Case C-319/20

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:

15 July 2020

Referring court:

Bundesgerichtshof (Federal Court of Justice, Germany)

Date of the decision to refer:

28 May 2020

Defendant and appellant in the appeal on a point of law:

Facebook Ireland Limited

Applicant and respondent in the appeal on a point of law:

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.

Subject matter of the main proceedings

Application for a prohibitory injunction owing to a breach of provisions of data protection law

Subject matter and legal basis of the reference

Interpretation of Chapter VIII, in particular Article 80(1) and (2) and Article 84(1) of the General Data Protection Regulation; Article 267 TFEU

Question referred

Do the rules in Chapter VIII, in particular in Article 80(1) and (2) and Article 84(1), of Regulation (EU) 2016/679 preclude national rules which – alongside the powers of intervention of the supervisory authorities responsible for monitoring and enforcing the Regulation and the options for legal redress for data subjects – empower, on the one hand, competitors and, on the other, associations,

entities and chambers entitled under national law, to bring proceedings for breaches of Regulation (EU) 2016/679, independently of the infringement of specific rights of individual data subjects and without being mandated to do so by a data subject, against the infringer before the civil courts on the basis of the prohibition of unfair commercial practices or breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions?

Provisions of EU law cited

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), Chapter VIII, in particular Article 80(1) and (2) and Article 84(1) [('the Regulation')]

Provisions of national law cited

Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Law on prohibitory injunctions in the case of breaches of consumer and other laws, 'the UKlaG'), Paragraph 1 (Prohibitory injunctions and rights of cancellation in general terms and conditions), Paragraph 2 (Rights in the case of practices contrary to consumer protection law) subparagraph 2(11), Paragraph 3 (Authorities entitled) and Paragraph 4 (Qualified entities)

Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, 'the UWG'), Paragraph 3 (Prohibition of unfair commercial practices), Paragraph 3a (Breach of law) and Paragraph 8 (Removal and injunctive relief) subparagraphs 1 and 3

Telemediengesetz (Law on telemedia, 'the TMG'), Paragraph 13 (Duties of the service provider)

Brief summary of the facts and procedure

1 The applicant is the Federation of German consumer organisations, which is included on the list of qualified entities pursuant to Paragraph 4 of the UKlaG. Using the address www.facebook.de, the defendant, a company established in Ireland, operates the internet platform Facebook which is used to exchange personal and other data. A sister company of the defendant, Facebook Germany GmbH, established in Germany, advertises the availability of advertising space on the internet platform and supports the defendant's local advertising clients there. The defendant is the contract partner for advertising clients in Germany. It also processes the data of Facebook's German customers. The parent company of the defendant and of Facebook Germany GmbH is established in the United States.

2 The Facebook internet platform has what is referred to as an App Centre where the defendant makes available to its users, amongst other things, free games from third party suppliers. When the App Centre was accessed on 26 November 2012, the game 'The Ville' was being offered there and the following information was displayed under a 'Play now' button:

3 If you click on 'Play game' above, this application obtains the following: – *Your general information (?),* – *Your email address,* – *About you,* – *Your status messages. This application may post on your behalf, including your score and more*.

4 The following notice was also provided there: *By continuing, you accept The Ville's general terms and conditions and data protection policies.*

5 The general terms and conditions and data protection rules could be accessed via a link. Corresponding notices were also displayed in various other games. In the game 'Scrabble', the notices ended with the sentence: *This application may post status messages, photos and more on your behalf*.

6 The applicant objects to the presentation of the notices provided under the 'Play now' button in the App Centre as being unfair, amongst other things, from the aspect of a breach of law on account of infringement of the legal requirements for obtaining the user's valid consent under data protection law. It also regards the final notice in the game 'Scrabble' as a general condition which is unreasonably prejudicial to the user.

7 The applicant is essentially requesting that the defendant be ordered to cease and desist from the described practices vis-à-vis consumers who are permanently resident in the Federal Republic of Germany, and be prohibited from using a clause like the one used in connection with the game 'Scrabble'.

8 The applicant lodged the action independently of the specific infringement of data protection rights of a data subject and without being mandated to do so by such a person.

9 The Landgericht (Regional Court, Germany) ruled against the defendant, in accordance with the application. The defendant's appeal was unsuccessful. The defendant is continuing to seek the dismissal of the action by means of its appeal on a point of law, the dismissal of which is being requested by the applicant.

Brief summary of the basis for the reference

10 In the opinion of the referring court, the appeal court rightly considered the claims in the application to be well founded. For the appeal on a point of law to be successful, it is therefore relevant whether the appeal court was correct in law in proceeding on the basis that the action was admissible.

