

Anonymised version

Translation

C-132/21 – 1

Case C-132/21

Request for a preliminary ruling

Date lodged:

3 March 2021

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

2 March 2021

Applicant:

BE

Defendant:

Nemzeti Adatvédelmi és Információszabadság Hatóság (National Authority for Data Protection and Freedom of Information, Hungary)

Fővárosi Törvényszék (Budapest High Court, Hungary)

Other party intervening in support of the defendant: Budapesti Elektromos Művek Zártkörűen Működő Részvénytársaság ([...] Budapest [...])

[...] [matters of domestic procedural law]

Subject matter of the dispute: Administrative-law action brought against [an] administrative decision [...] relating to data protection

Order:

The referring court hereby makes a reference to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Articles 51(1), 52(1), 77(1) and 79(1) 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, and of Article 47 of the Charter of Fundamental Rights in conjunction with the aforementioned provisions.

The referring court submits the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. **Must Articles 77(1) and 79(1) of [Regulation 2016/679] be interpreted as meaning that the administrative appeal provided for in Article 77 constitutes an instrument for the exercise of public rights, whereas the legal action provided for in Article 79 constitutes an instrument for the exercise of private rights? If so, does this support the inference that the supervisory authority, which is responsible for hearing and determining administrative appeals, has priority competence to determine the existence of an infringement?**
2. **In the event that the data subject — in whose opinion the processing of personal data relating to him has infringed Regulation 2016/679 — simultaneously exercises his right to lodge a complaint under Article 77(1) of that regulation and his right to bring a legal action under Article 79(1) of the same regulation, may an interpretation in accordance with Article 47 of the Charter of Fundamental Rights be regarded as meaning:**
 - (a) **that the supervisory authority and the court have an obligation to examine the existence of an infringement independently and may therefore even arrive at different outcomes; or**
 - (b) **that the supervisory authority's decision takes priority when it comes to the assessment as to whether an infringement has been committed, regard being had to the powers provided for in Article 51(1) of Regulation 2016/679 and those conferred by Article 58(2)(b) and (d) of that regulation?**
3. **Must the independence of the supervisory authority, ensured by Articles 51(1) and 52(1) of Regulation 2016/679, be interpreted as meaning that that authority, when conducting and adjudicating upon complaint proceedings under Article 77, is independent of whatever ruling may be given by final judgment by the court having jurisdiction under Article 79, with the result that it may even adopt a different decision in respect of the same alleged infringement?**

[...] [matters of domestic procedural law]

Grounds

- 1 This administrative court, which is hearing a dispute relating to data protection, seeks from the Court of Justice of the European Union ('the Court of Justice') under Article 267 TFEU an interpretation of certain provisions of EU law which it needs in order to be able to dispose of the dispute in the main proceedings.

Subject matter of the dispute and relevant facts

- 2 The applicant, acting in his capacity as a shareholder in the limited liability company concerned ('the controller'), attended the general meeting of shareholders of that company that was held on 26 April 2019, at various points during which he put questions to the members of the board of directors and to other persons attending the meeting. Afterwards, the applicant asked the controller to hand over to him, as his own personal data, the phonogram which had been recorded during the general meeting. The controller complied with that request but provided to the applicant only those segments of the recording that contained his own voice, not those containing what other persons had said. The applicant lodged a complaint with the defendant, in its capacity as the supervisory authority, and asked it, first, to declare that the controller had acted unlawfully, in breach of Regulation 2016/679, in not providing him with the phonogram of the general meeting of shareholders — including, in particular, the answers to his questions — and, secondly, to compel the controller to provide him with the phonogram. The defendant stated that there had been no infringement and, by decision of 29 November 2019 [...], dismissed the applicant's appeal.
- 3 The applicant brought against the defendant's decision an administrative-law action — claiming, principally, that that decision should be amended or, in the alternative, annulled — which gave rise to the dispute in the main proceedings that is currently pending before the referring court. The defendant has maintained the position which it took in its decision and contends that the administrative-law action should be dismissed.
- 4 At the same time, the applicant brought an action before the civil courts in exercise of his rights under Article 79 of Regulation 2016/679. The civil court that heard that case at second instance held, by final judgment, that the controller had infringed the applicant's right to access his personal data, given that the former had not made available to the latter, notwithstanding his request to that effect, those segments of the phonogram recorded during the general meeting of shareholders which contained the answers to his questions. Consequently, that court ordered the controller to provide the applicant with the aforementioned segments. In the administrative-law proceedings, the applicant has requested that account be taken of the findings contained in the civil court's judgment.

