Case C-620/19

Request for a preliminary ruling

Date lodged:

20 August 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

4 July 2019

Appellant on a point of law, appellant in the first appeal and defendant:

Land Nordrhein-Westfalen

Respondent in the appeal on a point of law, respondent in the first appeal and applicant:

D.-H. T., acting as insolvency administrator in relation to the assets of J & S Service UG (limited liability)

Bundesverwaltungsgericht

(Federal Administrative Court)

DECISION

…

In the administrative-law case

Mr D.-H. T., acting as insolvency administrator in relation to the assets of J & S Service UG (limited liability), … Euskirchen,

applicant, respondent in the first appeal and respondent in the appeal on a point of law,

… **[Or. 2]**

v

Land Nordrhein-Westfalen (North Rhine-Westphalia),

…

defendant, appellant in the first appeal and appellant on a point of law,

…

Interested party:
The representative of the federal interest
before the Bundesverwaltungsgericht,
… Berlin,

the 7th Chamber of the Bundesverwaltungsgericht
…

made the following order on 4 July 2019:

The proceedings are stayed.

The Court of Justice of the European Union is requested to clarify the following questions concerning the interpretation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119 of 4 May 2016, p. 1) by way of a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union ('TFEU'): **[Or. 3]**

1. Does Article 23(1)(j) of Regulation (EU) 2016/679 also serve to protect the interests of financial authorities?

2. If so, does the wording 'the enforcement of civil law claims' also cover the defence of the financial authority against civil law claims and must such claims already have been submitted?

3. Does the provision of Article 23(1)(e) of Regulation (EU) 2016/679 relating to the protection of an important financial interest of a Member State in taxation matters allow a restriction of the right of access under Article 15 of Regulation (EU) 2016/279 in relation to the defence of civil law insolvency avoidance claims against the financial authority?

Grounds:

I

1 The applicant is an insolvency administrator. He is requesting tax information in relation to the insolvency debtor, an entrepreneurial company, in order to examine insolvency avoidance claims from the competent tax office.

2 He made a request, citing the Informationsfreiheitsgesetz (Law on freedom of information) of the *Land* of North Rhine-Westphalia, for information concerning the threat of enforcement measures and the granting of enforcement orders, payments received, the date of notification of the debtor's insolvency and sending of stored account extracts of all tax types managed there for the tax periods from March 2014 to June 2015. This request was rejected by the tax office.

3 The Verwaltungsgericht (Administrative Court) essentially upheld the action filed against this rejection. The Oberverwaltungsgericht (Higher Administrative Court) dismissed the first appeal by the defendant *Land*: The right to information, it held, was neither ruled out by area-specific provisions under tax procedure law nor precluded by grounds for exclusion. Although the requested information was objectively subject to the scope of protection of tax secrecy, it did not have to be kept confidential vis-à-vis the insolvency administrator, just as it did not **[Or. 4]** have to be kept confidential vis-à-vis the party whose tax circumstances were concerned. The right of disposal in relation to tax information transferred to the insolvency administrator with the opening of the insolvency proceedings. This transfer also extended to business secrets and tax information, where this was necessary for proper administration of the insolvency estate and handling of the insolvency proceedings. The insolvency administrator was able to request information in relation to all circumstances concerning the proceedings from the insolvency debtor. The insolvency debtor's duty to cooperate also encompassed the obligation to release the tax office from maintaining tax secrecy; his interests in confidentiality had to be of secondary importance in this respect.

4 The defendant continues to pursue his request for dismissal of the action by way of the appeal on a point of law, which he was granted leave to bring by the appeal court, due to the fundamental importance of the case.

II

5 The proceedings must be stayed and a preliminary ruling must be obtained from the Court of Justice of the European Union ('the Court') on the questions formulated in the operative part of the decision (Article 267 TFEU).

6 1. The relevant provisions of EU law are Article 1(1), Article 4(1), Article 15 and Article 23(1)(e), (i) and (j) of Regulation (EU) 2016/279.

7 2. The relevant provisions of national law were incorporated by Law of 17 July 2017 […] into the Abgabenordnung (General Tax Code; 'the AO') during the proceedings relating to the appeal on a point of law and entered into force with effect from 25 May 2018. Those provisions read as follows:

8 Paragraph 2a: Scope of the provisions relating to the processing of personal data

‘(3) The provisions of this Law and the tax Laws relating to the processing of personal data do not apply where **[Or. 5]** European Union law, in particular Regulation (EU) 2016/679 … applies directly in the version valid in each case or in accordance with subparagraph (5)’.

‘(5) Unless stated otherwise, the provisions of Regulation (EU) 2016/679, of this Law and of the tax Laws relating to the processing of personal data of natural persons apply correspondingly to information relating to identified or identifiable

1. deceased natural persons or

2. corporations, associations of persons and corporate funds with or without legal personality.’

