

Case C-394/23

Request for a preliminary ruling

Date lodged:

28 June 2023

Referring court:

Conseil d'État (France)

Date of the decision to refer:

21 June 2023

Applicant:

Association Mousse

Defendant:

Commission nationale de l'informatique et des libertés (CNIL)

SNCF Connect

CONSEIL D'ÉTAT (COUNCIL OF STATE)

acting

in its judicial capacity

[...]

Having regard to the following procedural stages:

By an application registered on 21 May 2021 and two statements in reply registered on 3 June 2022 at the secretariat of the judicial section of the Conseil d'État (Council of State), the association Mousse requests that the Council of State:

1. annul, as being *ultra vires*, the decision of 23 March 2021 by which the Commission nationale de l'informatique et des libertés (French Data Protection Authority) rejected its complaint brought against the company responsible for the website OUI.sncf;

2. prior to ruling on those claims, refer to the Court of Justice of the European Union [two questions for a preliminary ruling] [...]:

[...]

[Proposed questions for a preliminary ruling]

3. order SNCF Connect, the company responsible for the website, to remove the obligation to complete the field ‘Mr’ or ‘Ms’ in order to make a purchase, to delete from its databases the information gathered by means of that field and, in the event that the company should wish to collect data on ‘gender’, to add one or more additional non-binary choices such as ‘neutral’ or ‘other’;

[...]

It submits that:

- the obligation to complete one of the two headings ‘Mr’ or ‘Ms’ in order to purchase a travel ticket, a discount card or a season ticket online on the ‘SNCF Connect’ website does not meet the requirements of lawfulness, fairness and transparency laid down in Article 5(1)(a) 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 (‘the GDPR’), since the customer does not give his or her consent, such information is not necessary either for the performance of the contract or for compliance with a legal obligation, nor is it necessary for the purposes of legitimate interests, while it results in an infringement of the right to travel without disclosing one’s civil title and of the right to respect for private life, which includes, *inter alia*, the freedom freely to define one’s gender expression, and a risk of discrimination;
- that obligation is not mentioned in the legal information on the website or in the general terms and conditions of sale; moreover, the identity and contact details of the controller are not mentioned, nor is the legal basis for the processing; the principles of fairness and transparency set out in Article [5](1)(a) of the GDPR and the right to information guaranteed by Article 13 thereof are thus infringed;
- that obligation does not serve any of the purposes mentioned in the online contract; the fact that the expressions ‘Mr’ and ‘Ms’ are used in commercial correspondence cannot suffice to make the collection of those data necessary; some transport companies outside France do not require it; moreover, OUI.sncf does not use civil titles in its correspondence with its customers; consequently, the obligation is contrary to the principle of data minimisation set out in Article 5(1)(c) of the GDPR;
- for some people, those indicators do not correspond to reality and do not take account of the fact that that reality may change; thus, the obligation at issue is contrary to the principles of accuracy and updating set out in Article 5(1)(d) of the

GDPR and exposes those persons to the risk of discrimination; furthermore, for nationals of countries whose civil status allows ‘neutral gender’, the obligation infringes the principle of mutual recognition, the freedom to provide services and the freedom of movement guaranteed by EU law.

By two statements of defence, registered on 5 May 2022 and 30 May 2023, the French Data Protection Authority contends that the application should be dismissed or, failing that, that a question should be referred to the Court of Justice of the European Union for a preliminary ruling. It submits that the pleas relied on are unfounded.

By two statements of defence, registered on 19 January and 31 May 2023, the company SNCF Connect contends that the application should be dismissed and that the association Mousse should be ordered to pay the sum of EUR 10 000 pursuant to Article L. 761-1 of the code de justice administrative (Code of Administrative Justice). It contends that the pleas relied on are unfounded.

Having regard to the other documents in the file;

Having regard to:

- [...]
- the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the Treaty on European Union;
- the Treaty on the Functioning of the European Union;
- the Charter of Fundamental Rights of the European Union;
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016;
- [...];
- Law No 78-17 of 6 January 1978;
- [...];

[...]

Whereas:

- 1 The association Mousse lodged a complaint with the French Data Protection Authority (CNIL) against the company SNCF Voyageurs, which was subsequently succeeded by OUI.sncf and now SNCF Connect, on the ground that the conditions under which customers’ civil titles were collected and recorded

during the purchase of train tickets, season tickets and discount cards on the company's website or applications infringed certain provisions 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 ('the GDPR'). By letter of 23 March 2021, the CNIL informed the association that it took the view that the matters alleged against the company did not constitute infringements of the provisions of the GDPR relied on and that, consequently, it was closing the complaint. The association Mousse is seeking the annulment of that decision and is also seeking an injunction against SNCF Connect and the imposition of an administrative fine on it.