Reasons for making the request for a preliminary ruling and arguments of the parties

- 5 Following the final judgment given by the civil court, the defendant proposed, in the course of the administrative-law proceedings, that a reference for a preliminary ruling be made, on the ground that, in its view, the supervisory authority and the civil courts share parallel competences. The referring court concurs with the raising of this point of uncertainty and considers it necessary, in order to dispose of the dispute, to arrive at a definition of those parallel competences, that definition being contingent upon a legal interpretation by the Court of Justice.
- 6 In the view of the defendant, Article 57(1)(a) of Regulation 2016/679 supports the inference that the supervisory authority has priority competence to monitor the correct application of that regulation and is the primary guarantor of the protection of personal data in the context of public law. However, neither Regulation 2016/679 nor the national procedural legislation define how that administrative competence interacts with the jurisdiction of the civil courts, which represent a secondary level of legal protection, and this raises a fundamental issue of legal certainty. The defendant submits that, owing to the particular features of national procedural law, the supervisory authority could not participate in the civil proceedings relating to the present case, even as an intervener, and was therefore unable to express its point of view in those proceedings. It states that this is not an isolated instance and it knows of several such cases in which, as a result of a single infringement, the data subject brought administrative proceedings and a civil case in parallel.
- 7 The applicant considers that both the national legislation and Regulation 2016/679 enable holders of data to exercise their civil rights as against controllers before the civil courts too. The civil courts clearly have jurisdiction to examine infringements relating to data protection and to award damages for non-material harm. According to the applicant, a court hearing data protection proceedings is in no way bound by the decision of the supervisory authority.

Relevant legal provisions

- 8 EU legislation

Regulation 2016/679:

Article 51(1)

Article 52(1)

Article 57(1)(a) and (f)

Article 58(2)(b) and (d)

Article 77(1)

Article 78(1)

Article 79(1)

Article 82(6)

Charter of Fundamental Rights: Article 47

9 National legislation

Az információs önrendelkezési jogról és az információszabadságról szóló 2011. évi CXII. törvény (Law CXII of 2011 on the right to self-determination as regards information and freedom of information; ‘the Law on information’)

Article 22

In the exercise of his rights, the data subject may, in accordance with the provisions of Chapter VI:

- (a) ask the [Nemzeti Adatvédelmi és Információszabadság Hatóság (National Authority for the Protection of Data and Freedom of Information; ‘the Authority’)] to launch an investigation into the lawfulness of a measure adopted by the controller, in the case where the latter has limited the exercise of the rights enjoyed by the data subject under Article 14 or has refused a request by which that person has sought to exercise his rights, and
- (b) ask the Authority to conduct administrative data protection proceedings, in the case where the data subject considers that, in processing his personal data, the controller, or, where appropriate, his agent or the processor acting under his orders, has infringed provisions on the processing of personal data which are laid down in legislation or in a binding legal act of the European Union.

Article 23

1. The data subject may bring a legal action against the controller or the processor — in connection with processing operations falling within the latter’s sphere of activity — in the case where he considers that, in processing his personal data, the controller, or, where appropriate his agent or the processor acting under his orders, has infringed provisions on the processing of personal data which are laid down in legislation or in a binding legal act of the European Union.

[...]

4. Court proceedings shall also be open to participation by persons who otherwise lack *locus standi*. The Authority may intervene in those proceedings in support of the claims pursued by the data subject.

