

Case C-757/22

Request for a preliminary ruling

Date lodged:

15 December 2022

Referring court:

Bundesgerichtshof (Federal Court of Justice, Germany)

Date of the decision to refer:

10 November 2022

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

Meta Platforms Ireland Limited

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

Bundesverband der Verbraucherzentralen und
Verbraucherverbände – Verbraucherzentrale Bundesverband e. V.
(Federation of German Consumer Organisations)

**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY;
'BGH')**

DECISION

[...]

Delivered on:
10 November 2022

[...]
[...]
[...]
[...]

in the case of

Meta Platforms Ireland Limited, [...],

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

– [...] –

v

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale e. V., [...], (Federation of German Consumer Organisations)

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

– [...] –

The First Civil Chamber of the Federal Court of Justice [...]

has decided as follows:

- I. The proceedings are stayed.
- II. The following question is referred to the Court of Justice of the European Union [(‘CJEU’)] for a preliminary ruling on the interpretation of Article 80(2) 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 2016 L 119, p. 1) (‘the GDPR’).

Is an infringement of rights ‘as a result of the processing’ within the meaning of Article 80(2) of the GDPR asserted when a consumer protection association invokes, in support of its action, infringement of a data subject’s rights on the ground of non-compliance with the information obligations laid down in the first sentence of Article 12(1) of the GDPR, read in conjunction with Article 13(1)(c) and (e) of the GDPR, relating to the purpose of the data processing and the recipient of the personal data?

Grounds:

- 1 A. The applicant is the Federation of German Consumer Organisations of the German *Länder*, which is included on the list of qualified entities pursuant to Paragraph 4 of the Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Law on injunctions against infringements of consumer law and other infringements; ‘the UKlaG’). The defendant, Meta Platforms Ireland Limited (formerly Facebook Ireland Limited), established in Ireland, operates the Facebook internet platform at www.facebook.de, which is used to exchange personal and other data. A sister company of the defendant, Facebook Germany GmbH, established in Germany, advertises there the availability of advertising space on the internet platform and supports local advertising clients of the defendant. 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 of America.

- 2 The Facebook internet platform contains an area called the 'App-Zentrum' ('App Centre'), in which the defendant makes available to users, inter alia, free games provided by third parties. 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:

If you click on 'Play game' above, this app obtains the following:

- Your general information (?)
- Your email address
- About you
- Your status reports

This app may post on your behalf, including your score and other information.

- 3 The following notice was also to be found there:

By continuing, you consent to The Ville's general terms and conditions and data protection policy.

The general terms and conditions and data protection provisions were accessible via a link. Similar indications appeared in connection with the games 'Diamond Dash' and 'Wetpaint Entertainment', also under a 'Play now' button. The information on the game 'Scrabble' ended with the following sentence:

This app may post status reports, photos and more on your behalf.

- 4 The applicant takes issue with the presentation of the information supplied under the 'Play now' button in the App Centre on the ground that it is unfair, inter alia, in terms of the failure to comply with the legal requirements that apply to the obtention of the user's valid consent under the provisions governing data protection. Moreover, it considers that the final notice in the case of the game 'Scrabble' is a general condition which is unreasonably detrimental to the user.

- 5 The applicant applied for an order restraining the defendant, on pain of administrative penalties,

1. from presenting games, in the context of commercial activities aimed at consumers permanently resident in the Federal Republic of Germany, on the website with the address www.facebook.com, in an 'App Centre' in such a way that, by clicking on a button such as 'Play now', the consumer makes a declaration enabling the game operator to

obtain, via the social network operated by the defendant, information on the personal data on that website and authorising it to transmit (post) information on behalf of the consumer, as shown in the screenshots reproduced [not printed here];

2. from including the following provisions or provisions with identical content in agreements with consumers habitually resident in the Federal Republic of Germany concerning the use of applications (apps) within a social network, as well as from invoking the provisions relating to the transmission of data to the game operators:

This app may post status reports, photos and more on your behalf.

