Case C-17/22

Request for a preliminary ruling

Date lodged:

7 January 2022

Referring court:

Amtsgericht München (Germany)

Date of the decision to refer:

21 December 2021

Applicant:

HTB Neunte Immobilien Portfolio geschlossene Investment UG & Co. KG

Defendant:

Müller Rechtsanwaltsgesellschaft mbH

[…]

Amtsgericht München (Local Court, Munich)

[…]

In the case of

HTB Neunte Immobilien Portfolio geschlossene Investment UG & Co. KG, […] 28217 Bremen – applicant -

[…]

v

Müller Rechtsanwaltsgesellschaft mbH, […] 80687 Munich – defendant -

[…]

in the matter of requests for information

The Court of Justice of the European Union is hereby requested to give a preliminary ruling. The order for reference is made together with and, aside from the heading, is identical in wording to the order made in other proceedings before the referring court […]. The order for reference suspends the proceedings pending the ruling by the Court. On 21 December 2021, the court made the following

Request for a preliminary ruling

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council):

1.a. Is Article 6(1)(b) and (f) of the General Data Protection Regulation to be interpreted as meaning that, in the case of a partnership comprised of many members of the public, a limited partner with negligible liability has a 'legitimate interest' in obtaining information relating to all partners with shares held indirectly through a trustee, together with their contact details and the number of their shares in such a partnership, and a contractual obligation to that effect must be inferred from the partnership agreement?

1.b. Or is a legitimate interest restricted under such circumstances to obtaining from the partnership information on limited partners with shares held indirectly and, rather than bearing negligible liability, hold shares above a minimum threshold that may, at least potentially, allow them to influence the future of the partnership?

2.a. Does the intention to make contact for the purpose of becoming better acquainted, exchanging views or negotiating the purchase of shares in the partnership suffice in order not to exceed the limits to prevent abuse of rights inherent in such an unrestricted right (1a) or to make an exception to the restriction applicable to a restricted right to information (1b)?

2.b. Or is an interest in information potentially relevant only where its disclosure is requested with the express intention of contacting other partners in order to invite them to coordinate on specifically designated matters on which a consensus is needed for the purpose of partners' resolutions?

Reasons

A. The dispute to be adjudicated by the national court:

The national court has been seised of two disputes seeking information and hence data disclosure. The applicants have each invested indirectly in different

investment companies, both of which are organised in the form of a limited partnership. The partnerships are publicly owned and holdings in them are acquired by cash investment. In terms of order of magnitude, one of the partnerships has approximately 1 800 limited partners with direct and indirect holdings.

The applicants are seeking disclosure of the names and addresses of everyone, that is of the entire public invested in the publicly owned investment company, including the names of all the limited partners with holdings held indirectly via a trustee and information on how they can be reached. In other words, they have requested information on everyone who has invested in the partnership.

The applicants are also investment companies themselves. The defendants assume that the intention is to use the data requested in order to pursue the applicants' own economic interests, be it to advertise their own investment products or to worry investors into selling their shares at a discount and to resell them at a profit, rather than for the purpose of promoting the business. The investment and trust agreements lay down contractual rules prohibiting the disclosure of data to other investors.

The applicants deny any such intentions. They claim that they have a right to contact the other members; that the contractual terms prohibiting the disclosure of data are invalid; and that they wish to enter into share purchase negotiations with the other limited partners and to invite them to an exchange of views in order to become better acquainted. By that submission, the actions address two mutually reinforcing lines of case-law by the supreme and higher civil jurisdiction in Germany.

1. The applicants refer to case-law of the Bundesgerichtshof (Federal Court of Justice) in support of their right to contact the other members. By its order of 19 November 2019, II ZR 263/18, the Federal Court of Justice abided by its case-law that one 'vital and key right of partners' in a partnership is the right to obtain the names and addresses of the other partners and thus to become acquainted with their contractual partners; that this also applies to limited partners with indirect holdings; that each partner needs to know all the partners, including partners with indirect holdings, in order to make effective use of the rights in the partnership formed between trustors of a partnership comprised of many members of the public; that disclosure of the data to other partners is therefore in keeping with the obligations of the partnership under the partnership agreement executed; and that one partner's request for information for the purpose of becoming acquainted with the other partners is restricted only by the ban on the inadmissible exercise of rights (Paragraph 242 of the Bürgerliches Gesetzbuch (Civil Code, 'the BGB') and the ban on chicanery (Paragraph 226 of the BGB).