5. If the court upholds the action, it shall find that an infringement has been committed and order the controller, or, where appropriate, the processor, to:

- (a) cease the unlawful processing operation;
- (b) restore the lawfulness of data processing; and/or
- (c) adopt precisely defined conduct in order to ensure that the data subject can exercise his rights,

and at the same time give judgment on any claims for damages for material and non-material harm.

[...] [circumstances in which the judgment mentioned in the foregoing paragraph must be published]

Article 38

1. The Authority shall be an independent body of the State Administration.

2. The Authority shall have the task of monitoring and promoting the application of the right to the protection of personal data and to access data in the public interest and data disclosed on public interest grounds, and of promoting the free movement of personal data within the European Union.

2a. The Authority shall perform the tasks and exercise the powers which Regulation 2016/679 entrusts to the supervisory authority in relation to individuals subject to Hungarian competence and in accordance with the provisions of the aforementioned regulation and of this Law.

3. As part of the tasks referred to in paragraphs 2 and 2a and in accordance with the provisions of this Law, the Authority shall in particular be responsible for:

- (a) conducting investigations, both in response to a complaint and of its own motion;
- (b) conducting administrative proceedings in relation to data protection, both at the request of the data subject and of its own motion;

[...] [tasks not relevant to this case]

(e) intervening in any court proceedings instituted at the request of a third party;

[...] [tasks not relevant to this case]

- (h) performing the other tasks entrusted to the supervisory authorities of the Member States by a binding legal act of the European Union, in particular by Regulation 2016/679 and Directive (EU) 2016/680, as well as those tasks established by law.

[...]

5. The Authority shall be independent and subject only to law, being unamenable to instructions in relation to its tasks, and shall perform these separately from other bodies and in a manner free from influence. The Authority's tasks may be established only by law.

A bíróságok szervezeteről és igazgatásáról szóló 2011. évi CLXI. törvény (Law CLXI of 2011 on the organisation and administration of the courts; 'the Law on the organisation of the courts')

Article 6

Decisions of the courts shall be binding on everyone, even where the court declares itself to have or to lack jurisdiction in a case.

Statement of the grounds on which the reference for a preliminary ruling was made

- 10 The Court of Justice has not yet interpreted Articles 77 and 79 of Regulation 2016/679 from the point of view of the definition of the competences established in those provisions. The aforementioned articles confer on individuals rights enforceable in parallel, but the parallel exercise of those rights may give rise to uncertainty in relation to legal certainty, as is the case in the dispute in the main proceedings. Since, in accordance with national procedural legislation, decisions of the supervisory authority are not binding on the civil courts, it is not inconceivable that a civil court may adopt a decision contrary to that of the supervisory authority in relation to the same facts.
- 11 The referring court is an administrative court the role of which, pursuant to the powers conferred by Article 78 of Regulation 2016/679, is to review the decisions of the supervisory authority. The competences of the supervisory authority also define the competences of the administrative court, given that the latter may carry out an examination of lawfulness in respect of points of law falling within the scope of the supervisory authority's sphere of competence. In the dispute in the main proceedings, the referring court has an obligation to review the findings contained in the supervisory authority's decision on the infringement of Regulation 2016/679, given that the civil courts, acting pursuant to the powers provided for in Article 79 of that regulation, have already given final judgment on the same point of law. The judgment of the civil court lacks the authority of *res judicata* in the dispute in the main proceedings because the parties to the proceedings are not identical. Although, in both the civil proceedings and the

dispute in the main proceedings, the applicant is the individual affected by the data processing, in the civil case, the defendant was the controller, whereas, in the dispute in the main proceedings, the defendant is the supervisory authority, in support of whose claims the controller has intervened as a interested party. In accordance with Article 23(4) of the Law on information, the supervisory authority may intervene in civil proceedings only in support of the claims pursued by the individual concerned. In this case, however, since the supervisory authority shares the view not of the applicant but of the controller, it did not meet the conditions governing intervention in civil proceedings.