- 6 The applicant also claimed from the defendant compensation for the costs of giving formal notice amounting to EUR 200 plus interest. It brought the present action independently of a specific infringement of a data subject's data protection rights and without being mandated to do so by such a person.
- 7 The Landgericht (Regional Court, Germany; 'LG') ruled against the defendant, in accordance with the application (LG Berlin, ZD 2015, 133). The defendant's appeal was dismissed (KG, GRUR-RR 2018, 115). By way of its appeal on a point of law, for which the appellate court granted leave and which the applicant seeks to have dismissed, the defendant is further pursuing its application to have the claim dismissed.
- 8 In a decision of 28 May 2020 (I ZR 186/17, GRUR 2020, 896 = WRP 2020, 1182 – App Centre I), the Chamber stayed the proceedings and referred the following question to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Chapter VIII, in particular Article 80(1) and (2) and Article 84(1) of the GDPR, to clarify the legal situation under the General Data Protection Regulation, which entered into force during the proceedings in the appeal on a point of law and which has a prospective effect on applications for an injunction:

Do the rules in Chapter VIII, in particular in Article 80(1) and (2) and Article 84(1), of the GDPR 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 the GDPR, independently of the infringement of specific rights of individual data subjects and without being mandated to do so by a data subject, against the person responsible for that infringement 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 condition?

- 9 By judgment of 28 April 2022 (C-319/20, [...] Meta Platforms Ireland), the Court of Justice of the European Union ruled as follows:

Article 80(2) of the GDPR must be interpreted as not precluding national legislation which allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.

- 10 B. It is apparent from the judgment of the Court of Justice of the European Union of 28 April 2022 that the provisions at issue in the present dispute, relating to standing to bring proceedings under Paragraph 8(3)(3) of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition; 'UWG') and under Paragraph 3(1)(1), read in conjunction with Paragraph 2(2)(11) of the UKlaG, must be interpreted in a manner consistent with EU law in the field of application of the General Data Protection Regulation, in the light of the conditions laid down in Article 80(2) of the GDPR. The question as to whether the applicant, which bases its claims on non-compliance with information obligations relating to the purpose of the data processing and the recipient of the personal data, is asserting its claim on the grounds of infringement of rights 'as a result of the processing' within the meaning of Article 80(2) of the GDPR hinges on the inconclusive interpretation of that provision. Before a decision can be taken on the defendant's appeal on a point of law, the proceedings must therefore be stayed again and a preliminary ruling sought from the Court of Justice of the European Union under point (b) of the first paragraph and the third paragraph of Article 267 TFEU.
- 11 I. The appeal court was right to find that the claims were well founded. For the defendant's 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. That presupposes that, following the entry into force of the General Data Protection Regulation, qualified entities, such as the applicant consumer association in the present dispute, have the standing to bring proceedings under Paragraph 8(3)(3) of the UWG and Paragraph 3(1)(1) of the UKlaG before the civil courts for infringements of that regulation, independently of any specific infringement of rights of individual data subjects and without being mandated to do so by such a person for infringement of 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 under Paragraph 1 of the UKlaG (BGH, GRUR 2020, 896 (juris paragraphs 17 to 32 and 55 to 62) – App Centre I).