This maintains a line of precedent initiated in supreme court judgments prior to the adoption of the General Data Protection Regulation. The court held as follows:

There is no abuse of rights where an investor seeks to contact other investors in order to exchange views with the other investors on what they consider to be problems in the partnership and, possibly, to establish an interest grouping between the investors. Where purposes are pursued that are unrelated to the business, the remedies available under competition law and data protection law suffice for the purpose of initiating action against abusive conduct. There is no reason to refuse information on the grounds of a purely abstract risk of misuse of the data (findings from the judgment of the Federal Court of Justice of 5 February 2013, II ZR 134/11). It must be left to the partner in that regard to decide how and by what means to approach the other partners. A partner should not have to rely on the management of the partnership as a go-between to contact other partners or be required to use media provided and controlled by it. Nor, therefore, should a partner need to be referred to an online forum as a milder device within the meaning of Paragraph 127a of the Aktiengesetz (Law on Stock Corporations, 'the AktG') (findings from the judgment of the Federal Court of Justice of 5 February 2013, II ZR 134/11).

Nor can the right to information be excluded by contract. Excluding a right to know all the other partners would eliminate in fact an essential partner's right, namely the right to convene an extraordinary meeting of partners, as a minority partner could only achieve the quorum needed to do so by joining forces with other partners, which would be impossible without their names and addresses (findings from the judgment of the Federal Court of Justice of 21 September 2009, II ZR 264/08).

Certain questions, such as who controls the partnership, whose 'mouthpiece' a trustee is acting as, whether the trustee is prohibited from voting where other partners have a vested interest, whether another partner has a duty to act in good faith similar to a prohibition of competition, and how the composition of the partnership changes in structure over time, give rise to an inalienable right to information on all the partners, even in a partnership comprised of many members of the public, that is more extensive than in the case of a listed public limited company, for which the statutory duty of disclosure enacted in Paragraph 33 of the Wertpapierhandelsgesetz (German Law on Trading in Securities) only applies to holdings representing upwards of 3% of voting rights (findings from the judgment of the Federal Court of Justice of 5 February 2013, II ZR 134/11).

The Federal Court of Justice did not feel duty bound to request a preliminary ruling by the Court. The fact that a partner should be granted a right to information, which cannot be restricted by contract and against which the only possible plea is abuse of rights, is so obvious an application of EU law as to leave no scope for reasonable doubt. The fact that disclosure by the partnership to one partner of the data of all the other partners is also justified under the General Data Protection Regulation clearly follows from recital 48 of the General Data Protection Regulation, which refers to data processing even 'within a group of undertakings' as a possible legitimate interest. This means, by the process of reduction applied by the Federal Court of Justice, that data transmission within a

group of undertakings is justified under recital 48 if carried out for 'internal administrative purposes', thereby putting the transmission of personal data of all the partners to one partner on the same footing as transmission from one controlled undertaking to another or to the controlling undertaking, while at the same time classing it as an internal administrative purpose.

2. By their further submission that they wished to negotiate share purchases with the other limited partners, the applicants then refer to the case-law on the following question: if the only limit on the right to information is abuse of rights, what of itself constitutes abuse of rights or at what point does abuse of rights occur. Other regional court judgments are relevant in that regard here, including judgment of the Oberlandesgericht München (Higher Regional Court, Munich) of 16 January 2019, 7 U 342/18, which found as follows:

Corporate law allows investors to strengthen their position in a partnership by acquiring additional shares. Every trustor is aware that the investment fund uses their data for the purpose of performing the partnership agreement. The partnership agreement essentially sets out terms governing the exercise of partners' rights, including by means of reciprocal exchange, the exercise of control and, where appropriate, mergers between partners, and the measures to strengthen a partner's position. That includes the facility to influence that position, if necessary by purchasing shares. The exercise of rights would only become inadmissible where there is no conceivable link between one partner's standing and their privity of contract with the other partners. The information may be refused only where there is no reasonable interest in its disclosure, for example, where it is established that its purpose is unrelated to the business. However, an interest in purchasing third-party shares is a reasonable interest.

Thus, the Higher Regional Court implicitly assumes that each partner's abstract expectation that their data are needed and will be used to perform the partnership agreement justifies the further assumption that the limited partnership may disclose data to any other partner for the simple reason that that other partner is interested in purchasing shares. The Higher Regional Court did not consider the other partners' reasonable interest in confidentiality of their personal data. The judgment of the Higher Regional Court further implies that even future voting rights secured by one partner, perhaps by increasing their own holding, would constitute a legitimate interest in information already inherent in the existing privity of contract.

