Case C-710/23

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:

22 November 2023

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of the decision to refer:

1 November 2023

Applicant:

Mgr. L. H.

Defendant:

Ministerstvo zdravotnictví (Ministry of Health)

Subject-matter of the main proceedings

The main proceedings concern an appeal in cassation lodged by the Ministerstvo zdravotnictví (Ministry of Health) (the Defendant) against the judgment of the Městský soud v Praze (Prague City Court), annulling the decision of the Defendant, as well as the decision of the Minister of Health, concerning the right to information claimed by the Applicant.

Subject-matter and legal basis of the request

The reference for a preliminary ruling pursuant to Article 267 TFEU pertains to the question of whether the provision of information about the actions of a legal person that includes information about a natural person constitutes the processing of the personal data of only legal persons or also natural persons, and whether – in the event that it does constitute the processing of the data of natural persons – such provision of information can be made subject to a condition that goes beyond the scope 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] (OJ 2016 L 119, p. 1; 'GDPR').

The questions referred

1) Does the disclosure of the first name, surname, signature and contact information of a natural person as the director or responsible representative of a legal person, made exclusively for the purpose of identification of the (person authorised to represent a certain) legal person still constitute processing of 'personal data' of the natural person concerned, pursuant to Article 4, point (1), GDPR, and thus fall within the scope of GDPR?

2) Can national law, including settled case-law, render the application by an administrative authority of a directly applicable EU regulation, namely Article 6(1)(c) or (e) GDPR, conditional on compliance with other conditions that do not follow from the text of the regulation itself but which, nevertheless, essentially extend the level of protection of personal data subjects, namely the obligation of a public authority to inform the data subject in advance of the submission of a request for the provision of his or her personal data to a third party?

Provisions of European Union law relied on

GDPR: sentence two of recital 14, Article 4, point (1), and Article 6(1)(a), (c), and (e)

Provisions of national law relied on

Zákon č. 106/1999 Sb., o svobodném přístupu k informacím (Law No 106/1999 on Free Access to Information) ('Law 106/99"): Paragraph 2(1) (obliged entities), Paragraph 3 (the obligation to provide information);

Paragraph 8a(1): 'An obliged entity shall only provide information pertaining to the personality, expressions of a personal nature or the privacy of a natural person, and personal data in line with legislation governing its protection.', and

Paragraph 8a(2): 'An obliged entity shall provide personal information concerning a publicly active person, public officer or public servant that are indicative of his or her public or official activities or position or job.'

Succinct presentation of the facts in and arguments of the parties to the main proceeding

1 The Applicant sought from the Defendant, as the obliged entity, provision of the following information, pursuant to Law No 106/99: (i) agreements concerning the

purchase of tests used to test for the presence of the SARS-CoV-2 disease in a tested person, concluded by the obliged entity, and furthermore (ii) certificate of the product (test) purchased by the obliged entity, documenting the possibility to use the test in the European Union or in the Czech Republic for verifying the presence of the SARS-CoV-2 disease in the person tested. The applicant sought information to the following extent: identification and description of the persons who issued each of the certificates.

2 The Defendant decided to reject the application in part. It did provide the requested certificates to the Applicant, but in them blacked out information of the natural person who signed the certificate on behalf of the legal person. Specifically, the following information was blacked out: first name, surname, signature, position within the legal person concerned; and in the case of several certificates, also the contact e-mail addresses, telephone number, and in some cases also the website of the company that issued the certificate ('Blacked-out information'). The reason for blacking out that information was the protection of the personal data of the natural persons who were shown in the certificates concerned as persons representing the legal persons concerned.

3 The Applicant filed an administrative appeal with the Minister of Health challenging the decision. In a decision of 15 September 2020, the Minister of Health upheld the Defendant's decision.

4 The City Court annulled both the decision of the Defendant and the decision of the Minister of Health. The court stated that the blacked-out information does constitute personal data within the meaning of Article 4, point (1), GDPR, whereby a natural person may be identified within the meaning of that provision of the GDPR, but disagreed with the Defendant's conclusion that none of the scenarios for the lawfulness of the processing of the personal data of the natural persons concerned under Article 6(1) GDPR were met. The court noted that the administrative authorities did not attempt to contact the data subjects concerned in regard of the provision of their personal data to the Applicant. In this regard, it referred to the case-law of the referring court concerning the provision of information pursuant to Law No 166/99, from which follows (i) the obligation of administrative authorities to inform, without undue delay, the persons concerned by the personal data, about the fact that the obliged entity intends to disclose the information to a third party, and (ii) the right of the potentially concerned persons to express their opinion with respect to such disclosure. It is then up to the obliged entity to take the statement of the persons concerned into account and to infer consequences from it for its further steps.