- 12 II. The applicant's standing to bring proceedings in the present dispute depends on whether, by its action, it claims that the rights of a data subject were infringed 'as a result of the processing' within the meaning of Article 80(2) GDPR.
- 13 1. In its decision to request a preliminary ruling of 28 May 2020, the Chamber proceeded from the assumption that, in accordance with German law, the applicant's standing to bring proceedings under Paragraph 8(3)(3) of the UWG and Paragraph 3(1)(1) of the UKlaG could not be inferred from the provisions of Chapter VIII of the General Data Protection Regulation since its claim was directed solely at the objective legal enforcement of data protection law in the present case (see BGH, GRUR 2020, 896 (juris paragraph 35) – App Centre I). It considered that such standing to bring proceedings cannot be based either on Article 80(1) or (2) of the GDPR or on Article 84(1) of the GDPR and that, in the light of the wording, context and objective of the General Data Protection Regulation, it is doubtful whether it harmonised not only the substantive rules on the protection of personal data, but also the enforcement of the rights existing under that regulation. It was in that context that the Chamber referred to the Court of Justice of the European Union for a preliminary ruling the question whether the General Data Protection Regulation laid down exhaustive rules in relation to the right of associations to take legal action precluding the applicability in the event of a dispute of the provisions laid down in Paragraph 8(3)(3) of the UWG and Paragraph 3(1)(1) of the UKlaG (BGH, GRUR 2020, 896 (juris paragraphs 33 to 54) – App Centre I).
- 14 However, the Court of Justice of the European Union decided, in a departure from the position taken by the Chamber in its decision to request a preliminary ruling (BGH, GRUR 2020, 896 (juris, paragraphs 37, 60 and 62) – App Centre I), that the applicant's standing to bring proceedings can derive from Article 80(2) of the GDPR (Court of Justice of the European Union, [...] paragraph 49 [...] – Meta Platforms Ireland). It proceeded on the assumption that that provision gives the Member States a discretion with regard to its implementation. In order for it to be possible to proceed with the representative action provided for in Article 80(2) of the GDPR, Member States must make use of the option made available to them by that provision to provide in their national law for that mode of representation of data subjects (see CJEU, [...] paragraph 59 [...] – Meta Platforms Ireland).
- 15 On the basis of the decision of the Court of Justice of the European Union, it is therefore necessary to ascertain whether the rules at issue in the present case under Paragraph 8(3)(3) of the UWG and Paragraph 3(1)(1) of the UKlaG fall within the scope of the discretion conferred on each Member State by Article 80(2) of the GDPR. That discretion must be determined, by way of interpretation, taking into account the wording of Article 80(2) of the GDPR and the scheme and objectives of the General Data Protection Regulation (see CJEU, [...] paragraph 62 [...] – Meta Platforms Ireland). The possibility offered to the Member States by Article 80(2) of the GDPR to provide for a representative action mechanism against the person allegedly responsible for an infringement of the laws protecting personal data sets out a number of requirements at the level of the personal and

material scope which must be complied with for that purpose (CJEU, [...] paragraph 63 [...] – Meta Platforms Ireland). It is true that, in the present case, the requirements relating to the personal scope are satisfied. By contrast, it is questionable whether, in the light of the content of the claims at issue, all the requirements relating to the material scope of Article 80(2) of the GDPR are also fully satisfied.

- 16 2. The standing to bring proceedings conferred on the applicant by Paragraph 8(3)(3) of the UWG and Paragraph 3(1)(1) of the UklG falls within the personal scope of Article 80(2) of the GDPR. The applicant, as a consumer protection association, meets the requirements of Article 80(1) of the GDPR relating to the standing of a not-for-profit body, organisation or association to bring proceedings (see CJEU, [...] paragraphs 65 and 79 [...] – Meta Platforms Ireland).
- 17 3. In the present case, it cannot be established without doubt whether all the relevant requirements relating to the material scope of Article 80(2) of the GDPR have been fully satisfied.
- 18 a) However, the applicant’s standing to bring proceedings cannot be called into question by the fact that it brought its action independently of a specific infringement of a data subject’s right to protection of his or her data and without being mandated to do so by such a person (see BGH, GRUR 2020, 896 (juris paragraph 7) – App Centre I; CJEU, [...] paragraph 36 [...] – Meta Platforms Ireland). It is true that the subject matter of the action relates only to an abstract legal examination of the defendant’s presentation in its App Centre in the light of the objective law on data protection (concerning the claim at issue in the present case, see BGH, GRUR 2020, 896 (juris paragraph 62) – App Centre I). However, the Court of Justice of the European Union has already held that a body, within the meaning of Article 80(2) of the GDPR, cannot be required to carry out a prior individual identification of the person specifically concerned by data processing that is allegedly contrary to the provisions of the General Data Protection Regulation. The concept of ‘data subject’, within the meaning of Article 4(1) of the GDPR, covers not only an ‘identified natural person’, but also an ‘identifiable natural person’, namely, a natural person who can be identified, directly or indirectly, by reference to an identifier such as, inter alia, a name, an identification number, location data or an online identifier. In those circumstances, the designation of a category or group of persons affected by such treatment may also be sufficient for the purpose of bringing such representative action (see CJEU, [...] paragraph 68 et seq. [...] – Meta Platforms Ireland). The users of the Facebook internet platform targeted by the design of the App Centre, who were interested in playing one of the games offered there and who could therefore potentially, by clicking on the ‘Play now’ button, declare their consent to the processing of their personal data, are identifiable natural persons in the above sense.