- 12 It is indisputable that the referring court has to examine the same facts and the commission of the same infringement — and interpret the same EU and national legislation — as those/that in respect of which the civil court has already given final judgment. In accordance with national procedural law, even though the judgment of the civil court is not binding on the administrative court, [the latter court] cannot disregard the general principle of legal certainty, whereby court decisions are binding on everyone (Article 6 of the Law on the organisation of the courts).
- 13 In the opinion of the referring court, since the remedies provided for in Articles 77 and 79 of Regulation 2016/679 cannot be intended to permit the coexistence of parallel heads of competence to examine the same facts and the same infringement, it is necessary for the Court of Justice to define those competences. The absence of such a definition might lead to substantively contradictory judgments, thus seriously undermining legal certainty both for the controller and for the individual affected by the data processing.
- 14 The referring court puts forward a possible interpretation, similar to the regime developed in the context of competition law, according to which it is perfectly possible to separate the exercise of public rights and the exercise of private rights without infringing the competences or the rights of the persons concerned. Article 9(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union provides that Member States must ensure that an infringement of competition law found by a final decision of the competition authority is deemed to be irrefutably established for the purposes of an action for damages. The referring court sees a parallel between these two legislative regimes, given that Article 82(6) of Regulation 2016/679, which deals with the exercise of the right to compensation, expressly refers to the judicial remedy provided for in Article 79 — which, in the Hungarian legal system, falls within the jurisdiction of the civil courts —, whereas competence in respect of compliance with the obligations laid down in that same regulation lies principally with the supervisory authority.
- 15 In the view of the referring court, the remedy provided for in Article 77 of Regulation 2016/679 constitutes an instrument for the exercise of public rights —

notwithstanding that it is initiated by way of a complaint from, or at the request of, the data subject —, whereas the legal action provided for in Article 79 is pursued in the exercise of private rights. The referring court takes the view that a natural person so affected may, at his own discretion, pursue either remedy, neither one being a prerequisite for, or a ground for the exclusion of, the other. The Court of Justice held in its judgment of 27 September 2017, *Pušár* (C-73/16, EU:C:2017:725) (‘the judgment in *Pušár*’) that ‘Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that it does not preclude national legislation which makes the exercise of a judicial remedy by a person stating that his right to protection of personal data guaranteed by 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, has been infringed, subject to the prior exhaustion of the remedies available to him before the national administrative authorities, provided that the practical arrangements for the exercise of such remedies do not disproportionately affect the right to an effective remedy before a court referred to in that article’ (judgment in *Pušár*, point 1 of the operative part). In that judgment, the Court of Justice recognised that the prior processing of the administrative appeal is a method for achieving legitimate general interest objectives, such as relieving the courts of disputes which can be decided directly before the administrative authority concerned and increasing the efficiency of judicial proceedings as regards disputes in which a legal action is brought despite the fact that a complaint has already been lodged (judgment in *Pušár*, paragraph 67).

- 16 In the dispute in the main proceedings, unlike in the case of the facts in the judgment in *Pušár*, the national legislation does not make legal action subject to the condition of prior exhaustion of the administrative remedies available. On the contrary, the question of legal interpretation which has arisen in the dispute in the main proceedings stems from the fact that the parallel pursuit of remedies may give rise to different outcomes. In the case where a single natural person pursues both remedies in parallel in order to resolve a single infringement, it is necessary, for the purposes of establishing which forum has priority competence to determine the existence of an infringement, to define both the competences of the supervisory authority — together with those of the administrative courts, to which, in accordance with Article 78 of Regulation 2016/679, it falls to dispose of legal actions brought against administrative decisions — and the competences of the civil courts, to which, in accordance with Article 79, it falls to hear and determine actions under private law. As the Court of Justice held in the judgment in *Pušár*, increasing the efficiency of judicial proceedings is a legitimate general interest objective which, in the opinion of the referring court, must be achieved in all Member States irrespective of the differences established in national procedural rules.
- 17 The parallel between competences at the vertical level is also problematic, given that the objective set out in recital 117 of Regulation 2016/679 — according to which the establishment of supervisory authorities in Member States, empowered

to perform their tasks and exercise their powers with complete independence, is an essential component of the protection of natural persons with regard to the processing of their personal data —, the achievement of which is an obligation incumbent on the Member States under Article 51(1), would be partially restricted if the legal action preceded the administrative appeal. In so far as it is permitted to bring the administrative appeal and the legal action in parallel, any final court order made first would be binding on the supervisory authority at the time of adjudicating on a complaint lodged on account of the same facts. In that situation, therefore, the competences of the supervisory authority as provided for in Article 58 of Regulation 2016/679 would be restricted.

