Case C-507/23

Request for a preliminary ruling

Date lodged:

8 August 2023

Referring court:

Augstākā tiesa (Senāts) (Latvia)

Date of the decision to refer:

7 August 2023

Applicant at first instance and appellant:

A

Defendant at first instance and respondent:

Patērētāju tiesību aizsardzības centrs

[…]

Latvijas Republikas Senāts (Supreme Court (Senate) of the Republic of Latvia)

ORDER […]

In Riga, on 7 August 2023

This court […] [composition of the court]

[…] has examined the question of requesting a preliminary ruling from the Court of Justice of the European Union in the appeal brought by A against the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) of 20 May 2023, in so far as it concerns redress for non-material damage, in the administrative proceedings initiated by means of the claim, brought by A, in relation to the conduct of the Patērētāju tiesību aizsardzības centrs (Consumer Rights Protection Centre) involving the use and dissemination of the appellant's personal data in the course of an [audiovisual] narrative piece, without his authorisation. With that claim, the appellant is seeking the cessation of that

conduct, as well as a declaration of its unlawfulness and also redress for non-material damage.

Background

Facts

1 The [Latvijas Republikas] Senāts (Supreme Court (Senate), Latvia) has initiated appeal proceedings in the case ongoing between the applicant at first instance [now the appellant], A, a journalist and expert on the automotive industry who is well known in Latvia, and the Consumer Rights Protection Centre, regarding the unauthorised processing of the appellant's personal data by the Centre through the dissemination of a video.

The Consumer Rights Protection Centre ran an information campaign as part of which it disseminated, on various websites, a video titled 'Pārbaudi – Pērc – LietoTo sociālais eksperiments' ('Social experiment "Check – Purchase – Second-hand"'). The video was made as a message aimed at consumers about various significant risks they may face when purchasing a second-hand car. In the video, consumers are urged to check the identity and reputation of sellers and to be cautious, as dishonest dealers may use dishonest methods, attempting to imitate well-known experts, thereby using deception to increase the consumer's confidence in the seller of a particular vehicle and induce him or her to purchase a vehicle that is inadequate from the technical or some other perspective. The protagonist of the narrative piece imitated the voice of the appellant, spoke on the telephone in his characteristic style and wore a cap similar to that which the appellant had worn on other programmes. In the narrative piece, a list with the title 'Usual phrases of [A]' is seen and a sequence from the programme 'TE!' ('HERE!') is included in which the appellant can be seen and is heard speaking.

Disagreeing with the way in which his persona is used in the video, the appellant objected to the making and dissemination of a narrative piece of those characteristics. However, the piece was shown on various websites and is still available on the Internet.

The appellant asked the Consumer Rights Protection Centre to stop showing the video, to make a public apology for the damage caused to his reputation and to provide him with redress for that non-material damage. The Centre did not comply with that request.

The appellant brought legal proceedings seeking to have the conduct of the Consumer Rights Protection Centre declared unlawful and to order the Centre to apologise and pay him compensation of EUR 2 000 for non-material damage.

2 The Administratīvā rajona tiesa (District Administrative Court, Latvia) partially upheld the claim: it declared the conduct of the Consumer Rights Protection Centre, involving the use and dissemination of the appellant's personal data without his consent, unlawful and it ordered the Centre to cease that conduct,

as well as requiring it to pay the appellant compensation, in the amount of EUR 100, for the non-material damage caused and to make a public apology.

The Regional Administrative Court, hearing the case on appeal, also upheld the claim in part: it declared the conduct of the Consumer Rights Protection Centre, involving the use and dissemination of the appellant's personal data without his consent, unlawful and it ordered it to cease the use and dissemination of his personal data in the narrative piece 'Social experiment "Check – Purchase – Second-hand"', as well as requiring it to make a public apology to the appellant on the websites on which it had published the narrative piece. The remaining claims (regarding financial redress for non-material damage) were rejected.

The Regional Administrative Court found that the conduct of the Consumer Rights Protection Centre had continued after the entry into force 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), and that that conduct was contrary to Article 6(1)(e) of that regulation. The personal data include not only the appellant's full name, but also his persona, represented in the case in question using, inter alia, the appellant's image, taken from the programme 'TE!', with attention also being focused directly on his work in the automotive industry[.] Including personal data in a narrative piece, making them public and storing them in such a way that they are accessible to other people constitutes processing of personal data. The narrative piece was produced in the context of a public authority carrying out its functions and it was designed to achieve a legitimate and socially necessary aim, consisting in raising consumers' level of awareness, to enable them to make a financial decision regarding the purchase of a second-hand car based on accurate information. However, that aim could also have been achieved without the use of the appellant's personal data: addressing the public in a different way, using a narrative piece with different content or using a different person in a similar narrative piece.

