Case C-241/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 April 2022

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

5 April 2022

Appellant:

Advocaat-generaal bij de Hoge Raad der Nederlanden

Subject matter of the main proceedings

The advocaat-generaal (advocate-general) of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has lodged an appeal in cassation in the interest of the law against an order of the rechtbank Gelderland (Gelderland District Court) by which that District Court, in an appeal lodged by the officier van justitie (public prosecutor), set aside the order of the rechter-commissaris (investigating judge) – which rejected the claim of the public prosecutor that the investigating judge should be authorised to request the provision of historical data – and upheld the public prosecutor's claim.

Subject matter and legal basis of the request

The request is made under Article 267, first paragraph, point (b), TFEU and concerns the scope of Directive 2002/58 and the interpretation of the terms 'serious criminal offences' and 'serious crime', as well as the possibility of granting public authorities access to traffic and location data (other than mere identification data).

Questions referred for a preliminary ruling

1. Do legislative measures which relate to granting public authorities access to traffic and location data (including identification data) in connection with the prevention, investigation, detection and prosecution of criminal offences fall within the scope of Directive 2002/58/EC if they concern the granting of access to data which are not retained on the grounds of legislative measures within the meaning of Article 15(1) of Directive 2002/58/EC, but which are retained by the provider on some other ground?

2. a) Do the […] terms 'serious criminal offences' and 'serious crime' […] [used in the judgments of the Court of Justice cited in the order for reference] constitute autonomous concepts of European Union law, or is it incumbent on the competent authorities of the Member States themselves to give substance to those terms?

b) If these are indeed autonomous concepts of European Union law, in what way should it be established whether what is involved is a 'serious criminal offence' or 'serious crime'?

3. Can granting public authorities access to traffic and location data (other than mere identification data) for the purpose of the prevention, investigation, detection and prosecution of criminal offences be permissible under Directive 2002/58/EC if no serious criminal offences or serious crime are involved, that is to say, if in the specific case the granting of access to such data – in so far as may be assumed – causes only a minor interference with, in particular, the right to the protection of the private life of the user as referred to in Article 2(b) of Directive 2002/58/EC?

Provisions of European Union law relied on

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), Articles 1, 2, 3, 5, 6, 9 and 15(1)

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 2002/24/EC

Council Framework Decision 2002/584/JHA [of 13 June 2002] on the European arrest warrant and the surrender procedures between Member States

Case-law of the Court of Justice relied on

Judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16;

Judgment of 2 March 2021, *Prokuratuur*, C-746/18;

Judgment of 21 December 2016, *Tele2 Sverige* v *Watson and Others*, C-203/15 and C-698/15;

Judgment of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18;

Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12;

Judgment of the ECtHR of 4 December 2015, *Zakharov* v *Russia* (CE:ECHR:2015:1204JUD004714306)

Provisions of national law relied on

Wetboek van Strafvordering (Code of Criminal Procedure), Articles 67(1), 126bb, 126cc(1), (2) and (3), 126dd(1), 126n, 126na, 126ng, 126ni, 126u, 126ua, 126ug, 126ui, 126zh, 126zi, 126zja, 126zo, 126zh, 138g, 138h and 149b

Besluit van 3 augustus 2004 houdende aanwijzing van de gegevens over een gebruiker en het telecommunicatie-verkeer met betrekking tot die gebruiker die van een aanbieder van een openbaar telecommunicatienetwerk of een openbare telecommunicatiedienst kunnen worden gevorderd (Decree of 3 August 2004 on the designation of data about a user and telecommunications traffic relating to that user that may be requested from a provider of a public telecommunications network or a public telecommunications service), Articles 1 and 2

Succinct presentation of the facts and procedure in the main proceedings

1 On 10 September 2021, the public prosecutor claimed that the investigating judge should authorise the provision of historical/future data about a user of a communications service and the latter's voice traffic with a Dutch mobile telephone number over the period 9 to 12 August 2021.

2 By decision of 15 September 2021, the investigating judge rejected the claim.

3 On 16 September 2021, the public prosecutor lodged an appeal with the Gelderland District Court.

4 The Raadkamer (panel of three judges) of the Gelderland District Court then annulled the order of the investigating judge and upheld the public prosecutor's claim.

Cassation appeal grounds

5 The Advocate-General of the Supreme Court of the Netherlands has lodged an appeal in cassation in the interest of the law against the order of the Raadkamer of the Gelderland District Court. According to the Advocate-General, his appeal in cassation was prompted by the lack of clarity that has arisen in practice with regard to the conditions under which the public prosecutor may request the disclosure of the traffic and location data of a user of a communications service. In particular, this relates to the question of what requirements arise from Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, and to the case-law of the Court of Justice pertaining to this directive.