- 18 In the pending case of *Facebook Ireland and Others* (C-645/19), Advocate General Bobek expressed the view in points 95 to 97 of his Opinion, delivered on 13 January 2021 (‘the Advocate General’s Opinion in *Facebook*’), that a high level of protection of natural persons is contingent upon the assurance of consistency. In the view of the referring court, the application of Article 47 of the Charter of Fundamental Rights requires consistency not only at the horizontal level — through the operation of the mechanism for consistency between supervisory authorities — but also at the vertical level, in the relationship between administrative appeals and legal actions. The right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights can be guaranteed only through the assurance of legal certainty, that is to say through the consistent application of the law by independent bodies competent to conduct appeal proceedings. In the interests of consistency, it is necessary to define a precedence between the remedies which natural persons can pursue in parallel. This is only possible by way of an interpretation of Regulation 2016/679, given that both the supervisory authority and the courts enjoy independence, within the limits of their respective competences, in the adoption of their decisions.
- 19 In the proceedings pending before the referring court, concerning an administrative-law action brought against a decision adopted by the supervisory authority under Article 78 of Regulation 2016/679, the question of parallel competences has arisen at the horizontal level, between the administrative court and the civil court. In so far as it is not possible to define those competences and a single person, acting on account of a single alleged infringement, institutes in parallel administrative proceedings under Article 77 of Regulation 2016/679 and legal proceedings under Article 79, the issue identified in point 171 of the Advocate General’s Opinion in *Facebook* will arise in connection with the respective competences of the administrative court and the civil court too. The reason for this is that the administrative court, which oversees the supervisory authority — pursuant to its powers under Article 78 —, and the civil court, which operates under Article 79, might find themselves engaged in a ‘parallel race to the first judgment’. In this way, true competence to determine whether, in the particular case, data was processed lawfully or unlawfully would lie with the forum finally disposing of the legal proceedings first.

- 20 The referring court concurs with the supervisory authority's submission that the power granted by Article 51(1) of Regulation 2016/679 and the tasks and powers provided for in Article 57(1)(a) and (f) and Article 58(2)(b) and (c) confer on the supervisory authority priority competence for the purposes of investigating and overseeing compliance with the obligations laid down in that regulation. The referring court therefore proposes that the Court of Justice confirm the interpretation to the effect that, in the case where the supervisory authority conducts or has conducted proceedings in respect of one and the same infringement, the decision of that authority in that case — along with that of the administrative court overseeing it — will take precedence when it comes to determining the existence of an infringement, and, in the aforementioned administrative and administrative-law proceedings, no binding force will attach to any rulings given by the civil courts acting under Article 79 of Regulation 2016/679.
- 21 In order to settle the present dispute, it is necessary, for the purposes of determining the existence of an infringement, to define the competences of the supervisory authority, the administrative court reviewing the decisions of that authority and the civil court acting under Article 79 of Regulation 2016/679 respectively. It should be taken into account in this regard that, if the supervisory authority's competence is not recognised as taking priority, the referring court will be compelled, in accordance with the principle of legal certainty, to regard as binding the ruling given by the civil court in its final judgment, and will not be able to assess for itself the lawfulness of the ruling given in the administrative decision with respect to the existence of an infringement, and, in that event, the competence provided for in Article 78 of Regulation 2016/679 will in practice be divested of substance.
- 22 On the other hand, maintaining the current situation would create widespread legal uncertainty, given that chronology would determine which of the judgments delivered by the administrative courts and the civil courts respectively has binding force in respect of the other proceedings which are still pending.

[...] [matters of domestic procedural law]

Budapest, 2 March 2021.

[...] [signatures]