Anonymised version

Case C-199/24

Request for a preliminary ruling

Date lodged:

13 March 2024

Referring court:

Attunda tingsrätt (Sweden)

Date of the decision to refer:

1 March 2024

Applicant:

ND

Respondent:

Garrapatica AB

ATTUNDA TINGSRÄTT …
…

PARTIES

Applicant
ND

Respondent
Garrapatica AB, …
Stockholm

…

MATTER

Damages [inter alia]; now whether to obtain a preliminary ruling from the Court of Justice of the European Union

…

The tingsrätten (‘District Court’) makes the following

ORDER

1 The District Court decides, on the basis of Article 267 of the Treaty on the Functioning of the European Union, to obtain a preliminary ruling from the Court of Justice ….

2 The District Court declares that the case is to be stayed pending receipt of the preliminary ruling from the Court of Justice.

…

THE REQUEST FOR A PRELIMINARY RULING

The dispute

Garrapatica AB runs the database Lexbase and publishes on it the personal details of persons who have been involved in criminal proceedings. The Myndigheten för press, radio och tv (the Swedish Press and Broadcasting Authority) [now Mediemyndigheten; Swedish Agency for the Media] issued a so-called *utgivningsbevis* (certificate of no legal impediment to publication conferring constitutional protection; ‘publication certificate’) for Lexbase. On 17 January 2011, ND was convicted of crime and the relevant sentencing decision was available on Lexbase until February 2024. The sentencing decision has been removed from the public register of criminal records.

The dispute concerns whether Garrapatica AB is liable to pay damages for infringement of the European Union’s General Data Protection Regulation [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’] and other regulatory provisions on the processing of personal data. ND has claimed that the company should be ordered to pay damages of SEK 300 000 together with interest thereon. Garrapatica AB has contested the claim, arguing that the GDPR does not apply since Lexbase is covered by a publication certificate. The company has, however, acknowledged that it refused to remove ND’s personal data in accordance with his request before the personal data were removed as part of the company’s routine internal data clean-up.

Garrapatica AB has accepted that a payment of damages in the amount of SEK 20 000 is reasonable per se.

The legal framework

The yttrandefrihetsgrundlagen and the dataskyddslagen

The yttrandefrihetsgrundlagen (1991:1469) (Constitutional Law (1991:1469) on freedom of expression; 'the Law on freedom of expression') is one of the so-called *mediegrundlagar* (constitutional media laws) in Sweden and contains provisions on constitutional protection for, inter alia, radio and television broadcasts and certain websites. The purpose is to ensure freedom of expression in that regard. According to Chapter 1, Article 4, of the Law on freedom of expression, the constitutional provisions on programme transmission are to be applied to a certain type of databases if there is a publication certificate for the activity. In the present case, a publication certificate has been issued for Lexbase, which means that the database is subject to constitutional protection.

In accordance with the first subparagraph of Chapter 1, Section 7, of the lagen (2018:218) med kompletterande bestämmelser till EU:s dataskyddsförordning (Law (2018:218) laying down supplementary provisions to the EU GDPR; the dataskyddslagen ('Law on data protection')), the GDPR is not to apply where it would contravene the tryckfrihetsförordningen (Constitutional Law on the freedom of the press; 'Law on the freedom of the press') or the Law on freedom of expression. Under the second subparagraph of the above provision, certain articles of the GDPR are not to apply to the processing of personal data carried out for, inter alia, journalistic purposes.

It follows from Chapter 1, Article 14, of the Law on freedom of expression that no public body may, except by virtue of that Law, take action against a person who has abused the freedom of expression or contributed to such abuse in a programme or take action against the programme for such a reason. Further, it follows from Chapter 1, Article 11, thereof that it is not permitted for a public body to prohibit or obstruct the transmission, publication or dissemination to the public of a programme, on the ground of its content, unless that measure has support in that Law.

Damages for abuse of the freedom of expression due to the content of a programme may – under Chapter 9, Article 1, of the Law on freedom of expression – be founded only on the fact that the programme which is the subject of the claim involves freedom of expression offences. Identifying someone as having a lifestyle which is criminal or culpable or otherwise providing information which is liable to expose another to the contempt of others constitutes the crime of defamation and is a violation of the freedom of expression under Chapter 5, Article 1, of the Law on freedom of expression and Chapter 7, Article 3, of the Ordinance on the freedom of the press (1949:105). However, it is not punishable if, having regard to the circumstances, it was justifiable to provide

information on the matter and if the person who provided the information can show that it was true or that he or she had reasonable grounds for believing that it was true.