B. […] The relevance of the answers to the questions referred […]:

As a consequence of the national case-law, empty and practically unprovable assertions by one partner that they might be interested in purchasing another partner's shares would suffice in order to demand comprehensive information on all the limited partners, even those with an indirect holding, including their addresses and their stake in the business. As rights are potentially abused only where there is no conceivable link with the partner's position, even abstract risks,

i.e. risks which cannot be shown and which are not purely theoretical, that unrelated purposes will be pursued carry no weight, as there is always the possibility that the data will, at the very least, also be used to achieve a consensus with the other partners that promotes the business. Once the data have been disclosed, the data controller is no longer able to apply security measures to control the handling of the data by the applicants. To summarise, the disclosed data of limited partners, including those with an indirect holding in a partnership comprised of many members of the public, lose all residual protection as of their disclosure.

Although interpretation may well result in that outcome, for example where the principles of commercial law governing investment in an undertaking in the form of a partnership take precedence, such that anyone who personally invests in an undertaking, even with limited liability, must be treated as a principal, the referring court does not consider that, in the case of the limited partners of a partnership comprised of many members of the public with relatively negligible liability, often amounting in total to a manageable sum of capital, an interpretation by the Court is so predictable as to render an order for reference superfluous.

The questions submitted will enable judgment to be given, as the only assertion made to date in the proceedings at issue is that the intention was to purchase third-party shares. If that suffices, the action must be admitted. If it does not and all other submissions remain the same, the action would be ripe for dismissal. If the action is admitted, the court's judgment would be final, as the adverse effects for the defendant are limited to the cost of providing the information, which falls below the national limit for referral to a higher court.

C. Considerations of the court on the answers to the questions referred:

1.a. The referring court also assumes that the term of the agreement excluding the provision of information is invalid, not because such exclusion is impossible as a matter of principle, but because, as a far-reaching and therefore unreasonable and hence invalid restriction of rights, it fails as a general term of business.

1.b. The question referred by the national court is limited to the requirements of EU law applicable to information on partners with indirect holdings. Under German law, limited partners with direct holdings must by law be entered in the commercial register with their full name, date of birth and place of residence. Anyone who invests in an undertaking in that way must expect such disclosure.

2. By contrast, it is not obvious to a person who invests via a trustee that such data must necessarily be disclosed because the partners have a key right to such disclosure. There is nothing to suggest that they should be treated in the same way as limited partners with a direct holding:

2.a. The contested investment or trust agreements provide, even if they are invalid in that respect, that no data are to be disclosed to other investors and thus, at the very least, express a fundamental expectation of the partners.

2.b. There is no legal obligation to publish the names of persons party to a trust who invest in a commercial partnership without incorporating.

2.c. Although the local court then concurs with the fundamental assumptions of the higher courts, namely that everyone in a partnership is aware that their personal data are retained by the partnership and may be disclosed, provided that is 'objectively reasonable' for the purpose of discharging contractual or legal obligations, in which case it is obvious that, where an obligation exists, it is objectively reasonable to discharge it,

the existence of an obligation depends not only on whether the request by the partner seeking the information is objectively reasonable, but on how the agreement is to be evaluated, meaning that the request must outweigh the other partners' interest in being allowed to keep their data secret, at least to start with, and not to see it disclosed as soon as a reasonable counter-interest arises. Under EU law, data protection is the rule and the fact that an interest is comprehensible does not of itself suffice to justify an exception. In the opinion of the referring court, that interest must always relate to the purpose for which the partner concerned disclosed their data, namely the fortunes of the business.

2.d. Next, the referring court agrees with the objectives of the case-law set out above, that a partner has an automatic and, in that sense, unrestricted right to know who exerts real influence on the partnership in which they have made a business investment with the risks that entails. The referring court simply questions whether that can substantiate a duty to disclose information on all limited partners with indirect holdings.

(1) It is obvious that the holding of most limited partners of a partnership comprised of many members of the public is not so large that the limited partner can expect to exert any influence on the fortunes of the partnership through their holding. Instead, the referring court assumes that the fact of being in a partnership and thus personally involved does not of itself suffice to be able to demand information. If it did, that would fail to take proper account of the fact that, in publicly owned limited partnerships which are or were open to any number of investors, an element of personal involvement has largely given way to the view that this is simply a form of investment in the capital market similar to a shareholding, and no shareholder whose holding falls below a significant percentage would expect the share depositary to pass their name and address to other shareholders.

