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**Case C-655/23**

**Request for a preliminary ruling**

**Date lodged:**

7 November 2023

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

26 September 2023

**Applicant, appellant in the appeal on a point of law and respondent in the appeal on a point of law:**

IP

**Defendant, respondent in the appeal on a point of law and appellant in the appeal on a point of law:**

Quirin Privatbank AG

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[...]

**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE)**

**ORDER**

[...]

of

26 September 2023

in the case of

IP, [...],

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Applicant, appellant in the appeal on a point of law and respondent in the appeal on a point of law,

[...]

v

Quirin Privatbank AG, [...] Berlin,

Defendant, respondent in the appeal on a point of law and appellant in the appeal on a point of law,

[...]

at a hearing held on 11 July 2023, the Sixth Civil Chamber of the Bundesgerichtshof [...]

ordered as follows:

I. Proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation 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 (General Data Protection Regulation, GDPR, OJ 2016 L 119, p. 1):

1. (a) Must Article 17 of the GDPR be interpreted as meaning that a data subject whose personal data have been unlawfully disclosed by the controller through onward transfer has the right to obtain a prohibitory injunction against the controller prohibiting further unlawful onward transfer of those data if the data subject does not request the controller to erase the data?

(b) Can such a right to obtain a prohibitory injunction (also) arise from Article 18 of the GDPR or any another provision thereof?

2. If the answers to Questions 1(a) and/or 1(b) are in the affirmative:

(a) Does the right to obtain a prohibitory injunction under EU law exist only if a risk of further infringements of the data subject's rights under the GDPR is to be apprehended in the future (risk of recurrence)?

(b) Is the existence of the risk of recurrence presumed, where applicable, by reason of the existing infringement of the GDPR?

3. If the answers to Questions 1(a) and 1(b) are in the negative:



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Must Article 84 of the GDPR, in conjunction with Article 79 thereof, be interpreted as permitting the national court to confer on the data subject whose personal data were unlawfully disclosed by the controller through onward transfer, in addition to the right to obtain compensation for material or non-material damage pursuant to Article 82 GDPR and the rights arising from Articles 17 and 18 of the GDPR, a right to obtain a prohibitory injunction against the controller prohibiting further unlawful onward transfer of those data in accordance with the provisions of national law?

4. Must Article 82(1) of the GDPR be interpreted as meaning that mere negative feelings such as annoyance, displeasure, dissatisfaction, worry and fear, which are in themselves part of the general risk of life and often part of everyday experience, are sufficient for the assumption of non-material damage within the meaning of that provision? Or is a disadvantage to the natural person concerned which goes beyond those feelings necessary for the assumption of damage?

5. Must Article 82(1) GDPR to be interpreted as meaning that the degree of fault of the controller or processor or its employees constitutes a relevant criterion in assessing the amount of non-material damage to be compensated?

6. If the answers to Questions 1(a), 1(b) or 3 are in the affirmative:

   Must Article 82(1) of the GDPR be interpreted as meaning that, in assessing the amount of non-material damage to be compensated, the fact that the data subject concerned has a right to obtain a prohibitory injunction in addition to the right to compensation can be taken into account as reducing the claim?

Grounds:

1 I. Facts of the case and the dispute in the main proceedings

2 The applicant is seeking against the defendant a prohibitory injunction and compensation for non-material damage in relation to the communication of personal data.

3 1. The applicant was involved in an application process at the defendant private bank, which took place via the online portal Xing. In the course of that process, an employee of the defendant also sent, via the portal's messenger service, a message intended solely for the applicant to a third person not involved in the application process on 23 October 2018. The message had the following content:

'Dear Mr [IP], I hope you are well. Our manager – Mr R [...] – finds your trader profile very interesting. However, we cannot meet your salary expectations. He can offer 80k + variable remuneration. Would this still be of interest to you in the



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light of these considerations? I look forward to hearing from you and wish you a good start to Tuesday. Best regards, I [...] J [...]'