The GDPR

According to Article 10 of the GDPR, processing of personal data relating to criminal convictions and offences based on Article 6(1) is to be carried out only under the control of official authority or when the processing is authorised by EU or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions is to be kept only under the control of official authority.

According to Article 17 of the GDPR, the data subject has the right to obtain from the controller the erasure of personal data concerning him or her without undue delay inter alia if the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed.

Any person who has suffered material or non-material damage as a result of an infringement of the GDPR has the right, under Article 82 thereof, to receive compensation from the controller or processor for the damage suffered.

It follows from Article 85(1) of the GDPR that Member States are by law to reconcile the right to the protection of personal data pursuant to that regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. Recital 153 states that Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to that regulation. Further, it follows that Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights.

For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States are also to provide, in accordance with Article 85(2) of the GDPR, for exemptions or derogations from certain chapters of the regulation if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

Need for a preliminary ruling

Under Article 267 of the Treaty on the Functioning of the European Union, a national court may request a preliminary ruling from the Court of Justice of the European Union. The possibility of requesting a preliminary ruling presupposes that a question of interpretation of EU law relevant to the case has arisen and that clarification is necessary to be able to rule on the matter.

The present case concerns the relationship between the freedom of expression and information and the right to the protection of personal data. The GDPR gives Member States a degree of legislative discretion in that regard. The Swedish rules mean that the GDPR is not applicable and that the right to the protection of personal data is catered for by the rules in the Law on freedom of expression and the Law on freedom of the press. The rules in the Law on freedom of expression on the processing of personal data in Chapter 1, Article 20, thereof do not apply to personal data such as those at issue in the present case. The right to the protection of personal data as regards the dissemination of personal data such as those at issue in the present case is catered for only through criminal responsibility for defamation and the possibility of seeking damages for defamation.

With regard to the balance between the freedom of expression and the right to the protection of personal data, the Court of Justice, interpreting the Data Protection Directive (Directive 95/46[/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31)], has ruled that a correct balance between those rights and interests is to be assessed on application of the provisions implemented in the national legislation on the basis of the directive. It is for the referring court to interpret the national legislation in a manner consistent with the directive and to ensure that the interpretation does not contravene the fundamental rights protected by the [EU] legal order or with the other general principles of [EU] law, such as, inter alia, the principle of proportionality (see judgment of the Court of Justice, *Bodil Lindqvist*[,] C-101/01[, paragraph 87])[.]

In the view of the District Court, there is room for interpretation with regard to the question of the extent to which and for what purpose the GDPR allows the Member States to take legislative measures with regard to the processing of personal data and the requirements laid down by the GDPR for the national legislation adopted on the basis of that regulation. Since EU law takes precedence over national legislation, clarification in that regard is necessary to be able to rule on the matter.

The GDPR expressly allows the Member States to provide for exemptions and derogations for the processing of personal data carried out for, inter alia, journalistic purposes. The GDPR does not define what constitutes journalistic purposes. The Court of Justice has stated that the expression is to be interpreted broadly and that activities the object of which is to disclose information, opinions or ideas to the public are to be regarded as being carried out for journalistic purposes, irrespective of the medium which is used to transmit them (see judgment of the Court of Justice, *Satakunnan Markkinapörssi Oy and Satamedia Oy*[,] C-73/07[, paragraph 61]). The Court of Justice further ruled that that is also the case of data from documents which are in the public domain under national legislation. However, it has not been further clarified whether the dissemination of information, opinions or ideas to the public also requires there to be some form of editing or processing of what is made available to the public.

The District Court is of the view that it is unclear how the GDPR is to be interpreted in that regard. There are therefore grounds to request a preliminary ruling from the Court of Justice.

Request for a preliminary ruling

The District Court requests a preliminary ruling from the Court of Justice of the European Union on the following questions.

1. Does Article 85(1) of the GDPR make it possible for the Member States to adopt legislative measures in addition to those which they must adopt under Article 85(2) of the regulation relating to the processing of personal data for purposes other than journalistic ones or the purposes of academic, artistic or literary expression?

2. If the previous question is answered in the affirmative: Does Article 85(1) of the GDPR allow a reconciliation of the right to the protection of personal data pursuant to that regulation with the freedom of expression and of information which means that the only legal remedy available to a person whose personal data are processed by making criminal convictions involving that person available to the public on the internet in return for payment is the initiation of criminal proceedings for defamation or the claiming of damages for defamation?

3. If the first question is answered in the negative or the second question is answered in the negative: Can an activity which consists of making available to the public on the internet in return for payment, without any processing or editing, public documents in the form of criminal convictions constitute processing of personal data for the purposes set out in Article 85(2) of the GDPR?