Case C-200/23

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:

28 March 2023

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

21 March 2023

Appellant in cassation:

Agentsia po vpisvaniyata

Respondent in cassation:

OL

Subject matter of the main proceedings

The main proceedings have their origin in the appeal in cassation brought by the Agentsia po vpisvaniyata (Registration Agency, 'the AV') against the judgment of the Administrativen sad Dobrich (Administrative Court, Dobrich) annulling a letter from the Izpalnitelen direktor (Executive Director) of the AV and ordering the AV to pay compensation in the amount of LEV (BGN) 500 to OL for the non-material damage suffered by her in the form of negative emotions and experiences resulting from that letter, which infringed her right to erasure under Article 17(1) of Regulation 2016/679.

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. May Article 4(2) of Directive 2009/101/EC be interpreted as meaning that it imposes an obligation on the Member State to permit the disclosure of an instrument of memorandum and articles of association, which is subject to registration under Article 119 of the Targovski zakon (Commercial Code), in the case where that instrument contains not only the names of the members of the company, which are subject to compulsory disclosure under Article 2(2) of the Zakon za targovskia registar i registara na yuriditcheskite litsa s nestopanska tsel (Law on the Commercial Register and the Register of Not-for-Profit Legal Persons), but also other personal data? When answering this question, it is important to take into account that the Registration Agency is a public-sector body against which the directly effective provisions of the aforementioned directive may be relied on, in accordance with the settled case-law of the Court of Justice (judgment of 7 September 2006, *Vassallo*, C-180/04, ECLI:EU:C:2006:518, paragraph 26 and the case-law cited).

2. If the first question is answered in the affirmative, may it be assumed that, in the circumstances which gave rise to the dispute in the main proceedings, the processing of personal information by the Registration Agency is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, within the meaning of Article 6(1)(e) of Regulation 2016/679?

3. If the first two questions are answered in the affirmative, may a national provision such as that contained in Article 13(9) of the Zakon za targovskia registar i registara na yuriditcheskite litsa s nestopanska tsel (Law on the Commercial Register and the Register of Not-for-Profit Legal Persons), in accordance with which, in the event that personal data not required by law are contained in an application [for registration] or in the documents annexed thereto, it must be assumed that the persons who made those data available consented to the processing thereof by the Agency and to the provision of public access thereto, be regarded as permissible, notwithstanding recitals 32, 40, 42, 43 and 50 of Regulation 2016/679, as a clarification of the possibility of ‘voluntary disclosure’, within the meaning of Article 4(2) of Directive 2009/101/EC, even of personal data?

4. Is it permissible for provisions of national law intended to give effect to the obligation laid down in Article 3(7) of Directive 2009/101/EC, whereby Member States are to take the necessary measures to avoid any discrepancy between what is disclosed in accordance with paragraph 5 and what appears in the register or file, and to take into account the interests of third parties in being acquainted with the essential documents of the company and certain information concerning the company, as referred to in recital 3 of that directive, to prescribe a procedure (application forms, submission of copies of documents in which personal data have been redacted) for exercising the

right of natural persons under Article 17 of Regulation 2016/679 to obtain from the controller the erasure of personal data concerning him or her without undue delay, in the case where the personal data the erasure of which is sought are part of publicly disclosed (notified) documents which were made available to the controller, in accordance with a similar procedure, by another person who, in so doing, also determined the purpose of the processing initiated by him or her?

5. In the situation underlying the dispute in the main proceedings, does the Registration Agency act only as controller in relation to the personal data or is it also the recipient thereof, in the case where the purposes of processing those data were determined by another controller as part of the documents that were submitted for disclosure?

6. Does the handwritten signature of a natural person constitute information relating to an identified natural person, in the sense that it is covered by the term 'personal data' within the meaning of Article 4(1) of Regulation 2016/679?

7. Is the concept of 'non-material damage' in Article 82(1) of Regulation 2016/679 to be interpreted as meaning that the assumption of non-material damage requires a noticeable disadvantage and an objectively comprehensible impairment of personal interests, or is the mere short-term loss of the data subject's unfettered control over his or her data due to the publication of personal data in the commercial register, which did not have any noticeable or adverse consequences for the data subject, sufficient for that purpose?