9 Paragraph 32e:Relationship to other rights to access and provision of information

‘If the data subject or a third party has a right to information access vis-à-vis the financial authority in accordance with the Law on freedom of information of 5 September 2005 (*Bundesgesetzblatt* (Federal Law Gazette) (BGBl.) I p. 2722) in the version applicable in each case or in accordance with corresponding legislation of the *Länder*, Articles 12 to 15 of Regulation (EU) 2016/279 apply correspondingly in conjunction with Paragraphs 32a to 32d. More extensive rights to information relating to tax data are excluded in this respect. Paragraph 30(4)(2) is not applicable in this respect.’

10 Paragraph 32b: Duty of the financial authority to provide information where personal data have not been obtained from the data subject

‘(1) The duty on the part of the financial authority to provide information relating to the data subject in accordance with Article 14(1), (2) and (4) of Regulation (EU) 2016/679, in addition to the exceptions laid down in Article 14(5) of Regulation (EU) 2016/679 and Paragraph 31c(2), does not exist

1. where the provision of the information

(a) would be prejudicial to the proper performance of the tasks within the competence of the financial authorities or other public bodies within the meaning of Article 23(1)(d) to (h) **[Or. 6]** of Regulation (EU) No 2016/679, or

(b) …

and therefore the interest of the data subject with respect to the provision of information has to be of secondary importance. Paragraph 32a(2) applies correspondingly.’

11 Paragraph 32c: Right of access by the data subject

‘(1) The right of access by the data subject vis-à-vis a financial authority in accordance with Article 15 of Regulation (EU) 2016/679 does not exist where

1. the data subject does not have to be informed pursuant to Paragraph 32b(1) or (2),

2. the provision of information would adversely affect the legal entity of the financial authority in the establishment, exercise or defence of civil law claims or in the defence of civil law claims established against it within the meaning of Article 23(1)(j) of Regulation (EU) 2016/679; duties on the part of the financial authority to provide information under civil law remain unaffected,

…’.

III

12 The questions referred are material to the decision. The success of the defendant’s appeal on a point of law depends on the answers to these questions. They require clarification by the Court of Justice, as they have not been clarified in its case-law and there are no obvious answers. The following considerations are relevant to the referral and to the individual questions referred:

13 Regulation (EU) 2016/679 does not directly apply to the underlying facts of this case; the facts do not involve either personal **[Or. 7]** (tax) data of a natural person within the meaning of Articles 1(l) and 4(1) of Regulation (EU) 2016/679 or a right of access by the data subject under data-protection law in accordance with Article 15 of Regulation (EU) 2016/679. Data subject status under data-protection law is a highly personal right that is not part of the insolvency estate and therefore is not covered by the transfer of the administrative power and right of disposal to the insolvency administrator in accordance with Paragraph 80(1) of the Insolvenzordnung (Insolvency Code; ‘InsO’). However, the Court of Justice has repeatedly held that, in order to ensure uniform interpretation of EU law, it also has jurisdiction to allow requests for preliminary rulings on questions concerning EU-law provisions in situations where the facts of the cases being considered by the national courts were outside the scope of EU law but where those provisions of EU law had been rendered applicable by domestic law in a direct and unconditional way due to a reference made by that law to the content of those provisions (cf. CJEU, judgments of 16 March 2006, C-3/04 [ECLI:EU:C:2006:176], *Poseidon Chartering BV*, paragraph 14 et seq., and of 18 October 2012, C-583/10 [ECLI:EU:C:2012:638], *Nolan*, paragraph 45 et seq.).

14 Those conditions are satisfied in the present case. By means of the additions to the General Tax Code, the legislature is pursuing — as is clear in particular from Paragraph 2a(3) and (5) AO — the objective, beyond the direct scope of Regulation (EU) 2016/679, of providing, in compliance with the general principle of the General Tax Code, uniform procedural rules — which usually at the same time constitute rules relating to the processing of personal data — for all persons affected by tax law and tax procedural law, regardless of their legal form ….

There are no apparent indications that this legislative objective is limited to taxes determined under EU law. Processing of data in a manner differentiated by taxable persons and tax types would moreover — as the representatives of the competent Federal Ministry of Finance leading the amendment to the General Tax Code have explained in the oral part of the procedure — be impossible to implement from a technical perspective.

