Case C-339/20

Request for a preliminary ruling

Date lodged:

24 July 2020

Referring court:

Cour de cassation (France)

Date of the decision to refer:

1 April 2020

Applicant:

VD

[…]

FRENCH REPUBLIC

[…]

JUDGMENT OF THE COUR DE CASSATION (COURT OF CASSATION), CRIMINAL CHAMBER

OF 1 APRIL 2020

VD has brought an appeal against judgment No 10 of 20 December 2018 of the Chambre de l'instruction (Indictment Division) of the Cour d'appel de Paris (Court of Appeal, Paris), Second Section, which, in the course of the investigation of VD on charges of insider dealing and money laundering, ruled on VD's application for the annulment of procedural documents.

[…] **[Or. 2]** […] [*procedural matters*]

Facts and procedure

1 […] [*introductory wording*]

2 Further to an application made by the prosecutor on 22 May 2014, a judicial investigation was opened in respect of acts constituting the offence of insider dealing and concealment.

3 The scope of that judicial investigation was extended, following a first supplementary application to that effect made on 14 November 2014, to the offences of insider dealing, aiding and abetting and concealment of those offences. Further to a report issued on 23 and 25 September 2015 by the Secretary General of the Autorité des marchés financiers (French Financial Markets Authority (AMF)), and the communication of documents from an investigation by that independent public authority (including, inter alia, personal data relating to the use of telephone lines), that investigation was extended, following three supplementary applications to that effect made on 29 September and 22 December 2015, to securities in CGG, Airgas and Air Liquide or to any other financial instruments that might be linked to them, in connection with the same offences as well as those of aiding and abetting, corruption and money laundering.

4 Then, on 22 December 2015, an order was made for the acts relating to the securities in CGG and Airgas to be investigated separately; on 20 April 2017, a further such order was made for the acts relating to securities in CGG to be investigated in isolation.

5 Having been charged on 10 March 2017 with acts in connection with those securities that constitute offences of insider dealing and money laundering, VD, on 5 September 2017, made an application for a declaration of invalidity and, on 19 October 2018, lodged two statements of case for the annulment of procedural documents.

First plea in law

[…]

6 […] **[Or. 3]**

7 […]

[…]

8 […]

9 […] [*Plea alleging the unconstitutionality of Article L.465-1 of the Code monétaire et financier (Monetary and Financial Code), declared devoid of purpose by the Cour de cassation (Court of Cassation)*]

Second and third pleas in law

[…]

10 […]

11 […]

[…] **[Or. 4]** […]

12 […]

13 […]

[…]

14 […]

15 […] **[Or. 5]** […] [*Pleas alleging infringement of Article 6(1) of the European Convention on Human Rights, [infringement] of national provisions, failure to state reasons, lack of legal basis and absence from the case file of material from the initial judicial investigation, rejected by the Cour de cassation (Court of Cassation)*]

Fourth plea in law

Description of the plea

16 This plea alleges infringement of Articles 6(1) and 8 of the European Convention on Human Rights, Articles 7, 8 and 11 and 52 of the Charter of Fundamental Rights of the European Union, Article 15(1) of Directive 2002/58/EC of 12 July 2002, Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code), Articles L. 14-1 and R. 10-13 1 of the Code des postes et communications électroniques (Postal and Electronic Communications Code), Article 112-4 of the Code pénal (Criminal Code), the preliminary articles and Articles 591 and 593 of that Code, failure to state reasons and lack of legal basis.

17 The plea criticises the judgment under appeal in so far as it held that the application was unfounded and that there was no need to annul procedural material or documentation, given:

‘(1) first, that, since a statutory provision applicable to the dispute has been found to be incompatible [with EU law] by decision of the Court of Justice of the European Union (‘Court of Justice’), the national court must rule in accordance with the decision as to incompatibility; that, in taking the view that “the provisions of Article L. 621-10 do not appear to be contrary to Article 15(1) of Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector”, when it should

have acted in such a way as to take into account the incompatibility of Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code) [with EU law], the Cour d'appel (Court of Appeal) infringed the abovementioned provisions;

(2) secondly, and in any event, that any judgment or order must contain reasons such as to justify the decision contained therein, and a failure to state adequate reasons amounts to a failure to state reasons; that, by relying on a judgment of the Court of Justice of the European Union of 2 October 2018 in order to dismiss VD's application for a declaration of invalidity, without stating how the case-law cited and adopted by it precluded the application to the present case of the decision declaring Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code) to be incompatible [with EU law], the court hearing the substance of the case misconstrued the meaning and scope of the abovementioned texts'.