8. May opinion No 01-116(20)/01.02.2021, issued by the national supervisory authority, the Komisia za zashtita na lichnite danni (Commission for the Protection of Personal Data), in accordance with Article 58(3)(b) of Regulation 2016/679, to the effect that the Registration Agency does not have the option or power in law to restrict of its own motion or at the request of the data subject the processing of data which have already been disclosed, permissibly be regarded as proof, for the purposes of Article 82(3), that the Registration Agency is in no way responsible for the circumstance which gave rise to the damage suffered by the natural person?

Provisions of European Union law and case-law relied on

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 94/46/EC (General Data Protection Regulation, 'GDPR'): Recitals 4, 32, 40, 42, 43, 50 and 65, and Articles 2, 4, 6, 17, 58 and 82

Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent: recitals 3 and 4, Article 2(a), Article 3 and Article 4(2)

Provisions of national law relied on

Targovski zakon (Commercial Code, 'the TZ'): Article 115, point 3, and Article 119

Zakon za targovskia register i registara na yuridicheskite litsa s nestopanska tsel (Law on the Commercial Register and the Register of Not-for-Profit Legal Persons, 'the ZTRRYULNTS'): Articles 2, 3, 6 and 11

Naredba № 1 ot 14 fevruari 2007 г. za vodene, sahranyavane i dostap do targovskia register i do registara na yuridicheskite litsa s nestopanska tsel (Regulation No 1 of 14 February 2007 on keeping, storing and accessing the Commercial Register and the Register of Not-for-Profit Legal Persons): Article 6

Succinct presentation of the facts and procedure in the main proceedings

1 OL is a member of the company 'Praven Shtit Konsulting OOD', which, on 14 January 2021, was entered in the Commercial Register kept by the AV. Submitted with the application for registration was an instrument of memorandum and articles of association, signed by the members of that company, which contained OL's three names, her identification number, the number and date and place of issue of her identity card and her address. The instrument of memorandum and articles of association was registered and published in the form in which it had been registered.

2 On 8 July 2021, OL asked the AV to erase her personal data as contained in the instrument of memorandum and articles of association and stated that, in so far as the processing of those data was based on her consent, she was revoking that consent.

3 The AV's failure to act on that request was the subject of a challenge as a result of which the Administrativen sad Dobrich (Administrative Court, Dobrich) annulled by final judgment the AV's tacit refusal to erase OL's personal data and referred the matter back to the AV for a new decision.

4 In implementation of that judgment (and another judgment of the Administrativen sad Haskovo (Administrative Court, Haskovo) to similar effect but in respect of the other member of the company, RS), the AV drafted a letter, No 66-00-758/26.01.2022, stating that grant of the request to erase personal data was

conditional upon the submission of a certified copy of the instrument of memorandum and articles of association of 'Praven Shtit Konsulting OOD' in which the personal data of the company members, other than the personal data required by law, have been redacted.

5 On 31 January 2022, OL brought directly before the Administrativen sad Dobrich (Administrative Court, Dobrich) an action against letter No 66-00-758/26.01.2022 from the AV and an action for compensation in the amount of LEV (BGN) 2000 for the non-material damage she had sustained as a result of that letter, which infringes her rights under Regulation 2016/679.

6 Without having received a copy of the instrument of memorandum and articles of association with the company members' personal data redacted, the AV, on 1 February 2022, erased of its own motion OL's identification number, the number and date and place of issue of her identity card and her address. OL's three names and her signature were not erased.

7 By its judgment, now being challenged before the referring court, the Administrativen sad Dobrich (Administrative Court, Dobrich) annulled the contested letter from the AV's executive director and ordered the AV to pay OL compensation in the amount of BGN 500, plus statutory interest on the main claim from 26 January 2022 until the date of its settlement in full. That compensation was awarded for the non-material damage in the form of negative emotions and experiences caused to her by the aforementioned letter, which had infringed her right to erasure under Article 17(1) of the 1 DSGVO and had led to the unlawful processing of OL's personal data as contained in the instrument of memorandum and articles of association disclosed in the Commercial Register.

8 The Administrativen sad Dobrich (Administrative Court, Dobrich) found that the letter of 26 January 2022 was contrary to the final judgment and that the unlawful processing of the personal data of the natural person concerned was therefore carrying on, in breach of her rights under Article 17 of the DSGVO and Article 2(2) of the ZTRRYULNTS. In order to establish liability under Article 82 of the DSGVO and to determine the amount of the compensation, the Administrativen sad [Dobrich] (Administrative Court, Dobrich) took into account the fact that the letter which it had found to have committed the breach was dated 26 January 2022, and that the AV erased OL's identification number, the number and date and place of issue of her identity card and her address on 1 February 2022, while her signature continued unerased. The court considered it to have been proved that, during that time, OL had suffered negative psychological and emotional experiences, namely fear and anxiety caused by the potential misuse of her personal data, and powerlessness and disappointment in the face of being unable to protect her personal data, and that there was a direct causal link between those experiences and the letter of 26 January 2022, in which the AV, notwithstanding the erasure request, the absence of any consent on OL's part to the ongoing processing [of her personal data] and the final judgment, took no steps to erase the personal data in question without delay.

