EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Transfer of phone-tap data to Competition Authority was compatible with the Convention

The case of Ships Waste Oil Collector B.V. and Others v. the Netherlands (applications nos. 2799/16, 2800/16, 3124/16 and 3205/16) concerned the transmission of "by-catch" data, lawfully obtained in criminal investigations through telephone tapping, to another law enforcement authority, the Competition Authority, that had used those data in unrelated administrative investigations into the applicant companies' involvement in price-fixing.

In today's Grand Chamber judgment[1] the European Court of Human Rights held that there had been:

by 12 votes to 5, **no violation of Article 8 (right to respect for correspondence)** of the European Convention on Human Rights in respect of Ships Waste Oil Collector B.V., Burando Holding B.V. and Port Invest B.V.;

by 10 votes to 7, **no violation of Article 8** in respect of Janssen de Jong Groep B.V., Janssen de Jong Infra B.V. and Janssen de Jong Infrastructuur Nederland B.V.; and

by 15 votes to 2, **no violation of Article 13 (right to an effective remedy)**.

The Court found in particular that the transfers of data had been lawful, the procedural safeguards afforded by the domestic law were sufficient, the Dutch courts had adequately balanced the interests of the applicant companies and those of the State, and that the transfers had been necessary for the enforcement of competition law. The Netherlands had thus acted within their discretion ("margin of appreciation").

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicants are six limited liability companies based in the Netherlands.

In the application *Ships Waste Oil Collector B.V. v. the Netherlands* (no. 2799/16), the applicant company, Ships Waste Oil Collector B.V., is a company based in the Netherlands involved in the collection of waste liquids from ships in the Rotterdam region.

In the applications *Burando Holding B.V. v. the Netherlands and Port Invest v. the Netherlands* (nos. 3124/16 and 3205/16), the applicant companies, Burando Holding B.V. and Port Invest B.V., are two Dutch companies also involved in the collection of waste liquids from ships in the Rotterdam region. At the time of the events, the former was the sole shareholder in the latter company.

In 2006 an investigation codenamed "Toto" was begun by the Intelligence and Investigation Service (*Inlichtingen- en opsporingsdienst*) of the Ministry of Housing, Spatial Planning and the Environment into suspected criminal forgery of documents and involvement in the disposal of polluted waste by Burando Holding's and Port Invest's subsidiary company. As part of that, the subsidiary company's phone conversations were monitored, including conversations with employees of Ships Waste Oil Collector.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The relevant conversations were passed with prosecutorial authorisation onto the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit* – since succeeded by the Consumer and Market Authority (*Autoriteit Consument en Markt*)) - on several dates, on the suspicion that they concerned a violation of competition law, specifically price fixing.

Following competition-law proceedings, the companies were found guilty of price fixing and fined: 834,000 euros (EUR) for Ships Waste Oil Collector, EUR 1,861,000 for Burando Holding and Port Invest jointly and severally, with Port Invest liable for the whole amount; and EUR 621,000 for Burando Holding. They appealed to the courts.

In 2013 the Rotterdam Regional Court found in their favour, ruling that there had been no reasoning in the transfer authorisation. That decision was overturned in July 2015 by the Supreme Administrative Court for Trade and Industry. It held that the data from phone tapping had been lawfully transferred to the Competition Authority. It furthermore found that the data transfer had pursued a compelling "general interest, namely the economic well-being of the country" and that "the information about the alleged price-fixing could not reasonably have been obtained by the [Competition Authority] in a different, less intrusive manner".

In the application *Janssen de Jong Groep B.V. and Others v. the Netherlands* (no. 2800/16), the applicant companies, Janssen de Jong Groep B.V., Janssen de Jong Infra B.V. and Janssen de Jong Infrastructuur Nederland B.V., are three Netherlands-based construction companies. Janssen de Jong Groep B.V. is the sole shareholder of Janssen de Jong Infrastructuur Nederland B.V., which is in turn the sole shareholder in Janssen de Jong Infra B.V.

In 2007 an investigation began into alleged bribery of local government officials in respect of government infrastructure contracts under the codename "Cleveland". As suspects, following court authorisation, some of the employees of Janssen companies had their calls intercepted by the police.

Potential price-fixing issues were identified, and police officers gave the Competition Authority officials access, in strict confidence and on police premises, to a selection of transcripts of the intercepted communications. A CD with a selection of audio recordings was passed onto them for information purposes. Subsequently the prosecutor authorised the use of telephone tapping data from the "Cleveland" investigation by the Competition Authority.

Following competition law proceedings, the Janssen companies were found guilty of tender collusion with other companies and fined EUR 3 million. The Janssen companies brought civil proceedings against the State before a provisional measures judge, arguing that the transfer of the intercept data had not been in accordance with the law and had breached Article 8 of the Convention. A request for a provisional measure request was dismissed. The Janssen companies did not appeal.