In assessing whether it was appropriate to require redress to be provided for the infringement of the appellant's rights, the Regional Administrative Court held that the infringement committed by the Consumer Rights Protection Centre was not serious. That court took account of the fact that the aim of using the appellant's persona in the narrative piece was neither to defame him, nor to attack his reputation. The narrative piece is not capable of creating the impression, in an objective and reasonably attentive third-party viewer, that the appellant is a fraudster or a dishonest person. Non-material damage was caused to the appellant in so far as the Centre processed and made public his personal data without taking into account his objections and without rectifying the infringement when he requested it. The Centre committed that infringement because it interpreted the legislation wrongly; moreover, the legislation was complicated to interpret. That court also took account of the fact that the creation and publishing of such a narrative piece without the authorisation of the person concerned would have been

permitted if it had been done for journalistic purposes, that a narrative piece of those characteristics was the most appropriate kind to achieve the aim in question and that sensitive data of the appellant had not been used. Accordingly, that court held that the availability of the narrative piece on the Internet does not, in itself, cause defamatory damage to the appellant.

Given that the Centre had not ceased the conduct at issue following the reasoned objections made by the appellant, the Regional Administrative Court was of the opinion that rectification of the non-material damage by means of the restoration of the situation that existed before the damage was caused, as envisaged in Article 14 of the Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums (Law on the liability of public authorities), was not sufficient. Therefore, the court ordered the authority to make a public apology to the appellant on the websites on which it had published the narrative piece. Given that the narrative piece had not defamed the appellant, nor damaged his reputation, and that sensitive data of the appellant had not been used, the court did not consider it necessary to establish an amount of financial redress.

3 The appellant lodged a further appeal against the judgment of the Regional Administrative Court, in so far as it concerns the rejection of the claim for financial redress for non-material damage. In that appeal, the following grounds are stated for setting aside that judgment:

3.1 The Regional Administrative Court made an error in assessing whether damage had been caused to the appellant, because it wrongly interpreted the concept of defamation and damage to reputation and because, without any justification, it did not assess various circumstances pointed to by the appellant and relating to the defamation he had suffered and the damage to his reputation (including the republishing of a narrative piece in such a way that, in the eyes of the viewers, the appellant is diminished in his capacity as a recognised expert on cars). The court should have assessed the reaction of the average viewer – which is not usually the most attentive viewer – to the narrative piece and to the persona of the appellant reflected in it. Nor did the court take account of the fact that the narrative piece was published even despite the categorical opposition of the appellant, who based that opposition on fundamental objections to the script of the piece.

By failing to provide a judicial remedy in relation to defamation, the court infringed Article 95 (protection from defamation) and Article 96 (respect for private life) of the Constitution of the Republic of Latvia.

3.2 In essence, the court held that the appellant’s popularity and the fact that his character was suitable for the creation of the narrative piece were grounds for justifying interference with the appellant’s right to privacy and his right to decide for himself regarding the processing of his data.

3.3 The complexity of interpreting the legislation cannot provide a justification for arbitrariness on the part of the authority involving conduct that is deliberate and contrary to the clearly expressed wishes of the appellant.

3.4 The redress established by the court (the apology on the websites on which the Consumer Rights Protection Centre had published the narrative piece) is not just. In a democratic state subject to the rule of law, redress for damage cannot be disproportionately reduced. The obligation to make a public apology is a simple act of basic courtesy and ethical conduct. For the purposes of comparison, Article 83(5) of the General Data Protection Regulation establishes administrative fines of up to EUR 20 000 000, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year.

3.5 The court did not take into account, nor analyse in any way, Article 82 of the General Data Protection Regulation […] [quotation from Article 82(1) of the General Data Protection Regulation].

Law

Applicable legislation

European Union law

4 Article 8(1) of the Charter of Fundamental Rights of the European Union; Article 1(2), Article 82 and recitals 75, 85 and 146 of the General Data Protection Regulation.

Latvian law

5 Article 92, third sentence, of the Constitution of the Republic of Latvia:

‘In the event of unjustified interference with any right of any person, that person is entitled to appropriate redress.’