Succinct presentation of the reasoning in the request for a preliminary ruling

6 Directive 2002/58/EC lays down rules concerning the provision and retention of traffic and location data as well as identification data by providers of electronic communications services. Article 15(1) of that Directive relates to the legislative measures that Member States may adopt providing for the retention of data for a limited period in connection with the prevention, investigation, detection and prosecution of criminal offences.

7 The Wetboek van Strafvordering does not provide for a general retention obligation for telecommunications providers. The provisions concerning (general) retention periods that were included in the Telecommunicatiewet (Law on Telecommunications) for the purpose of combating crime have been rendered inoperative by the courts as a result of the declaration of invalidity of the Data Retention Directive (Directive 2006/24/EC, judgment in *Digital Rights Ireland and Others* C-293/12 and C-594/12). The powers conferred by the Wetboek van Strafvordering to request traffic and location data as well as identification data are therefore applied with respect to data that have been recorded and retained on a ground other than those statutory provisions that have been declared inoperative (such as a contractual ground).

8 Having regard to the fact that certain provisions of the Telecommunicatiewet have been rendered inoperative, it is important for the referring court to ascertain whether the considerations of the Court of Justice concerning the principle of proportionality in relation to access to traffic and location data (as well as identification data), in *Prokuratuur* C-746/18, *Tele2Sverige and Watson and Others*, C-203/15 and C-698/15, *La Quadrature du Net and Others* C-511/18, C-512/18 and C-520/18, and *Ministerio Fiscal* C-207/16, refer only to data retained pursuant to legislative measures adopted by a Member State under Article 15(1) of Directive 2002/58/EC or to data retained on some other ground, for example, a contractual ground.

9 Having regard to the objective of Directive 2002/58/EC, the wording of Article 5 of that directive, from which it may be inferred that legislative measures may also

relate to the gaining of access to traffic data, and the wording used by the Court in paragraph 113 of the *Tele2Sverige and Watson* judgment (C-203/15 and C-698/15), according to which the conditions governing access to retained traffic and location data are not dependent on 'the extent of the obligation to retain data that is imposed on providers of electronic communications services', the referring court takes the view that that case-law, in so far as it refers to the granting of access to those data, also applies to data retained on grounds other than legislative measures as referred to in Article 15(1) of Directive 2002/58.

10 By its second question referred for a preliminary ruling, the referring court seeks to ascertain whether the terms 'serious criminal offences' and 'serious crime' on which the case-law relating to Article 15(1) of Directive 2002/58/EC is based, constitute autonomous concepts of EU law, or whether it is incumbent on the Member States themselves to give substance to those terms.

11 In that regard, the referring court points out, first of all, that it is only in Article 15(1) that Directive 2002/58/EC refers to 'the prevention, investigation, detection and prosecution of criminal offences', without any further elaboration of the term 'criminal offences'. Directive 2002/58/EC does not contain the terms 'serious criminal offences' and 'serious crime' referred to in the case-law of the Court of Justice.

12 Furthermore, according to the referring court, it follows from the case-law of the Court on the granting of access to traffic and location data (and, in particular, the judgments in *Tele2Sverige* and *Watson and Others* [C-203/15 and C-698/15], *Ministerio Fiscal* C-207/16, *La Quadrature du Net* C-511/18, C-512/18 and C-520/18 and *Prokuratuur* C-746/18) that it is incumbent on the referring courts to determine whether and to what extent the national rules on, inter alia, access by the competent national authorities to retained data satisfy the requirements arising from Article 15(1) of Directive 2002/58. However, the Court's case-law does not set out criteria to be regarded as relevant when it comes to determining, in a specific case, whether a serious criminal offence or serious crime are involved. In the opinion of the referring court, the terms 'serious criminal offences' and 'serious crime' in the Court's case-law do not therefore constitute autonomous concepts of EU law.

13 By its third question referred for a preliminary ruling, the referring court seeks to ascertain whether public authorities may also be granted access to traffic and location data (other than mere identification data) in the case of less serious criminal offences or less serious crime, where the granting of access to those data causes only a minor interference with, in particular, the right to the protection of the private life of the user.

14 According to the referring court, that question must be answered in the affirmative in the light of the grounds set out in the case-law of the Court cited above (and, in particular, in the judgments in *Ministerio Fiscal* C-207/16 and *Prokuratuur* C-746/18) concerning the principle of proportionality. According to the referring

court, it follows from the Court's interpretation of the principle of proportionality that granting public authorities access to data retained by a telecommunications service provider may be justified by the objective of the prevention, investigation, detection and prosecution of criminal offences in general, provided that the granting of such access does not constitute, in a specific case, an interference or a serious interference with (in particular) the right to the protection of private life. The principle of proportionality does not therefore preclude, in such a case, the granting of such access where a criminal offence in a general sense is involved without that offence being capable of being regarded as 'serious' for the purposes of the foregoing.