11 In examining the admissibility of the action, a question arises as to the interpretation of Regulation 2016/679. It is questionable whether, following the entry into force of Regulation 2016/679, qualified entities, such as the consumer association that brought the action in this case, are empowered, under Paragraph 8(3)(3) of the UWG and Paragraph 3(1)(1) of the UKlaG, to bring proceedings before the civil courts for breaches of the Regulation independently of any specific infringement of rights of individual data subjects and without being mandated to do so by a data subject, on the basis of a breach of law according to Paragraph 3a of the UWG, breach of a consumer protection law within the meaning of Paragraph 2(2)(11) of the UKlaG or the use of invalid general terms and conditions according to Paragraph 1 of the UKlaG.

12 The claims based on the infringement of Paragraph 13(1) of the TMG were admissible and well founded before Regulation 2016/679 came into force.

13 According to the first half of the first sentence of Paragraph 13(1) of the TMG, at the beginning of the act of use, the service provider must inform the user about the nature, scope and purpose of the collection and use of personal data in a generally understandable form, to the extent that such information has not already been provided. The appeal court was correct in law in assuming that the information in the App Centre being challenged in the application did not meet these requirements and that the action was therefore well founded in this respect.

14 By breaching the duties of information specified in the first half of the first sentence of Paragraph 13(1) of the TMG, the defendant breached Paragraph 3a of the UWG and Paragraph 2(2)(11) of the UKlaG. The appeal court rightly proceeded on the basis that the provisions under Paragraph 13 of the TMG at issue here are market conduct regulations within the meaning of Paragraph 3a of the UWG. They are also requirements which, as provided for in Paragraph 2(2)(11) of the UKlaG, regulate the lawfulness of the collection, processing or use, by an economic operator, of personal data of a consumer which have been collected, processed or used for advertising purposes. The appeal court also rightly proceeded on the basis that the fact that the defendant was established in Ireland did not preclude the applicability of German data protection law. The Court of Justice of the European Union, in its judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:2018:388, paragraph 55), has already decided, with respect to the relationship – which also exists in the present case – between the defendant, established in Ireland and responsible for processing the data relevant in the present case, and its sister company, established in Germany and responsible merely for promoting the sale of advertising in Germany, that the German sister company is to be regarded as an establishment within the meaning of Article 4(1)(a) of Directive 95/46/EC.

15 The defendant also used a general condition which was invalid according to Paragraph 1 of the UKlaG owing to a breach of the duties of information under data protection law that are relevant in the present case. The action was originally well founded in this respect also.

The issue of the admissibility of the action

16 The action was originally also admissible. In particular, the applicant had the power to pursue its claims by way of an action before the civil courts before Regulation 2016/679 came into force.

17 According to Paragraph 8(3)(3) of the UWG, qualified entities which can prove that they are included on the list of qualified entities pursuant to Paragraph 4 of the UKlaG have a right under Paragraph 8(1) of the UWG to a prohibitory injunction in respect of commercial practices which are unlawful according to Paragraph 3 of the UWG. The applicant consumer association is included on the list of qualified entities pursuant to Paragraph 4 of the UKlaG. As such an entity, the applicant had the power under Directive 95/46/EC to pursue, by way of a prohibitory injunction under Paragraph 8(1) and (3)(3) of the UWG in conjunction with Paragraph 3(1) and Paragraph 3a of the UWG, infringements of data protection law (here: Article 10(a) of Directive 95/46/EC and the first half of the first sentence of Paragraph 13(1) of the TMG) on the basis of a breach of law as an unlawful commercial practice (see judgment of the Court of Justice of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, paragraph 63).

18 The applicant's power to apply for a prohibitory injunction was also set out in Paragraph 3(1)(1) of the UKlaG, according to which qualified entities within the meaning of that provision may seek an injunction on account of breaches of consumer protection laws, including, according to Paragraph 2(2)(11) of the UKlaG, provisions which relate to the lawfulness of the collection, processing or use of personal data of a consumer by an economic operator for advertising purposes.

19 The power to bring a claim in relation to the use of a general condition followed from Paragraph 3(1)(1) of the UKlaG. According to the latter, qualified entities have a right, under Paragraph 1 of the UKlaG, to an injunction against the use of general terms and conditions that are invalid according to Paragraph 307 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'). Before Regulation 2016/679 came into force, qualified entities within the meaning of Paragraph 3(1)(1) of the UKlaG could therefore, according to Paragraph 1 of the UKlaG, take action by way of a prohibitory injunction against the user of a general condition that was invalid according to Paragraph 307 of the BGB owing to the infringement of a provision of data protection law.