5 Furthermore, the City Court stated that the Defendant based its conclusion referred to above on an inadequate ascertainment of the facts of the case. It noted that the refusal by administrative authorities to provide the data concerned to the Applicant constitutes a procedural fault that may have an impact on the lawfulness of their decision. The Defendant failed to ascertain the position of any of the persons whose personal data it refused to disclose to the Applicant in respect of

the disclosure of their data to the Applicant, so it was unable to receive consent from the subject concerned pursuant to Article 6(1)(a) GDPR to such disclosure, and at the same time, it failed to grant those persons the position of parties to the proceedings pursuant to Paragraph 27(2) of the správní řád (the Administrative Code).

6 The Defendant considers the opinion of the City Court regarding data subjects as mandatory parties to national administrative proceedings to be mistaken. In the defendant's view, an administrative authority may inform the subject concerned if it finds it appropriate, but this does not constitute participation in proceedings before the administrative authority, even in an analogous sense. Hence, such a decision of an administrative authority that does not take advantage of the possibility to inform the data subject cannot constitute a procedural fault in its administrative decision.

7 The Defendant adds that, in the present case, data subjects (i.e., the natural persons whose data was blacked out in the certificates) are persons operating in the territory of the People's Republic of China and the United Kingdom of Great Britain and Northern Ireland where the legal persons that issued the certificates are incorporated, and that the Defendant does not have those natural persons' contact information. Hence, according to the Defendant, the requirement to inform them is, in practice, essentially impossible to meet. Furthermore, if the natural persons concerned were also parties to the proceedings concerning the disclosure of personal data, whether directly or in an analogous sense, the administrative authority would also be obliged to serve the challenged decision to them, which is not practicable given their unknown residence abroad.

8 The Applicant claims that it did not consider the blacked-out data of a natural person within a legal person to be personal data of a natural person, referring to recital 14 of the GDPR that excludes from the scope of the regulation 'the processing of personal data which concerns legal persons'. The fact that a natural person entitled to represent a legal person signs a certificate on behalf of that legal person cannot be deemed to constitute an expression of personal nature by a natural person.

Summary of the grounds for the request for a preliminary ruling and analysis of the questions referred

9 The first question concerns the definition of the boundary between 'personal data of natural persons', i.e., data subjects pursuant to Article 4, point (1), GDPR, to which this regulation applies provided other conditions are met, and 'personal data of legal persons' which are, on the other hand, excluded from its scope pursuant to recital 14 of the GDPR. The purpose of the application for the provision of information was not to obtain data about a natural person but only to monitor the conduct of a legal entity that is represented by a certain natural person.

10 The referring court states that, in view of the meaning and purpose of the request for information and the type of data disclosed in the present case, the view could be taken that the blacked-out data is data pertaining to a legal person. The GDPR would not apply to such a situation *ratione materiae*, as only data of a legal person is being requested, as part of an informative inquiry that concerns solely the activities of the legal person. The first name, surname, and position of a specific natural person authorised to represent the legal person should be logically seen as the 'contact details' of a legal person within the meaning of sentence two of recital 14 of the GDPR.

11 Nevertheless, the referring court is aware of the circumstances described below.

12 First: the case-law of the Court of Justice has repeatedly emphasised that the essence of the GDPR is to ensure effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data. [1] Hence, the interpretation of key defined terms of the GDPR, such as 'personal data', 'processing', or 'controller' must be very broad. [2] A reference can also be made to the judgment of 20 December 2017, *Nowak*, [3] where the Court of Justice concluded that *personal data* includes the written answers submitted by a candidate at a professional examination and any comments made by an examiner with respect to those answers. The interpretation of the term 'personal data' for the purpose of determining the scope of application of the GDPR is thus obviously very broad.

13 Second: although the second sentence of recital 14 of the GDPR seems to provide a negative definition of the scope of application of the regulation, apparently with regard to Article 4, point (1), GDPR, that recital is not specifically implemented in the definition of the material scope in Article 2 GDPR, or in the definitions in Article 4 GDPR, or in any other (legally binding) provisions thereof. It follows from established case-law of the Court of Justice that recitals of EU legislative acts may provide or adjust a certain interpretation of a binding provision of that act, but they do not have any normative force of their own. These are not legally binding provisions that could be applied independently. [4]

1 See judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 53 ('*Google*'), as well as of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 38.