Article 14 of the Law on the liability of public authorities, titled ‘Imposition of the obligation [to provide redress] for non-material damage’:

‘1. The obligation to provide redress for non-material damage shall be imposed according to the importance of the rights and legally protected interests which are interfered with and the seriousness of the interference in question in light of the basis of, and the factual and legal reasons for, the conduct of the authority and the conduct and joint responsibility of the victim, as well as the other circumstances relevant to the particular case.

2. Non-material damage shall be rectified by means of the restoration of the situation that existed before the damage was caused or, where that is impossible, in full or in part, or where that solution is inappropriate, by means of an apology or by means of payment of a suitable amount of compensation.

3. If, after assessing the circumstances of the particular case, the authority or the court finds the interference with the rights or legally protected interests of the individual not to be serious, a written or public apology may constitute the sole form of redress or a supplementary form of redress for the non-material damage.

4. The amount of compensation paid for non-material damage may be a maximum of EUR 7 000. Where serious non-material damage is caused, the maximum amount of compensation established may be EUR 10 000; however, in the case of damage to [an individual's] life or particularly serious damage to health, the maximum amount of compensation may be up to EUR 30 000.'

Reasons for uncertainties regarding the interpretation of the European Union legislation

6 The Regional Administrative Court found that the rights of the appellant had been infringed and, on that point, its judgment has acquired the force of *res judicata*; but the appellant does not agree either with the assessment of the interference with his rights and the damage caused by that interference or with the redress established in consequence. It is, therefore, appropriate, in these appeal proceedings, to verify whether that court correctly assessed the seriousness of the interference with the rights of the appellant on the part of the Consumer Rights Protection Centre and the existence of the damage caused by that interference, and whether the redress established by that same court may be considered appropriate.

7 Article 82(1) of the General Data Protection Regulation provides that any person who has suffered material or non-material damage as a result of an infringement of that regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

The Court of Justice of the European Union has held that, since the General Data Protection Regulation makes no reference to the law of the Member States as regards the meaning and scope of the terms set out in Article 82 of that regulation, in particular as regards the concepts of 'material or non-material damage' and of 'compensation for the damage suffered', for the purposes of the application of that regulation, those terms must be regarded as constituting autonomous concepts of EU law which must be interpreted in a uniform manner in all of the Member States (judgment of 4 May 2023, *Österreichische Post*, C-300/21, EU:C:2023:370, paragraph 30). Accordingly, for the purposes of interpreting those concepts, Latvian law is not applicable, but rather solely the provisions of that regulation, as interpreted in the case-law of the Court of Justice of the European Union.

As may be gathered from the judgment of the Regional Administrative Court, that court based its conclusions regarding redress for the damage solely on Latvian legislation and case-law, and that approach is inconsistent with Article 82 of the General Data Protection Regulation.

Moreover, the judgment of the Regional Administrative Court deals with various aspects to which the interpretation of Article 82 of the General Data Protection Regulation is relevant. From the information held by the Registry of the Court of Justice of the European Union, it emerges that the courts of the Member States have already referred various questions to it regarding the interpretation of that article, the answers to which may also be relevant to the present case (cases C-340/21, C-667/21, C-687/21, C-741/21, C-182/22, C-456/22, C-590/22 and C-65/23). However, no answer has yet been given to those questions and, therefore, this court considers it necessary to request a preliminary ruling from the Court of Justice of the European Union.

8 One relevant aspect in the examination of the case before the Regional Administrative Court was whether an obligation to pay compensation should be imposed in relation to the infringement of the General Data Protection Regulation, that is, in relation to an infringement concerning data protection in itself, or whether, on the contrary, the damage caused by that infringement also has to be proved. The Court of Justice of the European Union has already answered that question.

Article 82(1) of the General Data Protection Regulation provides for the right to compensation for material or non-material damage suffered as a result of an infringement of that regulation. As the Court of Justice of the European Union has explained, the mere *infringement* of the provisions of that regulation is not sufficient to confer a right to compensation, but rather the *damage* caused by the infringement must be proved (paragraphs 32 and 42 of the judgment in *Österreichische Post*).

It may be gathered from the judgment of the Regional Administrative Court that, in essence, that court assessed the need for redress in relation to the infringement, in itself, of that regulation by the authority, because it did not establish any defamatory damage to the appellant or damage to his reputation. That is not consistent with Article 82(1) of the General Data Protection Regulation. If that court concluded that the appellant had not suffered any damage as a consequence of the infringement of that regulation, it should have rejected the claim for compensation or redress.