4 The third party, who had worked with the applicant at the same holding company some time ago and therefore knew him, forwarded the message to the applicant and asked whether it was a message for the applicant and whether he was looking for a job.

5 2. The applicant claims that the – non-material – damage caused to him does not lie in the abstract loss of control over the disclosed data, but rather the fact that at least one other person who knows the applicant and potential and former employers now have knowledge of circumstances which are subject to confidentiality. It is to be feared that the third party working in the same industry has passed on the data contained in the message or has been able to gain an advantage as a competitor for possible positions in the application process by having knowledge thereof. In addition, he considered the 'defeat' in the salary negotiations to be a dishonour, which he would not have communicated to third parties, and especially not to potential competitors.

6 The applicant requested that the defendant should be ordered to refrain in future from processing personal data about the applicant in connection with his application or having such data processed, if that occurs as in the message via the Xing portal to Mr F. W. on 23 October 2018, and to pay the applicant non-material damages of at least EUR 2 500.

7 3. The Landgericht (Regional Court) partially upheld the action, issued a prohibitory injunction against the defendant in the form sought and awarded the applicant an amount of EUR 1 000, plus interest. After hearing the appeal brought by the defendant, the Oberlandesgericht (Higher Regional Court) varied the judgment of the Landgericht in respect of the claim made for non-material damages and dismissed the action in that respect.

8 The court hearing the appeal assumed that the applicant has a right under Article 17(1) of the GDPR to obtain a prohibitory injunction against the defendant prohibiting processing of his personal data in so far that takes place in the form of the message at issue. The required risk of recurrence exists. On the other hand, the applicant does not have a right compensation under Article 82 of the GDPR since no damage to the applicant has been established. It is true that the transfer of personal data to an uninvolved third party constitutes an infringement of data protection. However, in addition to the established infringement, evidence of specific – also non-material damage – is required for monetary compensation. The applicant failed to establish such damage. His submission merely establishes an infringement of data protection. Even if 'dishonour' is assumed, it cannot be regarded as non-material damage.

9 The applicant contests that finding by his appeal on a point of law, authorised by the court hearing the appeal, by which he continues to pursue his claims in full.



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By its appeal on a point of law, the defendant seeks dismissal of the action in its entirety.

10 II. Provisions of national law which may be applicable to the case

1. Article 2 of the Grundgesetz für die Bundesrepublik Deutschland (GG) (Basic Law of the Federal Republic of Germany):

‘Artikel 2

(1) Every person shall have the right to free development of his or her personality in so far as he or she does not violate the rights of others or offend against the constitutional order or the moral law.

(2) [...]’

2. Paragraph 253 of the Bürgerliches Gesetzbuch (BGB) (Civil Code):

‘Paragraph 253 Non-material damage

(1) Money may be sought as compensation for non-material damage only in the cases specified by law.

(2) Where damages are to be paid on account of bodily injury, damage to health, freedom or sexual self-determination, fair compensation in monetary terms for non-material damage may also be sought.’

3. Paragraph 823 of the BGB:

‘Paragraph 823 Obligation to make good damage

(1) Any person who, with intent or through negligence, unlawfully injures the life, body, health, freedom, property or other right of another person shall be obliged to compensate that other person for the resulting damage.

(2) The same obligation shall be imposed on a person who infringes a law which is intended to protect another person. If, according to the content of that law, it may also be infringed without fault, the obligation to provide compensation shall arise only in the event of fault.’

4. Paragraph 1004 of the BGB (in this case application by analogy to the infringement of absolute rights within the meaning of Paragraph 823(1) of the BGB or the infringement of a law intended to protect another person within the meaning of Paragraph 823(2) of the BGB):

‘Paragraph 1004 Claims for removal and for injunction

(1) If the ownership is interfered with otherwise than by dispossession or withholding of possession, the owner may demand from the disturber the



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removal of the interference in question. If further interference with ownership is to be apprehended, the owner may seek an injunction.

