Court of Justice of the European Union
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Advocate General's Opinion in Joined Cases C-793/19 SpaceNet and C-794/19 Telekom Deutschland, in Case C-140/20 Commissioner of the Garda Síochána and Others and in Joined Cases C-339/20 VD and C-397/20 SR

Press and Information

Advocate General Campos Sánchez-Bordona reiterates that the general and indiscriminate retention of traffic and location data relating to electronic communications is permitted only in the event of a serious threat to national security

The Court's case-law [1] on the retention and access to personal data generated in the electronic communications sector has given rise to concerns in certain Member States. Certain national courts referred a question to the Court for a preliminary ruling because they feared that that case-law could deprive State authorities of an instrument necessary to safeguard national security and to combat crime and terrorism. By two judgments of the Grand Chamber of 6 October 2020 in [2] *Privacy International* and *La Quadrature du Net,* the Court confirmed, by placing it in context, the case-law in *Tele2 Sverige.* Although one might have expected the debate to be settled, the Court having endeavoured to explain in detail, in dialogue with the national courts, the reasons which, despite everything, justify the views adopted, that does not seem to have been the case.

Before 6 October 2020, three other requests for a preliminary ruling calling into question the case-law relating to exceptions to the confidentiality of communications and users' data had been received by the Court. Two of those applications were referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany), before which an appeal on a point of law was brought by the Federal Network Agency against the judgments upholding the actions brought by two companies providing internet access services, in which they challenged the obligation to store their customers' telecommunications traffic data from 1 July 2017, laid down in German legislation [3] (Joined Cases C-793/19 and C-794/19). The third was referred by the Supreme Court (Ireland), in the context of civil proceedings in which a person convicted of murder and sentenced to life imprisonment challenges the validity of certain provisions of the Irish legislation [4] under which telephony data had been retained and made accessible and on which certain incriminating evidence was based (Case C-140/20). After examining the answers provided by the Court of

[1] Judgment of 8 April 2014, *Digital Rights Ireland and Others* (Joined Cases C-293/12 and C-594/12; see PR No 54/14), declaring invalid 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 2006 L 105, p. 54); judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (Joined Cases C-203/15 and C-698/15; see Press Rrelease No 145/16), in which it was held that Article 15(1) of 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) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009, L 337, p. 11), precludes national legislation which provides for general and indiscriminate retention of traffic and serious location data; judgment of 2 October 2018, *Ministerio Fiscal* (C-207/16; see Press Release No 141/18), which confirmed the interpretation of Article 15(1) of Directive 2002/58, explaining the importance of the principle of proportionality in that regard.

[2] Judgments of 6 October 2020, *Privacy International* (C-623/17) and *La Quadrature du Net and Others* (Joined Cases C-511/18, C-512/18 and C-520/18) (see Press Rreleae No 123/20).

[3] Gesetz zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten of 10 December 2015 (Law introducing a storage obligation and a maximum storage period for traffic data).

[4] Communications (Retention of Data) Act 2011.

Justice in the judgments of 6 October 2020, the national courts concerned decided to maintain their requests for a preliminary ruling.

Two further requests for a preliminary ruling were referred by the Cour de cassation (Court of Cassation, France), which is called upon to rule on an action brought by two natural persons accused of insider dealing and money laundering, following an investigation by the Autorité des marchés financiers (Financial Markets Authority) in which personal data relating to the use of telephone lines, collected on the basis of the Code monétaire et financier (Monetary and Financial Code), were used (Joined Cases C-339/20 and C-397/20).

In his Opinion delivered today in those cases, **Advocate General Manuel Campos Sánchez-Bordona considers that the answers to all the questions referred are already in the Court's case-law or can be inferred from them without difficulty.**

Joined Cases C-793/19 and C-794/19

While recognising the progress made in the **German legislation**, which show a deliberate intention to comply with the Court's case-law, the Advocate General observes that **the general and indiscriminate storage obligation which it imposes covers a very wide range of traffic and location data**. **The time limit imposed on that storage does not remedy the issue,** since, apart from the situation justified by the defence of national security, **the storage of electronic communications data must be targeted,** because of the serious risk entailed by their general storage. In addition, the Advocate General points out that, in any event, **access to that data entails a serious interference** with fundamental rights to private and family life and the protection of personal data, [5] irrespective of the duration of the period for which access to those data is requested.

Case C-140/20

According to the Advocate General, **the questions referred by the Supreme Court were answered in the judgments in *La Quadrature du Net* and *Prokuratuur,*** [6] the latter of which post-dated the decision of the Irish court to maintain its reference for a preliminary ruling.

Mr Campos Sánchez Bordona insists that **the general and indiscriminate retention of traffic and location data is justified only by the protection of national security, which does not include the prosecution of offences, including serious offences**. **By permitting,** for reasons going beyond those inherent in the protection of national security, **the preventive, general and indiscriminate retention of traffic and location data of all subscribers for a period of two years, Irish legislation does not therefore comply with the Directive** on privacy and electronic communications**.**

Moreover, **access by the** competent national authorities **to retained data does not appear to be subject to prior review by a court or an independent authority**, as required by the case-law of the Court, but to the discretion of a police officer of a certain rank. The Supreme Court will have to ascertain whether that official satisfies the conditions laid down in the case-law relating to the status of 'independent authority' and whether it is a 'third party' in relation to the authority requesting access. The Advocate General also points out that that review must take place before, not after, access to the data.

Finally, the Advocate General reiterates, as in the judgment in *La Quadrature du Net,* that **a national court cannot limit in time the effects of a declaration of illegality of domestic legislation incompatible with EU law.**

Joined Cases C-339/20 and C-397/20

[5] Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.
[6] Judgment of 2 March 2021, *Prokuratuur (Conditions for access to electronic communications data)* (C-746/18) (see Press Release No 29/21).

The Advocate General observes that **those two proceedings essentially relate, like the three previous proceedings, to the issue of whether the Member States may impose an obligation to retain electronic communications traffic data in a general and indiscriminate manner. For that reason**, even though, on that occasion, the Directive [7] and the Regulation [8] on market abuse come into play, **the Advocate General takes the view that the Court's case-law as summarised in *La Quadrature du Net* is applicable in that context.**

He states that the provisions concerning **the processing of data traffic records** set out in the **Directive and the Regulation on market abuse must be interpreted in the light of the scheme of the Directive on privacy and electronic communications**, which constitutes the reference standard in that regard.

The Advocate General points out that **neither the Directive nor the Regulation on market abuse confers specific and autonomous powers to retain data**; they merely **authorise** competent authorities **to access the data retained in existing records, which must have been drawn up in a manner consistent with the Directive on privacy and electronic communications**. At issue, in particular, are **records or recordings which may be retained in order to combat serious crime and to safeguard public security**, which cannot be assimilated to those retained in a preventive, generalised and indiscriminate basis for the defence of national security, failing which the delicate balance underpinning the judgment in *La Quadrature du Net* would be undermined. Accordingly, **national legislation** which requires electronic telecommunications undertakings **to retain traffic data on a general and indiscriminate basis in the context of an investigation into insider dealing or market manipulation and abuse is therefore contrary to EU law. Nor may a national court, in such circumstances, limit in time the effects of that incompatibility.**

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

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

[7] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

[8] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).