COURT OF JUSTICE
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Judgment of the Court in Joined Cases C-339/20 | VD and C-397/20 | SR

The general and indiscriminate retention of traffic data by operators providing electronic communications services for a year from the date on which they were recorded is not authorised, as a preventive measure, for the purpose of combating market abuse offences including insider dealing

In addition, a national court cannot restrict the temporal effects of a declaration that national legislation providing for such retention is invalid

Criminal proceedings were brought in France against VD and SR in respect of insider dealing, concealment of insider dealing, aiding and abetting, corruption and money laundering. Those proceedings were brought on the basis of personal data from telephone calls made by VD and SR which were generated when electronic communications services were provided; those data had been sent to the investigating judge by the Autorité des marchés financiers (Financial Markets Authority; 'AMF') after an investigation led by the AMF.

VD and SR brought an appeal before the Cour de Cassation (Court of Cassation, France) against two judgments of the cour d'appel de Paris (Court of Appeal, Paris, France), relying on the case-law of the Court of Justice [1] to challenge the fact that the AMF took provisions of national law as its legal basis for the collection of those data, while those provisions, first, did not comply with EU law in so far as they provided for general and indiscriminate retention of connection data and, second, laid down no restrictions on the powers of the AMF's investigators to require the retained data to be provided to them.

By its request for a preliminary ruling, the Cour de Cassation (Court of Cassation) asks the Court of Justice, in essence, how the relevant provisions of the 'Directive on privacy and electronic communications', [2] read in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), [3] can be reconciled with the relevant provisions of the 'Market Abuse Directive' [4] and the 'Market Abuse Regulation' [5] in the context of provisions of national law which, as a preventive measure, in order to combat market abuse offences including insider dealing, provide for the general and indiscriminate retention of traffic data by operators providing electronic

[1] Judgment of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15 (see also Press Release No 145/16).

[2] 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).

[3] In particular, Articles 7, 8 and 11 and Article 52(1) of the Charter.

[4] 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 (market abuse) (OJ 2003 L 96, p. 16).

[5] 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 (market abuse regulation) and repealing Directive 2003/6 and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

communications services for a year from the date on which they were recorded. In the event that the provisions of national legislation at issue prove to be inconsistent with EU law, the referring court is uncertain as to whether that legislation retains its effects provisionally, so as to avoid legal uncertainty and to allow the data retained on the basis of that legislation to be used for the purposes of detecting insider dealing and bringing prosecutions accordingly.

By today's judgment, the Court of Justice finds, in the first place, that **neither the Market Abuse Directive nor the Market Abuse Regulation** can constitute **the legal basis for a general obligation to retain the data traffic records held by operators providing electronic communications services for the purposes of exercising the powers conferred on the competent financial authorities under those measures.**

In the second place, the Court points out that **the Directive on privacy and electronic communications is the measure of reference on the retention and, more generally, the processing of personal data in the electronic communications sector**. Therefore, that directive also governs the traffic data records held by operators providing electronic communications services, which the competent financial authorities, within the meaning of the Market Abuse Directive and the Market Abuse Regulation, may require from those operators. Consequently, the assessment of the lawfulness of the processing of records held by operators providing electronic communications services must be carried out in the light of the **conditions laid down by the Directive on privacy and electronic communications, as interpreted by the Court**.

The Court finds that the Market Abuse Directive and the Market Abuse Regulation, read in conjunction with the Directive on privacy and electronic communications and in the light of the Charter, **do not authorise the general and indiscriminate retention by operators providing electronic communications services of traffic data for a year from the date on which they were recorded for the purpose of combating market abuse offences including insider dealing.**

In the third place, the Court upholds its case-law according to which EU law precludes a national court from restricting the temporal effects of a declaration of invalidity which it is bound to make under national law in respect of national legislation requiring operators providing electronic communications services to retain generally and indiscriminately traffic and location data due to that legislation being incompatible with the Directive on privacy and electronic communications.

That said, the Court points out that, **in accordance with the principle of procedural autonomy of the Member States, the admissibility of evidence obtained as part of such retention is a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness.** That latter principle requires the national criminal court to **disregard the information and evidence obtained by means of the generalised and indiscriminate retention of traffic and location data in breach of EU law if the persons concerned are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.**

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.

The full text and the résumé of the judgment is published on the CURIA website on the day of delivery.

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