(2) [...]'

11 III. Reference to the Court of Justice

12 The success of the appeals on a point of law lodged by the parties turns on the interpretation of European Union law

13 1. Applicability of European Union law

14 (a) The General Data Protection Regulation applies *ratione temporis* (Article 99(2) of the GDPR) and *ratione territoriae* (Article 3(1) of the GDPR). The regulation is also applicable *ratione materiae* (Article 2(1) of the GDPR). The message at issue contained personal data within the meaning of Article 4(1) of the GDPR in that it stated the applicant's surname, his gender which can be inferred from the form of address, the fact of the ongoing application procedure and the defendant's attitude towards the applicant's application and his salary expectations – which were indirectly disclosed with regard level thereof. That is because that information related to a natural person identified, or at least identifiable, by the defendant (data controller within the meaning of Article 4(7) of the GDPR), which had the applicant's contact details and CV. The sending of the message by an employee of the defendant to a third party using the messenger service of an online portal constitutes (partially) automated processing of personal data in the form of the disclosure by transmission mentioned as an example in Article 4(2) of the GDPR.

15 (b) The defendant has infringed the provisions of the General Data Protection Regulation. The court hearing the appeal correctly recognised that the contested processing of the applicant's personal data by the defendant was unlawful under Article 6(1) of the GDPR and, in particular, was not covered by the applicant's consent. The defendant also does not contend that the processing was lawful under that provision.

16 2. Questions 1(a) and 1(b)

17 '1(a) [...]

18 1(b) [...]'

19 The applicant is not seeking the erasure of his personal data processed in breach of the GDPR, but rather wishes to prevent a recurrence of the unlawful processing by means of an action seeking a prohibitory injunction. It is questionable whether the applicant can base that request on Article 17(1) of the GDPR as the court hearing the appeal assumed. The question is relevant to the resolution of the dispute and is neither clarified by the case-law of the Court of Justice nor answerable clearly in other respects.



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20 (a) However, in cases in which the applicants have also sought a prohibitory injunction against operators of internet search engines in connection with the request for removal of certain result links, this Chamber has assumed that the 'right to erasure' laid down in Article 17(1) of the GDPR cannot be confined to the simple deletion of data on account of the technical requirements of the data processing objected to, which are ultimately imponderable for the data subject and also subject to constant development, but also encompasses the request for non-relisting, regardless of the technical implementation (see judgements of the Chamber of 27 July 2020 – VI ZR 405/18, ECLI:DE:BGH:2020:270720:UVIZR405.18.0, BGHZ 226, 285, paragraphs 1, 17, and 35; and of 23 May 2023 – VI ZR 476/18, ECLI:DE:BGH:2023:230523UVIZR476.18.0, juris, paragraph 28). The Court of Justice obviously also took that as a basis in its decision of 8 December 2022 in Case C-460/20 (see judgment of the Court of Justice, [...] paragraph 82 et seq.). Accordingly, this Chamber has also considered a claim for a prohibitory injunction arising from Article 17(1) of the GDPR to be possible in cases where the applicants have sought, in addition to the deletion of their personal data from the database of a rating portal, also the non-publication of a profile concerning them on that portal (see judgments of this Chamber of 12 October 2021 – VI ZR 489/19, ECLI:DE:BGH:2021:121021UVIZR489.19.0, BGHZ 231, 263, paragraphs 3 and 10; and of 13 December 2022 – VI ZR 54/21, ECLI:DE:BGH:2022:131222UVIZR54.21.0, AfP 2023, 149, paragraphs 3 et seq., and 40).