The Court's response

18 In rejecting the plea as to the incompatibility of Articles L. 621-10 of the Code monétaire et financier (Monetary and Financial Code) and Article L. 34-1 of the Code des postes et communications électroniques (Postal and Electronic Communications Code) with the requirements of Directive 2002/58/EC of 12 July 2002, read in the light of the case-law of the CJEU, the lower court, after **[Or. 6]** recalling the circumstances in which the personal data concerning, inter alia, VD were collected, notes that Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code), which confers the power to procure connection data on those officials of an administrative authority who are so authorised and bound by professional secrecy, does not appear to be contrary to Article 15(1) of the abovementioned directive.

19 The lower court finds that the same is true of the provisions of Article L. 34-1 of the Code des postes et communications électroniques (Postal and Electronic Communications Code) owing to the restrictions imposed by Article R. 10-3 I as regards both the data to be retained by operators and the period of their retention.

20 It notes that Article 23([2])(h) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse allows the competent authorities to require, in so far as permitted by national law, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to the investigation of an infringement of point (a) or (b) of Article 14, concerning the prohibition on engaging or attempting to engage in insider dealing and on urging or inciting a third party to engage in insider dealing, or of Article 15, concerning the prohibition of market manipulation.

21 The lower court infers from this that no invalidity can arise from the application of provisions which comply with a European regulation, an EU legal act of general

application all of the provisions of which are binding and which is directly applicable in the legal order of the Member States to all legal persons.

22 In support of his claim that the judgment under appeal should be set aside, the applicant submits, in essence, that the fact that the data were collected on the basis of the abovementioned provisions, which provide for the general and indiscriminate retention of data, was in breach of Directive 2002/58/EC, as interpreted by the CJEU, and that the provisions of Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code), in the version resulting from the Law of 26 July 2013, impose no limits on the right of AMF investigators to procure retained data.

23 On that point, the Advocate General [to the Cour de cassation (Court of Cassation)] concludes that it is necessary to put two questions to the CJEU, the first concerning the compatibility of the conditions governing the retention of personal connection data by private operators, the second concerning the conditions under which the AMF may access those data under Article L. 621-10, cited above, in the version applicable at that time, account being taken of the provisions of Regulation (EU) No 596/2014 of 16 April 2014 **[Or. 7]** on market abuse and of the obligations incumbent on Member States under that regulation, which repealed Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation.

24 In response, according to the applicant, there is no need to refer a question to the CJEU for a preliminary ruling, since that court has already given a clear ruling on the meaning of Directive 2002/58/EC of 12 July 2002.

25 For the purposes of examining this plea, a distinction must be drawn between the detailed rules for accessing connection data, on the one hand, and those governing the storage of such data, on the other.

Access to connection data

26 In its judgment in *Tele 2 Sverige* of 21 December 2016 (Joined Cases C-203/15 and C-698/15), the Court of Justice of the European Union held that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8, 11 and 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as '*precluding national legislation governing the protection and security of traffic and location data ... where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union*' (paragraph 125).

27 For its part, the Conseil constitutionnel (Constitutional Council), by decision of 21 July 2017, declared the first paragraph of Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code) to be unconstitutional on the ground that the procedure for access by the AMF, as it existed at the material

time, was not consistent with the right to respect for private life, protected by Article 2 of the [French] Declaration of Human and Civic Rights. However, taking the view that the immediate repeal of the contested provisions would have manifestly excessive consequences, the Conseil constitutionnel (Constitutional Council) postponed that repeal until 31 December 2018. Drawing the necessary inferences from that declaration of unconstitutionality, the legislature, by Law No 2018-898 of 23 October 2018, introduced a new Article L. 621-10-2, which provides that all access to connection data by AMF investigators is to be subject to prior authorisation by another independent administrative authority known as the 'Access Request Controller'[.]

28 Given that the temporal effects of the decision of the Conseil constitutionnel (Constitutional Council) were postponed, the view must be taken that the unconstitutionality of the legislative provisions applicable at the material time is not such as to support an inference of invalidity. However, even though, according to Article L. 621-1 of the Code **[Or. 8]** monétaire et financier (Monetary and Financial Code), both in the version applicable at the time of the contested acts and in its current version, the AMF is 'an independent public authority', the power conferred on its investigators to obtain connection data without prior review by a court or another independent administrative authority was not consistent with the requirements laid down in Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union, as interpreted by the CJEU.

29 The only question that arises is whether the consequences of the incompatibility of Article L. 621-10 of the Code monétaire et financier (Monetary and Financial Code) [with EU law] may be postponed.

Retention of connection data

30 In its judgment in *Tele 2 Sverige* of 21 December 2016 (Joined Cases C-203/15 and C-698/15), the Court of Justice of the European Union held that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8, 11 and 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as '*precluding national legislation which, for the purpose of fighting crime, provides for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication*' (paragraph 112).