20 This legal position may have changed in a way that is relevant to the decision in this case when Regulation 2016/679 came into force.

21 The claims are well founded even after the entry into force of Regulation 2016/679. It is true that the provision laid down in Paragraph 13(1) of the TMG has since ceased to be applicable. What are relevant now are the duties of information arising from Articles 12 to 14 of Regulation 2016/679. The defendant breached its obligation under the first sentence of Article 12(1) of Regulation

2016/679 to provide the data subject with the information resulting from Article 13(1)(c) and (e) of the Regulation relating to the purpose of the data processing and the recipient of personal data in a concise, transparent, intelligible and easily accessible form, using clear and plain language.

22 However, the applicant's initial standing to bring proceedings will have lapsed when Regulation 2016/679 came into force if the question referred for a preliminary ruling is to be answered in the affirmative. The lapsing of standing to bring proceedings would also have to be taken into account in the appeal on a point of law and means that the action would be inadmissible.

The standing of associations to bring proceedings under competition law?

23 It is a matter of dispute whether qualified entities within the meaning of Paragraph 4 of the UKlaG have the power, following the entry into force of Regulation 2016/679, to plead breaches of data protection provisions of the Regulation, which are directly applicable according to the first sentence of the second paragraph of Article 288 TFEU, under Paragraph 8(3)(3) of the UWG from the aspect of a breach of law according to Paragraph 3a of the UWG.

24 One view assumes that conclusive provision on the enforcement of the data protection provisions contained in Regulation 2016/679 is made in the Regulation itself; it therefore denies competitors any standing to bring proceedings under competition law and assumes that associations have standing to bring proceedings only under the conditions set out in Article 80 of the Regulation.

25 Others consider the rules set out in Regulation 2016/679 on the enforcement of rights not to be conclusive and therefore regard the competitors, associations and entities mentioned in Paragraph 8(3) of the UWG as still having the power to seek prohibitory injunctions in proceedings on the basis of a breach of law within the meaning of Paragraph 3a of the UWG.

26 Yet others deny that competitors have any standing to bring proceedings but allow that associations do have standing as provided in Paragraph 3 of the UKlaG in order to pursue breaches according to Paragraph 2(2)(11) of the UKlaG, in so far as the associations meet the conditions specified in Article 80(2) of Regulation 2016/679.

27 It is, finally, also argued that Regulation 2016/679 has made no difference to the standing of competitors to bring proceedings in accordance with Paragraph 8(3)(1) of the UWG, whilst associations have standing to bring proceedings only under the conditions set out in Article 80 of the Regulation.

28 No standing of qualified entities which are acting within the meaning of Paragraph 8(3)(3) of the UWG to bring proceedings in order to protect consumer interests can be inferred from the **wording** of Regulation 2016/679, specifically the provisions of Chapter VIII thereof.

29 It is true that provision is made in Article 80(1) of Regulation 2016/679 for not-for-profit bodies, organisations or associations which have been properly constituted in accordance with the law of a Member State, have statutory objectives which are in the public interest, and are active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data, to have standing to bring proceedings. However, this is conditional upon the body, organisation or association having been mandated by the data subject to exercise the rights referred to in Articles 77, 78 and 79 of the Regulation on the data subject's behalf, and to exercise the right to receive compensation referred to in Article 82 of the Regulation on the data subject's behalf where provided for by Member State law.

30 The standing to bring proceedings pursuant to Paragraph 8(3)(3) of the UWG at issue here does not relate to an action brought on behalf and in the name of a data subject to enforce their personal rights. Rather, that provision regulates the standing of associations to bring proceedings in their own right, a right which allows them, in connection with an act in breach of the law according to Paragraph 3a of the UWG, to take objective legal action against breaches of the provisions of Regulation 2016/679 independently of any infringement of specific rights of individual data subjects and of a mandate to do so.

31 Nor is any standing for associations to bring proceedings for the objective legal enforcement of data protection law regulated in Article 80(2) of Regulation 2016/679. According to that provision, it is true, Member States may provide that any body, organisation or association referred to in paragraph 1 of that article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 of the Regulation and to exercise the rights referred to in Articles 78 and 79 of the Regulation. However, it is also necessary for the rights of a data subject under the Regulation to have been infringed as a result of the processing. Therefore, according to the wording thereof, the provision under Article 80(2) of Regulation 2016/679 likewise confers no standing to bring proceedings on associations which – as in the present case based on Paragraphs 3a and 8(3)(3) of the UWG – plead objective breaches of data protection law independently of the infringement of subjective rights of a specific data subject. This is also apparent from the second sentence of recital 142 of Regulation 2016/679 which likewise mentions the requirement of infringement of the rights of a data subject as a condition for associations' standing to bring proceedings independently of any mandate by the data subject.