9 Before the referring court, the AV is challenging the judgment in so far as it annulled the letter and awarded compensation. The appeal is founded on the ground that the letter is not an individual administrative act but is in the nature of information on the procedure provided for in connection with the requested erasure of personal data. It is expressly argued that the AV is not only the controller but also the recipient of personal data submitted in the registration procedure, and that the submission of an instrument of memorandum and articles of association with redacted data would have enabled the personal data of the natural persons concerned to be processed in such a way as to take into account the options for restricting access to parts of those data. In support of that position, the AV relies on opinion No PNMD-61-116(20)/2021 of the Komisiya za zashtita na lichnite danni (Commission for the Protection of Personal Data) of 1 February 2021, which the national supervisory authority had issued to the AV pursuant to its powers under Article 58(3)(b) of the DSGVO.

The essential arguments of the parties in the main proceedings

10 The AV submits that no unlawful act has been committed because, the applicant having failed to submit with the application to register the company concerned of 10 January 2021 an instrument of memorandum and articles of association with the personal data redacted, she was advised on 12 January 2021 to submit a copy of the instrument of memorandum and articles of association with the personal data not covered by the obligation of disclosure redacted. That advice not having been followed, the company concerned was registered and the instrument of memorandum and articles of association was disclosed in the form in which it had been submitted (that is to say, with non-redacted personal data). The AV argues that there is no possibility of changing the stated circumstances for registration and disclosure and that the failure to submit an instrument of memorandum and articles of association in which the personal data [have been] redacted is no reason to refuse in principle to register a company. In its view, the letter of 26 January 2022 simply provides information on the statutory procedure for erasing previously disclosed personal data.

11 In the view of the AV, it has not been proved that the letter of 26 January 2022 caused damage described as a ‘feeling of powerlessness and disappointment’ at not being able to protect personal data[’]; if OL was indeed perturbed because her data was accessible to the public, she had the option of submitting to the AV for disclosure a copy of the instrument of memorandum and articles of association with the personal data redacted, so as to ensure that that state of affairs did not carry on, instead of taking the more protracted route of seeking judicial relief.

12 In addition, the AV denies the existence of a causal connection between the letter of 22 January 2022 and OL’s emotional experiences.

13 OL takes issue with all of AV’s arguments and is of the view that the AV is the personal data controller and that it is not permissible for it to impose on others its

own obligations in connection with the erasure of the personal data of natural persons. She relies on case-law to the effect that the opinion of the national supervisory authority on the protection of personal data is contrary to Regulation 2016/679 and puts forward detailed reasons for her position that the AV processes personal data in a manner contrary to Community law. She further submits that notifications have already been sent to the European Commission (No CHAP(2022)0864/18.02.2022) and to the Ministar na pravosadieto (Minister for Justice) (No 014-00-118/18.05.2022).

Succinct presentation of the reasoning in the request for a preliminary ruling

14 In addition to the abovementioned judgment of the Administrativen sad Haskovo (Administrative Court, Haskovo), in a case in which RS, the other member of the company 'Praven Shtit Konsulting OOD' was a party, there are numerous other judicial decisions concerning the [exercise of the] right provided for in Article 17(1) of the DSGVO in similar factual circumstances. By judgment No 789/25.01.2023 of the Varhoven administrativen sad (Supreme Administrative Court), judgment No 167/04.05.2022 of the Administrativen sad Dobrich (Administrative Court, Dobrich) was set aside in so far as it ordered the AV to pay a natural person compensation in the amount of BGN 500 for non-material damage in the form of negative emotions and experiences caused by a letter from the Executive Director of the AV the content of which is identical to that of the letter of 26 January 2022. The Varhoven administrativen sad (Supreme Administrative Court) held that, the personal data of the natural person concerned as contained in the instrument of memorandum and articles of association having been erased [by the AV] of its own motion, and the dispute having to that extent been terminated, it was not permissible to adjudicate on an independent action for compensation for refusal to erase data.