15 At the same time, the national legislature intended to include claims for information access existing in principle in accordance with federal and regional laws on freedom of information under this uniform tax procedural law **[Or. 8]** and thus to supersede the laws on freedom of information in respect of tax information in an area-specific manner …. Paragraph 32e AO serves this purpose. An interpretation of this provision as a reference to a legal basis is unsuccessful. It would lead to the corresponding application as ordered therein of Articles 12 to 15 of Regulation (EU) 2016/679, in conjunction with Paragraphs 32a to 32d AO, to claims for information by third parties always resulting in the exclusion of a claim and therefore coming to nothing due to want of data subject status. Such an understanding of the rule is not intended in light of the wording of the first sentence of Paragraph 32e AO. According to the explanations of the representatives of the Federal Ministry of Finance in the oral part of the procedure, it is also not the intention of the provision set forth in the second and third sentences of Paragraph 32e to limit claims for information — where these have been established in the federal and regional laws on freedom of information — in the sense of an upper limit to the extent that emerges from the General Tax Code.

16 Against this background, a ‘split’ interpretation of the new provisions in the General Tax Code for situations that are subject to EU law, on the one hand, and situations that are not subject thereto, on the other, does not come into consideration.

17 Regarding Question 1:

The answer to this question depends on whether a financial authority is permitted at all to refuse access to tax information of the taxable person by reference to Article 23(1)(j) of Regulation (EU) 2016/679. This is obviously assumed by the national legislature according to the unambiguous wording of Paragraph 32c(1)(2) AO, which is, according to the explanatory memorandum …, based on Article 23(1)(j) of Regulation (EU) 2016/679 and, moreover, expressly refers to that provision. By contrast, among the relevant experts the view has in some cases been taken that the opening clauses in Article 23(1)(i) and (j) of Regulation (EU) 2016/679 were relevant only to subjects under private law; in this respect subparagraph (j) therefore had only a clarifying function with regard to subparagraph (i), which is broadly worded in relation to protection of the rights and freedoms of other private individuals … **[Or. 9]** …. This view is supported by the fact that the protection of important public interests is the subject matter of the opening clauses in Article 23(1)(a) to (h) of Regulation (EU) 2016/679. Important

financial interests of the State in budgetary and taxation matters may be protected for example on the basis of Article 23(1)(e) of Regulation (EU) 2016/679.

18 Regarding Question 2:

If financial authorities are in principle able to invoke Article 23(1)(j) of Regulation (EU) 2016/679, it is necessary to clarify whether the wording 'enforcement of civil law claims' also covers the defence against civil law claims. This is — as can again be clearly inferred from the wording and the justification relating to Paragraph 32c(1)(2) AO … — the case in the estimation of the national legislature. In this case, the express mention of Article 23(1)(j) of Regulation (EU) 2016/679 in Paragraph 32c(1)(2) AO, in accordance with the statements made by the representatives of the Federal Ministry of Finance in the oral part of the procedure with regard to the desired conformity with EU law, serves to make it clear that that provision relates only to the defence against civil law claims.

19 Paragraph 32c(1)(2) AO is intended to ensure that, in the context of uniform and lawful taxation and safeguarding of tax revenue, the financial authorities in the case of civil law claims are not placed in a better, but also not worse, position than other debtors or creditors; the duties to provide information are therefore to be guided solely by civil law …. The provision is aimed at correcting the 'insolvency administrator-friendly' case-law of the administrative courts in relation to requests for access to information under federal and regional laws on freedom of information …. According to that case-law, the administrative power and right of disposal of the insolvency administrator under Paragraph 80(1) InsO also extend to information covered by tax secrecy, which is intended to be used for the examination of **[Or. 10]** insolvency avoidance claims in accordance with Paragraph 129 et seq. InsO against the financial authority …. As a consequence of this case-law, insolvency administrators were able to demand access to tax information relating to the insolvency debtor from the financial authorities; it was generally only as a result of this that they were able to examine insolvency avoidance claims against the financial authority. With respect to other creditors of the insolvency debtor, the insolvency administrator is restricted to civil law claims for provision of information, which Paragraph 32c(1)(2) AO expressly leaves unaffected. However, the civil law claims for the provision of information depend, in accordance with the settled case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), on the fact that an insolvency avoidance claim is established on its merits and that the case only involves the further determination of the nature and extent of the claim. Until a contractual obligation for restitution is established, the insolvency administrator is therefore limited to requesting all of the information required from the insolvency debtor …. The insolvency administrator can thus request information from other creditors only at a much later stage of the procedure; Paragraph 32c(1)(2) AO is intended to prevent the financial authorities being in a weaker position as a result of this in future.

20 The question of whether this legislative objective is covered by Article 23(1)(j) of Regulation (EU) 2016/679 requires clarification. The provision authorises the

national legislature — subject to certain conditions — to enact restrictive rules in order to safeguard the enforcement of civil law claims. According to conventional understanding, the German term 'Durchsetzung' refers to the sphere of the claimant (creditor) and is chiefly used as a synonym for the enforcement or execution of a claim which has already been established on the merits; the same would apply, for example, to the term 'the enforcement' in the English version or 'l'exécution' in the French version of Regulation (EU) 2016/679. The defence against civil law claims therefore cannot simply be subsumed under the term 'enforcement'. This is especially true since the EU legislature distinguishes between the terms 'establishment', 'exercise' and 'defence' (of legal claims) in **[Or. 11]** Article 9(2)(f), Article 17(3)(e), Article 18(1)(c) and (2), Article 21(1), second sentence, and Article 49(1)(e) of Regulation (EU) 2016/679. In this case it is unclear whether the defence of legal claims also covers the defence against such claims ….