Administrative-review proceedings against the fine led to an appeal, with the Rotterdam Regional Court quashing the Competition Authority's finding of competition infringements in June 2013, ruling that there had been no reasoning in the transfer authorisation. That decision was overturned in July 2015 by the Supreme Administrative Court for Trade and Industry, which gave the same reasons as in the case of Ships Waste Oil Collector, Burando Holding and Port Invest.

In subsequent proceedings the fine was reduced to EUR 463,000.

Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for correspondence) and 13 (right to an effective remedy), the applicant companies argued that the transmission for use by the Competition Authority of the lawfully intercepted data that were irrelevant to the criminal investigations, was not foreseeable and that the procedural safeguards were insufficient.

The applications were lodged with the European Court of Human Rights on 7 January 2016.

In three judgments of 16 May 2023, a Chamber of the Court found no violation of Articles 8 and 13 in respect of application no. 2799/16, no violation of Articles 8 and 13 in nos. 3124/16 and 3205/16, and no violation in no. 2800/16.

On 3 July and 9 and 10 August 2023 the applicants requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber), and on 25 September 2023 the panel of the Grand Chamber accepted that request.

The Government of the United Kingdom was given leave to intervene as a third party.

A Grand Chamber hearing was held on 6 March 2024.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Marko **Bošnjak** (Slovenia), *President*,
Arnfinn **Bårdsen** (Norway),
Lado **Chanturia** (Georgia),
Mattias **Guyomar** (France),
Georges **Ravarani** (Luxembourg),
Carlo **Ranzoni** (Liechtenstein),
Georgios A. **Serghides** (Cyprus),
Tim **Eicke** (the United Kingdom),
Lətif **Hüseynov** (Azerbaijan),
Jovan **Ilievski** (North Macedonia),
Jolien **Schukking** (the Netherlands),
Raffaele **Sabato** (Italy),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Kateřina **Šimáčková** (the Czech Republic),
Davor **Derenčinović** (Croatia),
Oddný Mjöll **Arnardóttir** (Iceland),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 8

The Court held that transmission of intercept material to another law-enforcement authority should be attended by minimum safeguards, which should be set out in law in order to avoid arbitrariness and abuse. First, the transmission of intercept material beyond the original criminal context for its collection should be limited to such material as has been collected in a Convention-compliant manner. Secondly, the circumstances in which such a transmission may take place must be set out clearly in domestic law. Thirdly, the law must provide for safeguards concerning the examination, storage, use, onward transmission and destruction of the data transmitted. Lastly, the transmission and use of intercept data for a purpose beyond the original criminal context for their collection had to be subject to effective review by a judicial or otherwise independent body.

Furthermore, in the assessment of the necessity in a democratic society of data transmission, the following factors should be taken into account: the nature of the data, the importance of the aim pursued by their transmission, the resulting consequences for the person concerned, as well as the quality of the authorisation procedures and the effectiveness of available remedies.

The Court also found that the minimum safeguards under Article 8 should in principle be the same for natural and legal persons, although some differences might arise as a result of the application of data protection laws to the former. The Court noted that in this case the telephone tapping itself had been validly ordered by a court, and its compliance with the Convention had not been called into question.

The Court was satisfied that the relevant Dutch law – in particular section 39f of the Judicial and Criminal Data Act (*Wet Justitiële en Strafvorderlijke gegevens*) – clearly defined the circumstances in which transfer of intercept material to another law-enforcement authority could happen. The Court also rejected the applicant companies' argument that the Competition Authority's access to certain data prior to transmission authorisation had been unforeseeable.

The aim of the transfer – the economic wellbeing of the country – had been legitimate.

What remained then were the legal safeguards around the prosecutor's authorising of the data transfer. The Court noted that the authorisation of the data transmissions by a non-judicial authority and the absence of prior notice were not problematic as they were compensated for by the existence of an independent after-the-fact judicial review.

The transfer authorisations had not contained any reasoning on their "necessity in a democratic society", which, although not ideal, could be also compensated for with an after-the-fact review, which had been the case for the applicant companies, who had been able to access judicial review and contest the transfers. The reviewing courts assessed the lawfulness and the Convention compliance of the data transfers retrospectively and independently of the prosecutor's assessment. The applicants had not shown the review process to be ineffective.

Noting the careful assessment of the lawfulness of the transfers and the Dutch courts' adequate balancing of the interests of the applicant companies and those of the State, the Court was satisfied that the Netherlands authorities had advanced relevant and sufficient reasons to justify the necessity and proportionality of the data transfers for the purposes of enforcement of competition law. The Netherlands had thus acted within its discretion ("margin of appreciation").

The Court therefore found no violation of Article 8 of the Convention.

Article 13

Given its findings under Article 8, the Court found that the applicant companies had had an effective remedy at their disposal to raise their complaints under that provision. There had therefore been no violation.

Separate opinions

Judge Arnardóttir expressed a dissenting opinion, joined by Judges Serghides and Šimáčkova. Judges Arnardóttir and Serghides expressed a joint dissenting opinion. Judge Serghides expressed a dissenting opinion. Judges Bošnjak and Derenčinović a joint partially dissenting opinion. Judges Guyomar and Ravarani expressed a partially dissenting and partially concurring opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.