- 2 In accordance with Article 8 of the loi du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (Law of 6 January 1978 on information technology, files and liberties): *'I- The French Data Protection Authority is an independent administrative authority. It is the national supervisory authority within the meaning of, and for the purposes of applying, Regulation (EU) 2016/679 of 27 April 2016. It carries out the following tasks: ... 2. It ensures that the processing of personal data is carried out in accordance with the provisions of this law and other provisions relating to the protection of personal data laid down in laws and regulations, EU law and France's international commitments. To that end: ... (d) It handles complaints, petitions and claims lodged by a data subject or by a body, organisation or association, examines or investigates, to the extent necessary, the subject matter of the complaint and informs the complainant of the progress and outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary ...'*
- 3 It follows from the provisions referred to in paragraph 2 that it is for the French Data Protection Authority (CNIL), when dealing with a complaint or a claim concerning the exercise of its powers, to examine the underlying facts and to decide on the action to be taken. To that end, it enjoys a broad discretion and may take into account the gravity of the alleged breaches in the light of the legislation or rules which it is responsible for enforcing, the reliability of the evidence relating to those acts, the date on which they were committed, the context in which they were committed and, more generally, all the general interests for which it is responsible. A complainant may refer the CNIL's refusal to act on that complaint to a court with jurisdiction to examine cases of misuse of powers. It is for that court to censure that refusal, if appropriate, on grounds of formal unlawfulness and, in respect of the merits of the decision, in the event of an error of fact or of law, a manifest error of assessment or misuse of powers. However, where the complainant alleges that a controller has infringed the rights guaranteed by law to the data subject in respect of personal data concerning him or her, in particular the rights of access, rectification, erasure, restriction and objection referred to in Articles 49, 50, 51, 53 and 56 of the Law of 6 January 1978 on information technology, files and liberties, the exercise of the CNIL's discretion to decide on the action to be taken, having regard to the nature of the individual

right in question, is subject in full to review by the court hearing the case of misuse of powers.

- 4 It is clear from the documents in the file [that] the association Mousse is seeking the annulment, as being *ultra vires*, of the decision of 23 March 2021 by which the President of the CNIL closed its complaint concerning the conditions for the collection and processing of customers' civil titles by OUI.sncf, now SNCF Connect.
- 5 Under Article 5 of the GDPR: '*1. Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ...; (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ...; (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay*'. In accordance with Article 6 of the GDPR: '*1. Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing 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; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.*' Article 13 of the GDPR imposes an obligation on the controller to provide information to any person whose personal data are collected. Lastly, Article 21 of that regulation gives data subjects the right to object at any time, on grounds relating to their particular situation, to processing which is based on Article 6(1)(f).
- 6 In its complaint to the CNIL, the association Mousse submitted that, in order to purchase a train ticket, season ticket or discount card online on the 'OUI.sncf' (now SNCF Connect) website or application, customers are required to indicate their civil title and have the choice in that regard between two options, 'Mr' or 'Ms'. In its view, such data collection is not lawful, within the meaning of Article 5(1)(a) of the GDPR, since it is not based on any of the grounds set out in Article 6(1), it infringes the principles of data minimisation and accuracy also laid down in Article 5(1)(c) and (d) and, lastly, SNCF does not comply with the requirements in terms of transparency and information imposed by Article 5(1)(a)

and Article 13. It submits that the company should not collect such data or should, at the very least, offer one or more additional options, such as ‘neutral’ or ‘other’.

- 7 In deciding to close the complaint submitted to it, the CNIL, first, noted that, in the context of the provision of transport services by the company, the contract concluded with its customer constituted the legal basis for the processing. Thus, as regards the various legal bases provided for by Article 6(1) of the GDPR, it considered only that the processing at issue came within the scope of that provided for in point (b), according to which processing is lawful if it is ‘*necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract*’. Secondly, it took the view that the collection of customers’ civil titles could be regarded as necessary in relation to the purposes of the processing, within the meaning of Article 5[(1)](c), and therefore as satisfying the data minimisation requirement, since addressing customers by using their civil title corresponds to usual practice in civil, commercial and administrative communications. In its defence, it submits, inter alia, that the processing of the civil title could also be regarded as necessary for the purposes of the legitimate interests pursued by SNCF Connect, within the meaning of Article 6(1)(f), and that, in that case, the data subjects could, depending on their particular situation, exercise the right to object guaranteed to them by Article 21.
- 8 The question whether, in order to assess whether the data collection is adequate, relevant and limited to what is necessary, within the meaning of Article 5(1)(c) of the GDPR and the need for processing in accordance with Article 6(1)(b) and (f), account may be taken of commonly accepted practices in civil, commercial and administrative communications, with the result that the collection of data relating to customers’ civil titles, which is limited to ‘Mr’ or ‘Ms’, may be regarded as lawful, without this being precluded by the principle of data minimisation, raises a difficulty in the interpretation of EU law which is decisive for the resolution of the dispute before the Council of State. The same applies to the question whether, in order to assess the need for the compulsory collection and processing of data relating to customers’ civil titles, even though some customers consider that they do not come under either of the two civil titles and that the collection of such data is not relevant in their case, account should be taken of the fact that those customers may, after having provided those data to the data controller in order to benefit from the service offered, exercise their right to object to the use and storage of those data by relying on their particular situation, in accordance with Article 21 of the GDPR. It is therefore necessary to refer the matter to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union and, pending a ruling from the Court of Justice, to stay the proceedings relating to the application lodged by the applicant association.

DECIDES AS FOLLOWS:

[...] The proceedings on the application lodged by the association Mousse shall be stayed pending a ruling by the Court of Justice of the European Union on the following questions:

1. In order to assess whether data collection is adequate, relevant and limited to what is necessary, within the meaning of Article 5(1)(c) of the GDPR and the need for processing in accordance with Article 6(1)(b) and (f) of that regulation, may account be taken of commonly accepted practices in civil, commercial and administrative communications, with the result that the collection of data relating to customers' civil titles, which is limited to 'Mr' or 'Ms', may be regarded as necessary, without this being precluded by the principle of data minimisation?

2. In order to assess the need for the compulsory collection and processing of data relating to customers' civil titles, even though some customers consider that they do not come under either of the two civil titles and that the collection of such data is not relevant in their case, should account be taken of the fact that those customers may, after having provided those data to the data controller in order to benefit from the service offered, exercise their right to object to the use and storage of those data by relying on their particular situation, in accordance with Article 21 of the GDPR?

[...]

WORKING DOCUMENT