31 In the present case, retained data were accessed by the AMF on suspicion of the commission of insider dealing and market abuse likely to constitute serious criminal offences and on the ground that, in the interests of the effectiveness of its investigation, it needed to cross-check various items of data retained for a certain period of time in order to identify inside information, shared between several interlocutors, revealing the existence of unlawful practices in that regard.

32 Those investigations by the AMF meet the obligations which Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider

dealing and market manipulation (market abuse) imposes on States to designate a single administrative authority, the powers of which, defined in Article 12(2)(d), include the power to demand 'existing telephone and existing data traffic records'.

33 Regulation (EU) No 596/2014 of 16 April 2014 on market abuse, which replaced the abovementioned directive with effect from 3 July 2016, establishes the existence, as expressed by the definition of its purpose in Article 1 thereof, of 'a common regulatory framework for insider dealing, the unlawful disclosure of inside information and market manipulation … as well as **[Or. 9]** measures to prevent market abuse to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets'.

34 It provides, in Article 23(2)(g) and (h), that the competent authority may require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions.

35 The competent authority may also require, in so far as permitted by national law, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to the investigation of an infringement of point (a) or (b) of Article 14, concerning insider dealing and the unlawful disclosure of inside information, or Article 15, concerning market manipulation.

36 That text also emphasises (in recital 65) that such connection data constitute crucial, and sometimes the only, evidence to detect and prove the existence of insider dealing and market manipulation, since they offer means of establishing the identity of a person responsible for the dissemination of false or misleading information or that persons have been in contact at a certain time, and that a relationship exists between two or more people.

37 Noting that the exercise of such powers may amount to interferences with the right to respect for private and family life, home and communications, it requires Member States to have in place adequate and effective safeguards against any abuse in the form of limits confining those powers exclusively to situations in which they are necessary for the proper investigation of serious cases where the States have no equivalent means for effectively achieving the same result. It follows from this that some of the market abuses concerned by that provision are to be regarded as serious offences (recital 66).

38 In the present case, the inside information likely to form the material element of unlawful market practices was essentially verbal and secret.

39 The question therefore arises as to how Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union, is to be reconciled with the requirements laid down in the abovementioned provisions of Directive 2003/6 and Regulation 596/2014. **[Or. 10]**

40 Given that, for the purposes of answering such a question, the existing case-law does not appear to shed the necessary light on this unprecedented legal and factual framework, it cannot be said that there is no scope for any reasonable doubt as to the correct application of EU law. It is therefore necessary to refer questions to the Court of Justice.

41 In the event that the answer given by the Court of Justice is such as to prompt the Cour de cassation (Court of Cassation) to find that the French legislation on the retention of connection data is not compatible with EU law, it seems appropriate to ask the question whether the effects of that legislation could be temporarily maintained in order to avoid legal uncertainty and to enable the data previously collected and retained to be used for one of the purposes referred to in that legislation.

42 It is therefore necessary to refer to the Court of Justice of the European Union for a preliminary ruling the following questions set out in the operative part of this judgment.

ON THOSE GROUNDS, the Court hereby:

[…] [*rejects the second and third pleas*]

[…] [*declares the first plea devoid of purpose*]

REFERS the following questions to the Court of Justice of the European Union:

1) Do Article 12(2)(a) and (d) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation and Article 23(2)(g) and (h) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, which replaced that directive from 3 July 2016, read in the light of recital 65 of that regulation, not imply that, account being taken of the covert nature of the information exchanged and the fact that the potential subjects of investigation are members of the general public, the national legislature must be able to require electronic communications operators to retain connection data on a temporary but general basis in order to enable the administrative authority referred to in Article 11 of the Directive and Article 22 of the Regulation, in the event of the emergence of grounds for suspecting certain persons of being involved in insider dealing or market manipulation, to require the operator to surrender existing records of traffic data in cases where there are reasons to suspect that the records so linked to the subject matter of the investigation may prove relevant to the production of evidence of the actual commission of the breach, to the extent, in particular, **[Or. 11]** that they offer a means of tracing the contacts established by the persons concerned before the suspicions emerged?

2) If the answer given by the Court of Justice is such as to prompt the Cour de cassation (Court of Cassation) to form the view that the French legislation on the retention of connection data is not consistent with EU law, could the effects of

that legislation be temporarily maintained in order to avoid legal uncertainty and to enable data previously collected and retained to be used for one of the objectives of that legislation?

3) May a national court temporarily maintain the effects of legislation enabling the officials of an independent administrative authority responsible for investigating market abuse to obtain access to obtain connection data without prior review by a court or another independent administrative authority?

[…] [*stays the proceedings in relation to the fourth plea*]

[…]