21 (b) However, this still does not clarify whether Article 17 of the GDPR may constitute a basis for a claim if the person affected by unlawful processing of his or her personal data does not request the erasure of those data but rather, as in the present case, wishes to prevent a similar infringement of the GDPR from occurring again, in addition to the claim for compensation for the non-material damage caused. Even though Article 17 of the GDPR does not, according to its wording, lay down such a right to obtain a prohibitory injunction, the fact that the controller can in principle comply with the request for an injunction by erasing the unlawfully processed data and thus preventing another similar infringement of the GDPR could militate in favour of an affirmative answer to that question. If the data subject rejects erasure, he or she has the rights arising from Article 18 of the GDPR (see Article 18(1)(b) of the GDPR). In that case, the question arises as to whether the data subject's right to restrict processing under Articles 18 and 4(3) of the GDPR also includes a right to obtain a prohibitory injunction in the sense described above. Whether the provisions of the GDPR – possibly also with reference to Article 79 of the GDPR – give rise to a right to obtain a prohibitory injunction under EU law outside the situations set out above, which have already been decided by the highest court, is disputed in case-law and academic writings [...] [reference to national academic writings].

22 3. Question 2

23 'If the answers to Questions 1(a) and/or 1(b) are in the affirmative:



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24 (a) [...]

25 (b) [...]’

26 Under national law, the right to obtain a prohibitory injunction based on an infringement which has already occurred but is targeted at the future requires that further infringements of the applicant’s right are to be apprehended in future, that is to say there is a risk of recurrence, there being a factual presumption thereof by reason of the infringement which has already occurred, which can, however, be rebutted by the defendant (established case-law; see by analogy as regards the right to obtain a prohibitory injunction in the event of an infringement of the right to informational self-determination under the second sentence of Paragraph 1004(1) of the BGB, Paragraph 823(1) of the BGB, and Article 2(1) of the Basic Law prior to the entry into force of the GDPR, judgment of this Chamber of 15 September 2015 – VI ZR 175/14, ECLI:DE:BGH:2015:150915UVIZR175. 14.0, BGHZ 206, 347, paragraph 30; as regards the right to obtain a prohibitory injunction in the event of an infringement of the general right of personal identity, see, in particular, the judgment of this Chamber of 27 April 2021 – VI ZR 166/19, ECLI:DE:BGH:2021:270421UVIZR166.19.0, NJW 2021, 3334, paragraphs 21 and 23 and the references cited). In the view of this Chamber, this should also apply by reason of the nature of the right to obtain a prohibitory injunction if it arises from the GDPR in EU law. However, this has not been clarified by the case-law of the Court of Justice.

27 4. Question 3

28 ‘If the answers to Questions 1(a) and 1(b) are in the negative:

[...]’

29 If, under the provisions of the GDPR, a right to obtain a prohibitory injunction under EU law is not possible, the question arises as to whether recourse can be had to national law in that respect through Article 84 of the GDPR, in conjunction with Article 79 thereof, or whether the objective of an equal level of data protection within the EU (see recitals 9 and 10 of the GDPR) precludes this. That question likewise has not yet been clarified by the Court of Justice and is disputed in case-law and academic writings [...] [reference to national academic writings]. Under national law, a right to obtain a prohibitory injunction may exist applying by analogy the second sentence of Paragraph 1004(1) of the BGB, in conjunction with Paragraph 823 thereof if further infringements are to be apprehended (see by analogy, as regards the right to obtain a prohibitory injunction in the event of an infringement of the right to informational self-determination under the second sentence of Paragraph 1004(1), Paragraph 823(1) of the BGB, and Article 2(1) of the Basic Law, judgment of this Chamber of 15 September 2015 – VI ZR 175/14, ECLI:DE: BGH:2015:150915UVIZR175.14.0, BGHZ 206, 347, paragraph 18; as regards the right to obtain a prohibitory injunction in the event of an infringement



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of a law to protect another person within the meaning of the first sentence of Paragraph 823(2) of the BGB, see BGH, judgment of 17 July 2008 – I ZR 219/05, NJW 2008, 3565, paragraph 13 and the references cited).

30 5. Question 4

31 '[...]'