21 If the wording 'enforcement of civil law claims' includes the defence of the financial authority against such claims, this raises the further question of whether the claims (in this case the insolvency avoidance claims) must already have been already established vis-à-vis the opposing party or whether it is sufficient for the information to be requested in order to examine such claims. The unfortunate wording of Paragraph 32c(1)(2) AO refers to the defence of the legal entity of the financial authority 'against civil law claims established against it …'. If 'to establish' is understood as a synonym for 'to demand', 'to assert', 'to apply for', 'to claim' or 'to enforce', the wording 'established' implies that the claimant (creditor) has already raised a claim vis-à-vis the opposing party (debtor), and that the merits of that claim have in any case therefore already been substantiated. By contrast, the mere possibility — which needs to be examined in more detail on the basis of the requested tax information — that insolvency avoidance claims exist vis-à-vis the financial authority should not be sufficient. If, however, the claim for provision of information were to be excluded only after establishment of the insolvency avoidance claim, the rule would to a great extent be ineffective, as the insolvency administrator would have already acquired the necessary information. The present Chamber therefore understands Paragraph 32c(1)(2) AO in line with its unambiguous meaning and purpose, to the effect that the wording 'established' also encompasses 'yet to be established' or 'possible' claims. It is debatable and must be clarified whether this understanding is also covered by Article 23(1)(j) of Regulation (EU) 2016/679.

22 Regarding Question 3:

Lastly, it must be clarified whether a national provision, under which the right of access pursuant to Article 15 of Regulation (EU) 2016/679 is restricted to the defence **[Or. 12]** of possible insolvency avoidance claims against the financial authority, can be based on Article 23(1)(e) of Regulation (EU) 2016/679.

23 The national legislature envisaged the legislative objective of Paragraph 32c(1)(2) AO as being to place the financial authority in neither a better nor worse position

than other creditors in the case of civil law claims, also in the interest of uniform and lawful taxation and safeguarding of tax revenue; these two objectives constitute important objectives of general public interest in budgetary and taxation matters within the meaning of Article 23(1)(e) of Regulation (EU) 2016/679 […]. In light of the wording of Paragraph 32c(1)(2) AO and the explanatory memorandum, the Chamber proceeds on the assumption that the legislature primarily intended to make use of the opening clause in Article 23(1)(j) of Regulation (EU) 2016/679. From a systematic perspective, this is supported by the fact that it has referred to the opening clauses in Article 23(1)(d) to (h) of Regulation (EU) 2016/679 (only) in other provisions, for example in Paragraph 32b(1)(1)(a) AO, to which Paragraph 32c(1)(1) AO refers. Nonetheless, in any case it cannot be ruled out with certainty that Paragraph 32c(1)(2) AO can alternatively also be based on Article 23(1)(e) of Regulation (EU) 2016/679.

24 However, this assumption gives cause for concerns on the merits. The requested tax information is not of interest for the tax claims under substantive law, but rather mainly for the payment flows that are relevant under insolvency law as potentially voidable transactions within the meaning of Paragraph 129(1) InsO. The insolvency administrator's claim directed against the financial authority for restitution of payments contested under insolvency law is therefore not included among the claims arising from the tax relationship. Insolvency avoidance merely results in the invalidity of the transaction disadvantaging the creditor, but not in the invalidity of the underlying obligation. Instead, the legal ground of a contested payment — in this case the tax claims — remains unaffected by the insolvency avoidance. The recipient of the notice of avoidance must return the payment made to it by the insolvency debtor, but retains its initially satisfied, now reopened **[Or. 13]** claim (Paragraph 144(1) InsO), which it can include in the insolvency table …. Admittedly, the objective, pursued by Paragraph 32c(1)(2) AO, of equal treatment of financial authorities and other creditors does concern financial interests of the State, because the financial authority has to return any tax revenue collected and include its claims in the insolvency table. It is, however, at the very least debatable whether the interest in affording protection against this 'reverse transaction' constitutes a laudable 'important objective' within the meaning of Article 23(1)(e) of Regulation (EU) 2016/679, especially as there is no suggestion of a direct connection to ensuring uniform and lawful taxation and safeguarding tax revenue. The national legislature also — as shown by the provision of Paragraph 32a(2) AO referred to in Paragraph 32b(1), second sentence AO — primarily had other situations in mind in this regard.

…