2 See judgments *Google*, paragraph 34, as well as of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 28.

3 C-434/16, EU:C:2017:994, paragraph 62.

4 E.g., judgments of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraphs 91 and 92; of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraphs 42 and 43, or of 25 July 2018, *Confédération paysanne and Others*, C-528/16, EU:C:2018:583, paragraphs 44 to 46 and 51.

14 Third: in its judgment of 9 March 2017, in *Salvatore Manni*, [5] the Court of Justice appears to have accepted that information relating to identifiable natural persons are 'personal data' within the meaning of the previous legislation (i.e., Directive 95/46/EC, 'Directive 95/46'). The context of the case cited was, however, different, both in terms of facts and law.

15 Fourth: the GDPR entered into force after the *Manni* judgment; in recital 14, it excluded/confirmed the exclusion of the processing of information of legal persons from its scope. Hence a negative definition was added which was not explicitly mentioned in the recitals of Directive 95/46 and consequently was absent in the decision in the *Manni* case mentioned above. Recital 14 of the GDPR could also be understood as an expression of the intention of the EU legislature to interpret the scope of protection guaranteed by the GDPR somewhat more narrowly than before. In this regard, however, the question is to what extent GDPR regulation in this specific matter is to be identical with the previous Directive 95/46.

16 Fifth: even if 'personal data of legal persons' were *de facto* an exception derived by interpretation, which should then be presumably reflected in the interpretation of Article 4, point (1), GDPR *a contrario*, there is established case-law of the Court of Justice which insists on a strict and restrictive interpretation of any exception from the scope of the GDPR, in particular with regard to the interpretation of Article 2(2) GDPR. [6]

17 In this situation, the referring court therefore still holds that information concerning a responsible representative of a legal person does constitute data concerning the legal person, rather than data of the natural person representing that legal person, but it also contends that this issue of interpretation of EU law raises questions. The answer to the question referred may have a significant impact beyond the scope of the present case and the individual disclosure of information, among other things on the keeping of a number of registers and records of legal persons in Member States, as well as on the public's access to information about legal persons. It would be appropriate for the Court of Justice to set out general guidelines according to which a negative definition of the scope of the GDPR could be made with regard to data relating to legal persons that will frequently include information about natural persons who either represent the legal person or directly form it.

18 In general terms, the referring court concludes that, even though it understands the requirement of effective protection of the personal data of natural persons, this interest cannot, in its opinion, unilaterally and somewhat mechanically prevail

5 C-398/15, EU:C:2017:197, paragraph 34 ('*Manni*').

6 See e.g., judgments of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 68; of 20 May 2003, *Österreichischer Rundfunk, and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraphs 39 to 47; of 22 June 2021, *B*, C-439/19, EU:C:2021:504, paragraphs 61 to 72.

over any other legitimate interests, such as transparency and public access to information, which primary EU law itself recognises as constitutional values so far as concerns EU bodies (Article 15(3) TFEU). According to the referring court, the interpretation of the definitions in Article 4 GDPR should not be done in the abstract, in isolation, and without a link to a specific personal data processing operation, but in context, and with a view to the object of the specific processing, as was, after all, accepted by the Court of Justice in its judgment of 29 July 2019, *Fashion ID GmbH*, [7] as concerns the definition of 'controller' in Article 4, point (7), GDPR. A contrary approach would result in the GDPR being interpreted in an absolute manner, to then cover any and all human communication consisting, by definition, in an exchange of information, regardless of what it concerns.

19 If we accept the above-mentioned view of the specificity of processing, it would then be obvious in the referred case that the request for information was not aimed at obtaining the data of natural persons but concerned exclusively the provision of information about legal persons. Information about who is authorised to represent the legal person and sign a certificate on its behalf constitutes information about the legal person concerned, within the meaning of recital 14 of the GDPR in conjunction with a reasonable and contextually understood interpretation of Article 4, point (1), GDPR.

20 The second question referred concerns the obligation of national administrative bodies to inquire, prior to the disclosure of information, with the data subjects concerned about whom information may be disclosed, whether they agree to that disclosure, and to give them an opportunity to express their opinion in that regard.

21 This obligation arises from the referring court's case-law formed pursuant to Law No 106/99 *prior to the adoption of the* GDPR. Subsequently, the relevant provisions of the GDPR, namely Article 6, were, *de facto*, incorporated in the national legislation cited in the following manner.