15 Preceding that judgment and the main proceedings [in that case] are numerous other disputes which have their origin in requests made by natural persons to the AV for the erasure of their personal data as disclosed in the public registers kept by the AV. Depending on the specific features of the appeals lodged and the procedural steps taken or judgments given by the courts of first instance, the court of last instance, the Varhoven administrativen sad (Supreme Administrative Court), has developed a line of case-law which can be divided into three groups of judgments.

16 In the first group, the court finds that the action before it is directed against a letter of abstract content and in the nature of information which is said to be an individual administrative act of the Executive Director of the AV but which does not exhibit any of the characteristics of an [administrative] act of the kind open to challenge by way of the proceedings in question, with the result that the proceedings instituted by such an action are impermissible.

17 The second group comprises court judgments on actions which have already been directed against a refusal by the AV to erase personal data, so that the appeals are held to be admissible for examination, but the cases in which are for procedural reasons referred back to the AV for a new decision. In some of the judgments in this group, the courts have drawn legal conclusions to the effect that the processing of personal data is unlawful because Article 13(9) of the ZTRRYULNTS assumes consent and this is contrary to the DSGVO.

18 The decisions in the third group also set aside the judgments at first instance on procedural grounds and refer the cases back for a new decision, with instructions on how the law is to be applied.

19 The referring Chamber takes the view that, notwithstanding that the case-law of the court of last instance adjudicating on disputes in connection with the application of Regulation 2016/67 is not formally contradictory, there is no clear consensus among the parties and the courts in Bulgaria in this regard. For the most part, the grounds of the judgments draw the conclusion that the Komisiya za zashtita na lichnite danni (Commission for the Protection of Personal Data) issued an erroneous opinion providing an incorrect explanation of the AV's powers in respect of requests it receives to erase personal data. Such a contradictory interpretation of the provisions of the DSGVO in the opinion issued by the national supervisory authority, on the one hand, and in judgments binding only on the parties in the case concerned, on the other, is indicative of how difficult it is to find the true meaning of the applicable EU law. The risk of a misinterpretation of the relevant provisions in a multitude of cases pending before courts of different instances can be avoided only by submitting a request for a preliminary ruling to the Court of Justice of the European Union, which can provide a universally binding explanation of the meaning of the applicable law.

20 The case-law of the Court of Justice of the European Union of which the referring court is aware, namely the judgments of 9 March 2017, *Manni* (C-319/15, EU:C:2017:197), of 7 May 2007, *Rijkeboer* (C-553/07, EU:C:2009:293), and of 24 September 2019, *GC and Others* (C-136/17, EU:C:2019:773), does not answer the questions which are relevant to the correct adjudication of the case brought by the AV's appeal in cassation. While it may be that the judgment, when given, of the Court of Justice of the European Union in Case C-456/22, on the request for a preliminary ruling received on 8 July 22 from the Landgericht Ravensburg (Regional Court, Ravensburg) (Germany), will provide clarification of the concept of 'non-material damage', within the meaning of Article 82(1) of Regulation 2016/679, which may be of use in the present case, it is not inconceivable, in the light of the particular features of the main proceedings, that the answer expected to be given by the Court of Justice of the European Union will not be sufficient for the purposes of the decision in the main proceedings. In her Opinion of 6 October 1922 in *Norra Stockholm Bygg* (C-268/21, EU:C:2022:755, points 18, 19 and 22), Advocate General T. Ćapeta starts from the premiss that the data controller determines the purpose and means of the processing of personal data, and raises the possibility that a person may have different roles in relation to the same

personal data, as data controller, as data recipient or as both, depending on the purpose of the processing. Since that part of the Opinion is not discussed in the judgment of the Court of Justice in that case (judgment of 2 March 2023, *Norra Stockholm Bygg*, C-268/21, EU:C:2023:145), the Court's view on the questions raised is not clear, even though it would be of crucial relevance in the present case. The effects which the DSGVO has on all areas of law, in terms of reconciling the right to protection of the personal data of natural persons which it enshrines with the pre-existing law guaranteeing public disclosure and access to certain activities, including to trade, call for an extremely careful interpretation of each of its provisions which is clear and binding on all national authorities that apply it.

21 Since its decision in this case is not open to challenge, the referring court takes the view that it has a duty, given the uncertainties and difficulties that exist in relation to the interpretation of the relevant provisions of Community law, to avail itself of the cooperation procedure and to submit this request for a preliminary ruling to the Court of Justice, in order to avert a misinterpretation of provisions of Community law and contradictory case-law.