32 (a) In its decision of 4 May 2023 in Case C-300/21, the Court of Justice stated that Article 82(1) GDPR must be interpreted as meaning that the mere infringement of the provisions of the regulation is not sufficient to confer a right to compensation, but that the occurrence of damage is also required ([...] paragraphs 31 et seq. and 42). It further stated that Article 82(1) GDPR precludes a national rule or practice which makes compensation for non-material damage, within the meaning of that provision, subject to the condition that the damage suffered by the data subject has reached a certain degree of seriousness. [...]. However, the Court of Justice also made clear (loc. cit., paragraph 50) that the rejection of a threshold of seriousness does not mean that a person concerned by an infringement of the GDPR which had negative consequences for him or her would be relieved of the need to demonstrate that those consequences constitute non-material damage within the meaning of Article 82 of that regulation. The Court of Justice also referred to recitals 75 and 85 to interpret Article 82 GDPR (loc. cit., paragraph 37). In those recitals, concrete expression is given to the concept of damage by individually listed examples 'or any other significant economic or social disadvantage to the natural person concerned'.

33 (b) In view of the infringement of the GDPR in the present case and the consequences claimed by the data subject, namely the fear of the data being passed on to third parties working in the same industry, knowledge on the part of a person of circumstances subject to confidentiality, dishonour due to losing salary negotiations and knowledge thereof on the part of third parties, the question relevant to the decision, which is significant beyond the individual case and has not yet been clarified by the Court of Justice, consequently arises as to whether Article 82(1) GDPR is to be interpreted as meaning that such negative feelings, such as annoyance, displeasure, dissatisfaction, concern and fears of further infringements, and concern about reputational damage, which are in themselves part of the general risk of life and often part of everyday experience, constitute non-material damage within the meaning of the provision. Neither Article 82 of the GDPR nor the recitals on compensation for damage provide a clear answer to this question (see Opinion of the Advocate General of 27 April 2023 in Case C-340/21, [...] points 70 et seq. [...].).

34 6. Question 5

35 '[...]'

36 (a) In its decision of 4 May 2023 in Case C-300/21, the Court of Justice stated that the GDPR does not contain any provision intended to define the rules on the



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assessment of the damages to which a data subject, within the meaning of Article 4(1) of that regulation, may be entitled under Article 82 thereof, where an infringement of that regulation has caused him or her harm. Therefore, in the absence of rules of EU law governing the matter, it is for the legal system of each Member State to prescribe the detailed rules governing actions for safeguarding rights which individuals derive from Article 82 and, in particular, the criteria for determining the extent of the compensation payable in that context, subject to compliance with the principles of equivalence and effectiveness ([...] paragraphs 54 and the references cited, and 59).

37 As regards the principle of effectiveness, the Court of Justice has stated that it is for the national courts to determine whether the detailed rules laid down in national law for the determination, by the courts, of damages due under the right to compensation enshrined in Article 82 of the GDPR, make it impossible in practice or excessively difficult to exercise the rights conferred by EU law, and more specifically by that regulation. In that context, the Court of Justice has noted that the sixth sentence of recital 146 of the GDPR states that that instrument is intended to ensure 'full and effective compensation for the damage they have suffered' and in view of the compensatory function of the right to compensation under Article 82 of the GDPR, financial compensation based on that provision must be regarded as 'full and effective' if it allows the damage actually suffered as a result of the infringement of that regulation to be compensated in its entirety, without there being any need, for the purposes of such compensation for the damage in its entirety, to require the payment of punitive damages ([...] paragraphs 56 et seq.).

38 (b) However, this does not yet appear to clarify sufficiently whether the degree of fault underlying the infringement of the GDPR may be used as a relevant criterion in assessing the amount of non-material damage to be compensated under Article 82(1) GDPR (see, in this regard, also the fifth question referred by the Bundesarbeitsgericht (Federal Labour Court) in Case C-667/21, OJ 2022 C 95, p. 13 et seq.).