In that regard, further interpretation of the agreement would suggest various ways in which 'small' investors can be protected, so that they too can engage in the necessary collective exercise of interests, such as the right to have communications from 'small' investors passed to all the other investors via the partnership, which for its part is obliged to safeguard law-abiding conduct, or via a forum provided by the partnership for 'small' investors to exchange views similar to that referred to in Paragraph 127a of the AktG.

(2) The judgments given by the higher courts are also appropriate in that they establish a clear relationship between the rule and the exceptions. This allows for the fact that the controller in a partnership comprised of many members of the public cannot reasonably consider, individually and separately for each of its 1 800 partners, whether information should or should not be provided, and must rely instead on manageable criteria that define in the abstract the group of persons on which information is to be provided. Therefore, a general and hence formal criterion is needed by which to determine who is subject, as a rule at least, to mandatory disclosure of their information, so as to ensure that, as well as the courts, data protection officers have proper, legally secure, decision-making powers to adjudicate such disputes.

The case-law to date is easily applied, as investment companies have to comply with practically all requests for information from partners.

However, the court considers that a formal threshold clearly needs to be assumed, similar to the threshold which triggers mandatory disclosure in a listed stock corporation, above which significant influence on the partnership is considered formally feasible, as expressed in Paragraph 33 of the German Law on Trading in Securities, which sets a threshold of 3%. Although the application of that threshold *mutatis mutandis* has been rejected to date by the Federal Court of Justice, EU requirements would, at least potentially, allow such application *mutatis mutandis*.

2.e. In any event, the court disagrees that purely empty assertions of an 'interest in becoming acquainted' or an 'interest in purchasing shares' suffice for the purpose of data disclosure and are not an abuse of rights.

(1.) That an interest in purchasing shares suffices to establish a right to information would appear to the referring court to be contrary to the agreement and inappropriate: No-one is entitled to obtain names and addresses entrusted to a third party directly from that third party for the purpose of entering into negotiation with the data subject with a view to executing a future contract. On the contrary, that argument would appear to be inconsistent if future legal positions which depend on the will of others, and hence arbitrariness, are supposed to substantiate such rights to information *ex ante*. Proposing a transaction to someone does not justify disclosure of their data without their consent.

Even more fundamentally, the argument that any conceivable right of itself suffices to exclude an abuse of rights would appear to fall short in terms of guaranteeing data protection under EU law. The referring court is of the opinion that data protection means that even abstract risks must be prevented and that this must then inform what is understood by abuse of rights. Consequently, the assertion of a right which does not in turn express a minimum commitment and/or substantive plausibility should always be classed as abuse of rights.

(2.) Similarly, ‘becoming acquainted’, measured against what is expected by a person who, as a member of the public, provides their data for the purpose of making an investment, does not constitute a serious reason. No-one who makes a financial investment thereby consents to the possibility of being approached in order to become acquainted.

(3.) Instead, it seems reasonable and appropriate that particular, specifiable requests should have to be referred directly to the management. That would put the purpose of data transfer on a formal footing, thereby enabling the partnership to cite the purpose of the data transfer in the event of data disclosure complaints and, if it learns, for example through complaints from other partners, that the data are being used for undeclared purposes, to set in motion the sanction mechanisms provided for under data protection law.

3. In short, the referring court suggests that it would be reasonable to interpret the General Data Protection Regulation as meaning that, in the case of a partnership comprised of many members of the public, it establishes an unrestricted right to information only above a certain threshold as a starting point and, moreover, that the partnership is only obliged to pass communications from one partner to all the partners with direct and indirect holdings.

The referring court further suggests that it would be reasonable to interpret the General Data Protection Regulation as meaning that simply ‘becoming acquainted’ and an interest in purchasing shares are not relevant factors and cannot therefore establish a right to information, and that every request for information must state the specific, business-related reason behind the request for information.

D. Admissibility of the questions referred

The questions referred seek […] to determine the factors that are relevant in an appraisal by virtue of the law, i.e. what would appear to be significant and therefore ‘consequential’ in that appraisal. The same applies to questions concerning the factors that are relevant for the purpose of determining the intrinsic limits on a ‘legitimate interest’. Given the questions to which this gives rise concerning legal structures under EU law, it would appear appropriate to request a preliminary ruling by the Court.

[…]