- 19 b) Furthermore, the fact that the applicant, by invoking an infringement of the rules on the protection of consumers' personal data, also invokes an infringement of other rules intended to protect consumers or to combat unfair commercial practices does not preclude the application of Article 80(2) of the GDPR (see CJEU, [...] paragraphs 66 and 77 to 82 [...] – Meta Platforms Ireland).
- 20 c) Article 80(2) of the GDPR also presupposes that the applicant association invokes infringement of the rights of a data subject under the General Data Protection Regulation 'as a result of the processing'. It is not clear whether that condition is satisfied in the circumstances of the present case. The question referred seeks to clarify the legal requirements imposed in this context.
- 21 aa) The question referred for a preliminary ruling has not already been settled by the judgment of the Court of Justice of the European Union of 28 April 2022 in the 'Meta Platforms Ireland' case, delivered in the context of the present dispute. In its judgment, the Court did not comment on the conditions that must be satisfied under EU law in order for the rights of a data subject under the General Data Protection Regulation to be deemed to have been infringed 'as a result of the processing'.
- 22 bb) The interpretation of the concept of infringement of rights 'as a result of the processing' within the meaning of Article 80(2) of the GDPR is not free from doubt. It is already unclear under what circumstances it is to be assumed that there is 'processing' and, in particular, whether there is such processing in the case of a breach of the information obligation at issue in the present case (on this subject, see paragraphs 27 to 31). Even if this were to be affirmed, the question arises as to whether an infringement occurred 'as a result' of the processing within the meaning of Article 80(2) of the GDPR (on this subject, see paragraphs 32 to 34).
- 23 (1) Under Article 4(2) of the GDPR, 'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction. It is apparent from the wording of that provision, and in particular from the expression 'any operation', that the EU legislature intended the concept of 'processing' to have a broad meaning. That interpretation is borne out by the non-exhaustive nature of the list of operations in that provision, expressed in the words 'such as' (CJEU, judgment of 24 February 2022, C-175/20, [...] paragraph 35 [...] – Valsts ieņēmumu dienests).
- 24 (2) In the present case, account must be taken of the fact that the applicant asserts that there has been an infringement of the defendant's obligation to provide information as to the purpose and extent of the user's consent to the processing of his or her personal data (BGH, GRUR 2020, 896 (juris paragraph 19) – App Centre I; CJEU, [...] paragraph 35 [...] – Meta Platforms Ireland).