32 Nor can the lawfulness of the standing of associations to bring proceedings be based on Article 84(1) of Regulation 2016/679, according to which Member States are to lay down the rules on other penalties applicable to infringements of the Regulation and take all measures necessary to ensure that they are implemented. The standing of associations to bring proceedings, as regulated in Paragraph 8(3) of the UWG, cannot be a penalty according to the scheme of Regulation 2016/679 simply because, in Chapter VIII of the Regulation, the EU

legislature expressly distinguishes between legal remedies, liability and penalties and it is apparent from the connection between Article 84, Article 83 and recitals 148 to 152 of the Regulation that the penalties within the meaning of Article 84 of the Regulation are administrative and criminal penalties for infringements.

33 An interpretation that takes into account the **systematic context** of Regulation (EU) 2016/679 does not clearly show whether, by this Regulation, the EU legislature unified not only the provisions on the protection of personal data, but also enforcement of the rights that exist under the Regulation.

34 Regulation 2016/679 confers on supervisory authorities within the meaning of Article 51(1) and Article 4(21) of the Regulation extensive monitoring duties and investigative and remedial powers. It might be inferred therefrom that the EU legislature basically assumes enforcement of the provisions of the Regulation by the supervisory authorities. The saving clause relating to the regulation of the standing of associations to bring proceedings pursuant to Article 80(2) of Regulation 2016/679 could represent an exception with respect to these comprehensive rules on the duties and powers of supervisory authorities. In light of the above, a broad interpretation of the saving clause of Article 80(2) of Regulation 2016/679 addresses concerns while disregarding the condition of the 'rights of a data subject' laid down in that provision.

35 Accordingly, the Advocate General (Opinion of Advocate General Bobek of 18 December 2018 in *Fashion ID*, C-40/17, EU:C:2018:1039, point 47) also assumes that, owing to the enactment of Regulation 2016/679 to replace Directive 95/46/EC which left the Member States free to choose how to implement it, national rules implementing the Regulation may, in principle, only be adopted when expressly authorised.

36 However, the fact that Article 77(1), Article 78(1) and (2) and Article 79(1) of Regulation 2016/679 each contain the phrase 'without prejudice to any other remedy' might suggest that the provision is not conclusive. In addition, Article 82(1) of Regulation 2016/679 accords any person who has suffered material or non-material damage as a result of an infringement of the Regulation the right to receive compensation. It could be inferred from this that Regulation 2016/679 does not rule out action being taken against the infringement of data protection provisions of the Regulation by a party other than the data subject within the meaning of Article 80(2) of the Regulation.

37 Nor does the **legislative objective** provide a clear answer to the question referred.

38 The assumption that an association's standing to bring competition-law proceedings under Paragraph 8(3)(3) of the UWG continues to be lawful may be supported by the fact that this preserves an additional option for the enforcement of rights, one that is desirable in accordance with the principle of effectiveness,

thereby ensuring the highest possible level of data protection in accordance with recital 10 of Regulation 2016/679.

39 On the other hand, the lawfulness of such standing of associations to bring proceedings might be incompatible with the aim of unification pursued by the EU legislature when drafting Regulation 2016/679. Enforcement of data protection provisions by private individuals – that is to say, on the one hand, by competitors and, on the other, by business and consumer associations within the meaning of Paragraph 8(3) of the UWG – going beyond the instruments set out in the Regulation might be inconsistent with this aim.

40 Nor is it entirely certain that there is a gap in protection in the system for enforcing the Regulation which would have to be filled by giving private individuals standing to bring competition-law proceedings under Paragraph 8(3) of the UWG. According to Article 8(3) of the Charter of Fundamental Rights of the European Union, compliance with the protection of a person's personal data is to be subject to control by an independent authority. Accordingly, Regulation 2016/679 regulates all of the responsibilities and powers of supervisory authorities. There may be a danger that competition over the enforcement of objective data protection law by the supervisory authorities, on the one hand, and the civil courts, on the other, would lead to an elimination of the differentiated powers of the supervisory authorities and to differences in the enforcement of data protection law within the European Union.