However, before reaching other conclusions, it is necessary to verify whether the court in question was wrong in its assessment of the existence of damage.

9 In that regard, it is necessary to clarify, however, whether an infringement of the General Data Protection Regulation, that is, an infringement relating to data protection, may, at the same time, in itself, also constitute damage to the person concerned.

In accordance with recital 146 of the General Data Protection Regulation, the controller or processor should compensate any damage which a person may suffer as a result of processing that infringes that regulation. The concept of damage

should be broadly interpreted in the light of the case-law of the Court of Justice of the European Union, in a manner which fully reflects the objectives of that regulation. Data subjects should receive full and effective compensation for the damage they have suffered. The Court of Justice of the European Union, also referring to that recital, has stressed an interpretation of the concept of damage that is consistent with the objectives of that regulation, which are, inter alia, to ensure a consistent and high level of protection of natural persons with regard to the processing of personal data within the European Union and to ensure consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of such data throughout the European Union (paragraphs 46 to 48 of the judgment in *Österreichische Post*). Moreover, for the purposes of Article 82 of the General Data Protection Regulation, the concept of 'damage', including the concept of 'non-material damage', must be given an autonomous and uniform definition specific to EU law (paragraph 44 of the judgment in *Österreichische Post*).

Article 8(1) of the Charter of Fundamental Rights of the European Union formulates the right to data protection as a subjective right that is autonomous and inherent in the person; that is, everyone has the right to the protection of personal data concerning him or her. Article 1(2) of the General Data Protection Regulation also states that that regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data; that is, the right to the protection of personal data is mentioned as one of a person's fundamental rights and freedoms.

The question, therefore, arises of whether interference with that subjective right constitutes, in itself, damage to the person. That is, if interference with other guaranteed rights of a person (such as the right to a private life, the right to property, etc.) is regarded as damage, may the infringement of the above-mentioned right to data protection be regarded, in itself, as constituting – or at least possibly constituting in certain circumstances – damage caused to that person?

That, in turn, leads to the subsequent question of the relationship between the infringement of the General Data Protection Regulation, that is, an infringement relating to data protection, and the infringement of the right to data protection as a subjective right. Data processing is an activity carried out with personal data which, in principle, are protected. Consequently, when the processing of the data is unlawful, it may be presumed that, with that data processing, unjustified interference with the subjective right of the person concerned to the protection of his or her data is taking place, precisely because those data had not been protected from unlawful processing.

For example, in the present case, it may be appropriate to consider whether the dissemination of personal data in a narrative piece of an instructive nature, when it was done despite the express objection of the person concerned, in itself, causes damage, because it involves interference with that person's right to data protection

(thereby constituting damage per se, even if no breach of his privacy, defamatory damage or damage to his reputation are proved).

It is necessary to add that in recital 75 of the General Data Protection Regulation three specific types of damage are mentioned, from which it may be deduced that an infringement of that regulation, in itself, even if it constitutes an infringement of a person's right to the protection of his or her data, may not be regarded as damage for the purposes of that regulation; in other words, an infringement of that regulation, in itself, would not usually be regarded as interference with the 'rights and freedoms of natural persons' mentioned in that recital or as damage. That recital states as follows: 'The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data; where personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular of children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects.' Some of the types of damage mentioned here could be regarded as mere infringements relating to data protection, without the infringement of other rights and freedoms (for example, when the data subject is deprived of the right to control his or her personal data); whereas the wording of that recital as a whole seems to imply that, in the most usual case, an infringement relating to data protection, in itself, will not give rise to damage, but rather, to a certain extent, such an infringement is qualitatively different from damage.

Recital 85 of that regulation then gives the following clarification: 'A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned.' The possible types of damage mentioned here are both those which, in essence, in themselves, constitute an infringement relating to data protection (loss of control over personal data) and those which are related to interference with other rights and freedoms (for example, damage to reputation).

That, therefore, accentuates the uncertainties regarding the relationship that exists between, on the one hand, infringement of the provisions of the General Data Protection Regulation as an infringement relating to data protection and, on the other, 'damage' for the purposes of Article 82(1) of that regulation.

10 Next, the link that exists between the damage and compensation or redress appropriate to that damage must be addressed.