39 (aa) Under national law, if the law provides for fair monetary compensation for non-material damages (compensation for pain and suffering), in assessing the compensation account must be taken of the fact that compensation for pain and suffering has a dual function: It is intended to provide the injured party with appropriate compensation for the damages which are not of a financial nature (compensation function). At the same time, however, account is to be taken of the idea that the person responsible for the injury owes the injured party satisfaction for what that person has done to the injured party (satisfaction function, established case-law on Paragraph 253 of the BGB; see, in particular, judgment of this Chamber of 8 February 2022 – VI ZR 409/19, ECLI:DE:BGH:2022:080222UVIZR409.19.0, VersR 2022, 635, paragraph 11 and the references cited). It is true that the idea of compensation is regularly at the fore in that regard. However, as the law requires fair compensation, the compensation purpose cannot be the sole determining factor as regards the scale of the payment.



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It is not possible to take the idea of compensation as the sole basis because non-material damage cannot be expressed in monetary terms and the options for compensation can be so expressed to only a limited degree. The satisfaction function expresses a personal relationship, created by the injury, between the person responsible for the injury and the injured party, which by its very nature requires that all circumstances of the case are to be taken into consideration and, in so far as they give the individual injury its particular character, to be taken into account in determining the payment. Those circumstances also include the degree of fault of the person responsible for the injury (see judgment of this Chamber, loc. cit. paragraph 12 and the references cited).

40 (bb) In accordance with those principles, this Chamber considers that fault may be taken into account in assessing the amount of damages to be paid under Article 82(1) of the GDPR for the non-material damage suffered, having regard to the principle of effectiveness, if such damages also have a compensation function – which, in the view of national law, does not serve to justify punitive damages – in a manner comparable with damages for pain and suffering. The Advocate General's Opinion of 6 October 2022 in Case C-300/21 indicates that this could be the case ([...] point 29 [...]: 'Therefore, an interpretation which automatically associates the notion of "infringement" with that of "compensation", without the existence of any damage, is not compatible with the wording of Article 82 of the GDPR. Nor is it compatible with the primary aim of the civil liability established by the GDPR, which is to give the data subject satisfaction through "full and effective" compensation for the damage he or she has suffered'). Thus, fault could be one aspect to be taken into account when assessing what amount is appropriate to compensate the non-material damage 'fully and effectively'. However, in his Opinion of 25 May 2023 in Case C-667/21, the Advocate General gave reasons for his view that the degree of fault is not relevant to the assessment of the amount of non-material damage to be compensated under Article 82(1) of the GDPR, inter alia, by stating that the compensation must be 'full' ([...] point 118 [...]).

41 7. Question 6

42 'If the answers to Questions 1(a), 1(b) or 3 are in the affirmative'

43 If, in the present case, a right to obtain a prohibitory injunction is to be conferred on the applicant under EU or national law, the question arises as to whether that circumstance can be taken into account when assessing the amount of non-material damages under Article 82(1) of the GDPR – reducing the claim. Under national law, when assessing monetary compensation for non-material damage, an injunction obtained must also be taken into account in the required overall assessment; the injunction and the associated enforcement options can affect and, in cases of doubt, even exclude the claim for monetary compensation (see, as regards the relevant established case-law of this Chamber on monetary compensation in the event of culpable infringement of the general right of personal identity, in particular, judgment of this Chamber of 22 February 2022 –



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VI ZR 1175/20, ECLI:DE:BGH:2022:220222UVIZR1175.20.0, VersR 2022, 830, paragraph 44 and the references cited). Whether and, if so, to what extent (is only reduction or complete exclusion possible?) those principles can be applied to the claim for compensation for non-material damage under Article 82(1) of the GDPR, having regard to the principle of effectiveness, appears doubtful and cannot be answered clearly on the basis of the previous case-law of the Court of Justice.

[...]

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