- 25 The subject matter of the action is the presentation of games in the ‘App Centre’ on the defendant’s internet platform and an indication that the app is authorised to publish certain personal information of the user on his or her behalf (Court of Justice of the European Union, [...] paragraph 35 [...] – Meta Platforms Ireland). The applicant brought its action independently of a specific infringement of a data subject’s right to protection of his or her data and without being mandated to do so by such a person (BGH, GRLIR 2020, 896 [juris paragraph 7] – App Centre I); CJEU, [...] paragraph 36 [...] – Meta Platforms Ireland).
- 26 The action does not therefore concern the question whether the defendant infringes a user’s data protection rights at the moment when the user activates the ‘Play now’ or ‘Play game’ buttons in the App Centre, thus possibly triggering the processing of his or her personal data. Similarly, there is no dispute as to whether the automated operations relating to a user’s personal data following the activation of such a button infringe the user’s rights to the protection of personal data.
- 27 (3) According to the Chamber, it is not possible to answer unambiguously the question whether the infringement in the present case of the obligation arising from the first sentence of Article 12(1) and Article 13(1)(c) and (e) of the GDPR to transmit to the data subject information relating to the purpose of the processing of personal data and the recipient of the personal data in a concise, transparent, intelligible and easily accessible form, using clear and plain language (see BGH, GRUR 2020, 896 (juris paragraph 30) – App Centre I), falls under the concept of processing within the meaning of Article 4(2) of the GDPR.
- 28 ‘Processing’ could require, in the literal sense, a direct, or at least indirect, action in relation to personal data [...] [legal literature]. An ‘operation’, within the meaning of Article 4(2) of the GDPR, could presuppose an action that results in something happening to the data or the data being handled, and therefore possibly does not involve information obligations in connection with obtaining consent for the desired subsequent use of the data [...] [legal literature]. The regulatory context could also militate against the inclusion of information obligations in the concept of processing. The obligations to provide information about the purpose and scope of the processing of data envisaged by the controller relate to the stage prior to the actual processing of personal data.
- 29 On the other hand, having regard to the concept of processing, which must be interpreted broadly, the Court of Justice of the European Union has also held that it encompasses operations which simply ‘initiate’ data collection and thus an operation expressly regarded by the legislature as an example of processing (CJEU, [...] paragraph 37 [...] – Valsts ieņēmumu dienests). The situation at issue in the present dispute could be deemed to be equivalent because the presentation of the App Centre at issue in the action offered the user the possibility, by simply clicking on a button, to trigger directly an operation whereby his personal data were processed without any intermediate steps.

- 30 Moreover, a broad interpretation appears to be consistent with the objective pursued by the General Data Protection Regulation consisting in ensuring effective protection of the fundamental rights and freedoms of natural persons and, in particular, of ensuring a high level of protection of the right of every person to the protection of personal data concerning him or her (see CJEU, [...] paragraph 73 [...] – Meta Platforms Ireland).
- 31 Further support for a broad interpretation could be found in the need for the controller to fulfil the information obligation at issue in the present case, in accordance with Article 13(1) of the GDPR, ‘at the time when personal data are obtained’. Given that the information to be communicated is to serve as a basis for the data subject’s decision to consent to or oppose the processing of his or her data and that that purpose would be jeopardised if he or she did not obtain the information until after the beginning of the data collection, that information should be provided before the start of the flow of data [...] [legal literature]. That suggests that the legislature adopted a broad interpretation of the concept of collection, which also encompasses the situation prior to commencement of data collection in the technical sense.
- 32 (4) Even if the information obligation at issue in the present case falls within the concept of ‘processing’ within the meaning of Article 4(2) of the GDPR, the further question still arises as to whether, in the present case, the applicant is invoking an infringement that has occurred ‘as a result of’ the processing within the meaning of Article 80(2) of the GDPR.
- 33 The use of the expression ‘as a result of’ might suggest that the discretion conferred on the Member States by Article 80(2) of the GDPR extends only to the creation of legal standing to take representative action to invoke an infringement of the rights of a data subject under the General Data Protection Regulation resulting from a data processing operation within the meaning of Article 4(2) of the GDPR and which is, therefore, subsequent to such an operation.
- 34 However, the objective of the General Data Protection Regulation of ensuring effective protection of the fundamental rights and freedoms of natural persons and, in particular, of ensuring a high level of protection of the right of every person to the protection of personal data concerning him or her (see CJEU, [...] para. 74 – Meta Platforms Ireland) suggests that a right as an association to bring a representative action also encompasses the infringement of an obligation arising from the first sentence of Article 12(1) and Article 13(1)(c) and (e) of the GDPR to provide information on the purpose of the data processing and the recipient of the personal data in a concise, transparent, intelligible and easily accessible form, using clear and plain language. In that regard, account should also be taken of the fact that this information obligation also serves as preparation for the data subject’s consent as a primary requirement for the lawfulness of the processing of personal data under Article 6(1)(a) of the GDPR.

35 III. The Chamber states, for the sake of completeness, that, in any event, the question formulated in its decision to request a preliminary ruling of 28 May 2020 could arise again, in essence, in the event that the Court of Justice of the European Union answers the question referred here to the effect that standing to bring proceedings in the present case cannot be validly based on Article 80(2) GDPR.

[...]

WORKING DOCUMENT