In interpreting the concept of damage in accordance with the objectives of the General Data Protection Regulation, the Court of Justice of the European Union has ruled that it is not acceptable to make compensation for non-material damage subject to a certain threshold of seriousness, since the graduation of such a threshold, on which the possibility or otherwise of obtaining that compensation would depend, would be liable to fluctuate according to the assessment of the courts seised and thus undermine the coherence of the rules established (paragraph 49 of the judgment in *Österreichische Post*).

As regards the compensation obligation to be imposed, that is, redress in financial terms, the Court of Justice of the European Union has ruled that it is for the legal system of each Member State to prescribe the criteria for determining the extent of the compensation payable in that context, subject to compliance with the principles of equivalence and effectiveness (*ibidem*, paragraphs 53 and 54).

It has also held that financial compensation based on Article 82 of the General Data Protection Regulation 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 (*ibidem*, paragraph 58).

Thus, the Court of Justice of the European Union has, on a general basis, already established the framework for determining the compensation. Nevertheless, some questions remain unclear.

11 The Regional Administrative Court held that, in the case in question, a public apology to the appellant constitutes sufficient compensation for the non-material damage. It should be added that that form of redress for non-material damage, in particular when the interference with the person's rights is not serious, is expressly provided for in Latvian legislation (specifically, in Article 14(2) and (3) of the Law on the liability of public authorities), and it is also provided for in cases where *restitutio in integrum* is not possible.

So, if the form and extent of the compensation were determined in accordance with Latvian legislation, depending on the assessment of the defendant authority or the court, even in circumstances where *restitutio in integrum* is not possible, the result could be that an apology was considered sufficient compensation.

Given that the question of the existence and importance of the damage still remains unanswered in the present case and that the answer to that question depends on the interpretation of the concept of damage, it could, then, be significant to clarify whether the imposition of the obligation to apologise, as the sole form of compensation, is consistent with Article 82(1) of the General Data Protection Regulation, interpreted in accordance with the objectives of that regulation and the principle of full compensation.

12 In studying the form and extent of the compensation, the Regional Administrative Court took into account, inter alia, the aims of and basis for the authority's conduct. In particular, the Regional Administrative Court included in its reasoning the following facts: when it produced and disseminated the narrative piece in spite of the appellant's opposition, the authority was performing a task carried out in the public interest; the use of the appellant's personal data was appropriate for that purpose; the aim of the authority was not to defame the appellant or to damage his reputation; and, in the case in question, the application of the legislation was complicated.

That raises the question of whether such considerations, which are, in essence, indicative of the attitude and motivation of the originator of the data protection infringement, may be taken into account when imposing the obligation to provide redress for the damage.

As has already been mentioned, Article 82 of the General Data Protection Regulation establishes the principle of full compensation. Thus, if a court determined that, due to the motivation of the infringing party, an amount of compensation should be established that was smaller than that which would generally be proportional to the damage suffered, the amount of that compensation would cease to be proportional to the extent of the damage itself. The Court of Justice of the European Union has rejected the need for the amount of the compensation to be punitive in nature, precisely because that is not necessary to achieve full and effective redress for the damage itself (paragraph 58 of the judgment in *Österreichische Post*). The question arises of whether similar considerations should not be taken into account in the present case, that is, of whether, by taking into account the motivation of the infringing party, the correlation that exists between the damage and the compensation appropriate to it is being distorted and, therefore, likewise the mechanism for full and effective compensation.

13 In summary, this court has doubts regarding the interpretation of European Union legislation. It is, therefore, necessary to refer questions to the Court of Justice of the European Union for a preliminary ruling.

[...] [considerations of a procedural nature]

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union, […][reference to national procedural provisions], this court

decides

To refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 82(1) of the General Data Protection Regulation be interpreted as meaning that the unlawful processing of personal data, in so far as it is an infringement of that regulation, may, in itself, constitute unjustified interference with a person's subjective right to the protection of his or her data and damage caused to that person?

2. Must Article 82(1) of the General Data Protection Regulation be interpreted as meaning that, where there is no possibility of restoring the situation that existed before the damage was caused, it permits the imposition of the obligation to apologise as the sole form of compensation for non-material damage?

3. Must Article 82(1) of the General Data Protection Regulation be interpreted as meaning that it permits a smaller amount of compensation for the damage caused to be set on the basis of circumstances that are indicative of the attitude and motivation of the person processing the data (for example, the need to perform a task carried out in the public interest, the lack of intent to cause damage to the person concerned or difficulties in understanding the legal framework)?

To stay the proceedings pending a ruling from the Court of Justice of the European Union.

This decision is not open to appeal.

[…]

[signatures]