22 In Paragraph 8a(1), Law No 106/99 links the disclosure of a natural person's personal data to the compliance of the processing of that data with legislation governing the protection of that data, i.e., currently, to the GDPR. In practice, that means that in order for an obliged entity to be able to disclose personal data or other information pertaining to the personality of a specific natural person, that processing of personal data by it must be in line with the reasons for personal data processing pursuant to Article 6 GDPR and any other provisions of the GDPR. Consequently, one of the scenarios for the lawfulness of processing must be fulfilled, in accordance with Article 6(1)(a) to (f) GDPR. Paragraph 8a(2) of Law No 106/99 features an exception from that requirement, but that provision will, however, not apply to the present case.

23 However, older case-law of national administrative courts requires, for any form of processing, with the exception Article 6(1)(a) GDPR (processing with the

[7] EU:C:2019:629, '*Fashion ID*'.

consent of the data subject), that the data subject be informed that the controller has received a request for the disclosure of data, and to request the subject's opinion. Here, it must be emphasised that the case-law does not require the subject's 'consent' but the communication of information that an inquiry has been received and 'requesting the opinion' of the data subject. Hence, the process required by that case-law applies to scenarios under (c) and (e) of Article 6(1) GDPR, which would be relevant in the present case, and therefore also to situations in which no consent of the data subject is required according to the GDPR.

24 In cases outside of Article 6(1)(a) GDPR, the decision to disclose or not disclose the requested personal data is within the exclusive competence and responsibility of the data controller. Article 6(1) GDPR does not generally foresee (but neither rules out) that the data controller should also inquire with and inform the data subject that it is planning to disclose his or her personal data to a third party, thereby entering into a kind of preliminary and informative dialogue with the data subject.

25 In noting that obligation, the referring court took heed of the right of the subjects to informational self-determination and of the need to minimise interventions in the private sphere of the persons concerned. The GDPR builds on the same premises in recital 4 as does the case-law of the Court of Justice cited above, concerning the interpretation of the regulation (paragraph 12 of this order for reference). Similarly, it could be argued that the obligation to inform the data subject about a request for information pertaining to him or her fulfils some of the principles of personal data processing set out in Article 5 GDPR. In this regard, the referring court states (i) the principle of transparency in the processing of personal data pursuant to Article 5(1)(a) GDPR and (ii) on the factual level, due to the real difficulty in duly informing the persons concerned and to receive a potential statement from them – the principle of data minimisation pursuant to Article 5(1)(c) GDPR. It could therefore be argued that although the obligation of the obliged entity to inform the data subject goes beyond what the GDPR sets out in these cases, it follows its spirit and purpose to provide a high level of protection to data subjects.

26 Nevertheless, the extension of that obligation to all cases of processing pursuant to Article 6(1) GDPR, and hence also to situations when an administrative authority is to assess the entire situation independently, is problematic. Since the GDPR came into force and the entire field was regulated by a directly applicable EU regulation taking precedence (rather than by a directive, as before), the approach taken by administrative authorities throughout the EU should be substantially identical and should be subject to identical conditions. After all, an identical scope of personal data protection throughout the EU should ensure the free movement of that data within a single legal framework (also see recital 2 of the GDPR).

27 Instead of – albeit maximal – harmonisation in the case of Directive 95/46, [8] the sphere of law on the EU level is now unified by a regulation. That way, a Member State can no longer link the national application of a directly applicable EU regulation to additional terms and conditions that do not arise from the EU act itself and that, by definition, will be different in each Member State. By doing so it would set up a regime where personal data processing and access to it will be potentially more difficult than in other Member States.

28 Finally, the referring court comments on the difficulty or impossibility of making data subjects parties by analogy to every national proceedings potentially leading to the disclosure of any personal data. The provisions of Article 1(1) GDPR in conjunction with Article 4, point (1), GDPR, interpreted in light of the first sentence of recital 14 of the GDPR, indeed mean that the protection granted by the GDPR applies to the processing of the personal data of all natural persons regardless of their nationality or place of residence. It is, however, difficult or impossible to automatically apply the obligation to inform and preliminarily consult the data subject concerned on the global level, both geographically and purely quantitatively. The data requested in the present case pertains to legal entities incorporated in only a few countries around the world outside of the European Union. Nevertheless, many data files with personal data can concern hundreds or thousands of persons from various countries. Making inquiries and preliminary consultations of a similar nature is impossible in such a case.

29 In concluding, it adds that, in the event of a negative answer of the Court of Justice to the first question concerning the *ratione materiae* scope of the GDPR, the second question becomes devoid of purpose in the present case.

8 See judgment in *Fashion ID*, paragraph 54.