Breach of a consumer protection law within the meaning of Paragraph 2(2)(11) of the UKlaG

41 Clarification is also needed as to whether the qualified entities specified in Paragraph 3(1)(1) of the UKlaG have the power, following the entry into force of Regulation 2016/679, to pursue breaches of the data protection provisions set out in the Regulation on the basis of Paragraph 2(2)(11) of the UKlaG.

42 One view is that Paragraph 2(2)(11) of the UKlaG should be regarded as the anticipatory partial implementation of the provision in Article 80(2) of Regulation 2016/679.

43 Another view generally denies any such standing to bring proceedings. On that view it is doubtful whether the data protection rules referred to in Paragraph 2(2)(11) of the UKlaG – which relate to the rules in the older version of the Bundesdatenschutzgesetz (Federal law on data protection) that were repealed with effect from 25 May 2018 and do not correspond to the provisions of the new version of the Federal law on data protection which have applied since – meet the EU's legal requirements on a consumer protection law. At least no legal basis under EU law is to be found in Directive 2009/22/EC on injunctions for the protection of consumers' interests.

Use of invalid general terms and conditions according to Paragraph 1 of the UKlaG

44 Finally, the question arises whether, following the entry into force of Regulation 2016/679, the applicant has the power to enforce the data protection provisions set out in the Regulation by way of an application which is aimed at securing a review of a general condition.

45 According to Paragraph 3 of the UKlaG, qualified entities have a right, in accordance with Paragraph 1 of the UKlaG, to seek an injunction against the use of general terms and conditions which are invalid according to Paragraph 307 of the BGB.

46 It is not clear whether authorities entitled under Paragraph 3 of the UKlaG, like the applicant, are (still) entitled to claim a prohibitory injunction against the use of general terms and conditions even after the entry into force of Regulation 2016/679 if the application is based on the infringement of data protection provisions set out in the Regulation.

47 Thus, it is argued that, given the aim of comprehensive harmonisation pursued by Regulation 2016/679, it has to be assumed that the enforcement option for associations set out in Article 80(2) of the Regulation is conclusive. Regulation 2016/679 grants Member States the option, within precisely defined limits, to give associations their own power of enforcement independently of any mandate. Recourse to rules such as those governing substantive reviews of general terms and conditions must therefore, as with the application of reviews under competition law, be ruled out in regard to the assessment of data processing activities under Regulation 2016/679. Nor are such enforcement options for associations necessary any longer, since the German legislature is free to make comprehensive provision for the standing of associations to bring proceedings or to lodge complaints, through the saving clause in Article 80(2) of Regulation 2016/679.

No specific infringement

48 As has been stated, the lapsing of standing in the course of the appeal on a point of law means that the action is inadmissible. Standing to bring proceedings cannot be affirmed on the grounds that the provisions under Paragraph 3(1)(1) to 3(1)(3) of the UKlaG in conjunction with Paragraph 1 and Paragraph 2(2)(11) of the UKlaG are to be regarded as the (anticipatory) implementation of Article 80(2) of Regulation (EU) 2016/679 when interpreted in accordance with EU law.

49 However, it is argued that associations have standing to bring proceedings pursuant to Paragraph 3(1)(1) to 3(1)(3) of the UKlaG in respect of breaches under Paragraph 2(2)(11) of the UKlaG in so far as the associations meet the conditions specified in Article 80(1) of Regulation (EU) 2016/679.

50 The applicant's standing to bring proceedings in the present case cannot be assumed on the basis of this argument, however. This is because, even if one considered the (anticipatory) implementation of Article 80(2) of Regulation 2016/679 to be possible in principle according to the view described above, the assumption of standing to bring proceedings pursuant to the first sentence of Paragraph 3(1) of the UKlaG, when interpreted according to EU law as required with respect to Article 80(2) in conjunction with Article 80(1) of Regulation 2016/679, would be conditional upon fulfilment of the requirements to which the legislature made the Member States' conferral of standing on associations subject. That is not the case here; the opportunity given to Member States under Article 80(2) of Regulation 2016/679 to establish the possibility of legal protection for associations includes only those legal remedies by which a body, organisation or association can object to the infringement of the rights of a data subject under the Regulation as a result of the processing.

51 These conditions have not been met. It may admittedly be claimed that there has been an infringement in relation to the processing of data within the meaning of Article 4(2) of the Regulation. However, the applicant is not claiming any infringement of the rights of a data subject within the meaning of Article 80(2) of the Regulation. The subject of the claim for relief is instead the abstract assessment of the presentation of the App Centre by the defendant by reference to the objective legal standard of data protection law without the applicant having argued that rights of an identified or identifiable natural person within the meaning of Article 4(1) of Regulation 2016/679 have been infringed.