tribunal's judgments: judgment of 10.05.2000, K 21/99 (proceedings of issuing the security certificates in the Act on the protection of secret information); judgment of 10.04.2002, K 26/00 (statutory prohibitions of political party membership); judgment of 7.03.2000, K 26/98 (provision prohibiting trade unions for professional soldiers).

^{XL.VII} Further on the attitude of Romanian courts towards EU/ECHR law, see Raducu 2010.

^{XL.VIII} 28 November 2012, VfGH, G 47/12-11 G 59/12-10 G 62,70,71/12-11, www.vfgh.gv.at/cms/vfghsite/attachments/5/9/4/CH0007/CMS1363700023224/vorratdatenspeicherung_v_orlage_eugh_g47-12.pdf.

^{XL.IX} Preliminary ruling still pending, C-293/12, *Digital Rights Ireland*.

^L 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, OJ L 281 31-50, November 11, 1995. This instrument adopted under the EU internal market competence harmonizes the standards of protection of personal data within the Member States and provides for a higher level of protection than the one guaranteed by Article 8 ECHR and operates full harmonization of the national laws.

^{L¹} The CJEU stated that the directive also applies to purely internal situations in *Rechnungshof v. Österreichischer Rundfunk*, joined cases C-465/00, C-138/01 et C-139/01, 20 May 2003, [2003] ECR I-4989, preliminary ruling sent by the administrative Court (*Verfassungsgerichtshof*) and Supreme Court in civil and criminal matters (*Oberster Gerichtshof*) regarding to the processing of personal data — Directive 95/46/EC — Protection of private disclosure of data on the income of employees of bodies subject to control by the *Rechnungshof*. See also, CJEU, Order, 19 february 2009, *LSG-Gesellschaft zur Wahrnehmung v Tele2 Telecommunication GmbH*, C-557/07, on the protection of confidentiality of electronic communications on the Directive 2002/58/EC.

^{L¹¹} *Datenschutzgesetz* 2000 (DSG 2000), BGBl. I Nr. 165/1999. On Strasbourg side, see *Leander v. Sweden*, judgment of 26 March 1987, App. No. 9248/81, Series A 116-22; *Amann v. Switzerland*, judgment of 16 February 2000, App. No. 27798/95, EHRR 2000-II; *Halford v. United Kingdom*, 25 June 1997, App. No. 20605/92, EHRR 1997-III and *Rotaru c. Roumanie*, judgment of 30 November 2006, App. No. 29683/02, EHRR 2000-V.

^{L¹¹¹} See on the general relationship between EU law and ECHR, Martinico:2013.

^{L^{1V}} CJEU, *Commission v Austria*, Case C-189/09 and *Commission v Sweden*, Case C-185/09. Sweden was brought for a second time to the Court for failure to comply with the judgment in Case C-185/09, requesting the imposition of financial penalties under Article 260 of the TFEU, following a decision of the Swedish Parliament to postpone the adoption of legislation for 12 months. See also, *Commission v Germany*, Case C-329/12.

^{L^{1V}} Bulgarian Supreme Administrative Court, decision no. 13627, 11 December 2008; Supreme Court of Cyprus Appeal Case Nos. 65/2009, 78/2009, 82/2009 and 15/2010-22/2010, 1 February 2011; the Hungarian constitutional complaint was filed by the Hungarian Civil Liberties Union on 2 June 2008.

^{L^{1V1}} In *Kamberaj* (2013), Case C-617/10, not yet reported, the CJEU refused to pronounce upon the



relationship between domestic legal order and the ECHR, see further Martinico 2013 and Raducu 2014.

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