Case C-332/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 May 2023

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

22 May 2023

Applicant:

Inspektorat kam Visshia sadeben savet

Subject matter of the main proceedings

In order to fulfil its obligation to keep a public register of declarations of the assets and liabilities of judges and public prosecutors, the Inspektorat kam Visshia sadeben savet (Inspectorate at the Supreme Judicial Council, 'the IVSS') has applied to the referring court for permission to access data subject to banking secrecy relating to the account balances as at 31 December 2022 of six judges and public prosecutors and four of their family members.

Subject matter and legal basis of the request

Request under Article 267 TFEU for a preliminary ruling on the interpretation of the second subparagraph of Article 19(1) TEU and of the General Data Protection Regulation. This cases raises questions concerning the compatibility of extending the powers of a judicial supervisory authority (the IVSS) after its term of office has expired with the requirements of judicial independence, and the scope of the power of review of the court adjudicating as [competent] authority on the disclosure of personal data, where that court is under an obligation to examine formal conditions.

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) [TEU], read in conjunction with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that

   it is *per se* or under certain conditions an infringement of the obligation incumbent on Member States to provide effective remedies sufficient to ensure independent judicial review for the functions of an authority which can impose disciplinary penalties on judges and has powers to collect data relating to their assets and liabilities to be indefinitely extended after the constitutionally stipulated term of office of that body comes to an end? If such an extension is permissible, under what conditions is that the case?

2. Must Article 2(2)(a) of Regulation (EU) 2016/679 … on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation; 'the GDPR') be interpreted as meaning that

   the disclosure of data covered by banking secrecy for the purposes of verifying assets and liabilities of judges and public prosecutors which are subsequently made public constitutes an activity which falls outside the scope of Union law? Is the answer different where that activity also includes the disclosure of data relating to family members of those judges and public prosecutors who are not judges or public prosecutors themselves?

3. If the answer to the second question is that Union law is applicable, must Article 4(7) of the General Data Protection Regulation be interpreted as meaning that

   a judicial authority which allows another State authority to access data concerning the account balances of judges and public prosecutors and their family members determines the purposes or means of the processing of personal data and is therefore a 'controller' for the purposes of the processing of personal data?

4. If the answer to the second question is that Union law is applicable and the third question is answered in the negative, must Article 51 of the General Data Protection Regulation be interpreted as meaning that

   a judicial authority which allows another State authority to access data concerning the account balances of judges and public prosecutors and their family members is responsible for monitoring [the application of] that regulation and must therefore be classified as a 'supervisory authority' in relation to those data?

5. If the answer to the second question is that Union law is applicable and either the third or the fourth questions are answered in the affirmative, must

Article 32(1)(b) of the General Data Protection Regulation and Article 57(1)(a) of that regulation be interpreted as meaning that

a judicial authority which allows another State authority to access data concerning the account balances of judges and public prosecutors and their families, is obliged, in the presence of data concerning a personal data breach committed in the past by the authority to which such access is to be granted, to obtain information on the data protection measures taken and to take into account the appropriateness of those measures in its decision to permit access?

6. If the answer to the second question is that Union law is applicable, and irrespective of the answers to the third and fourth questions, must Article 79(1) of the General Data Protection Regulation, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that,

where the national law of a Member State provides that certain categories of data may be disclosed only after permission to do so has been granted by a court, the court so competent must of its own motion grant legal protection to the persons whose data are to be disclosed, by requiring the authority which has applied for access to the data in question and which is known to have committed a personal data breach in the past to provide information on the measures taken pursuant to Article 33(3)(d) of the General Data Protection Regulation and their effective application?

Provisions of European Union law and case-law relied on

Treaty on the European Union (TEU): second subparagraph of Article 19(1).

Charter of Fundamental Rights of the European Union (Charter): Article 47.

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 data, and repealing Directive 95/46/EC (GDPR): Article 2(2)(a), Article 4(7), Article 32(1)(b), Article 33(3)(d), Article 51, Article 57(1)(a) and Article 79(1).

Judgment of the Court of Justice of 11 May 2023, *Inspecţia Judiciară*, C-817/21, EU:C:2023:391.

Judgment of the Court of Justice of 22 June 2021, *Latvijas Republikas Saeima* (Penalty points), C-439/19, EU:C:2021:504.

Judgment of the Court of Justice of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551.

Provisions of national law and case-law relied on

Konstitutsia na Republika Balgaria (Constitution of the Republic of Bulgaria): Articles 117 and 132a.

Zakon za zashtita na lichnite danni (Law on data protection, 'the ZZLD'): Articles 6, 12a, 17, 17a and 20.

Zakon za sadebnata vlast (Law on the judiciary, 'the ZSV'): Article 54 and Article 175a to 175f. In particular

Article 175e: '(1) Within a period of six months following the expiry of the deadline for the submission of [declarations of the assets and liabilities of judges and public prosecutors], the [IVSS] shall verify the truthfulness of the information provided.

[…]

(6) […] The Chief Inspector and the inspectors of the [IVSS] may apply to the Rayonen sad (District Court) in the district of which the person concerned has his or her permanent address for the disclosure of data covered by banking secrecy […]'.

Zakon za kreditnite institutsii (Law on credit institutions, 'the ZKI'): Article 62:

'(7) The judge at the Rayonen sad (District Court) shall decide on the application […] by way of a reasoned decision given in closed session no later than 24 hours after the application is received; in so doing, he or she shall determine the period to which the information relates […]. No appeal shall lie against the decision of the court'.

Judgment No 12/27.09.2022 of the Konstitutsionen sad (Constitutional Court) in case No 7/2022.

Judgment No 260704/25.02.2022 of the Sofiyski gradski sad (City Court, Sofia) in the appeal proceedings in civil case No 3611/2021.

Succinct presentation of the facts and procedure in the main proceedings

1 The IVSS was established by way of an amendment to the Constitution of the Republic of Bulgaria in 2007. It is comprised of an Inspector General and ten inspectors who investigate indications of undue influence on judges and public prosecutors; since 2015, the IVSS has reviewed declarations of the assets and liabilities of judges and public prosecutors with a view to identifying any conflicts of interest. The inspectors have a term of office of four years, the Chief Inspector one of five years.

2 At the current time, the judicial inspectors were last elected on 18 February 2016 and took office in the same year. The Inspector General was elected on 2 May 2015 and has been in office since 2015.

3 On 18 July 2019, several Bulgarian media reported that the data of M.T. (judge at the Sofiyski gradski sad (City Court, Sofia) and former chairperson of the Union of Judges) had been published in full on the IVSS website, even though her address and the names of her husband and her son should not have been published.

4 According to a statement issued by the Bulgarian Komisia za zashtita na lichnite danni (Commission for the protection of personal data, 'the KZLD') on 21 January 2020, twenty declarations made by judges and public prosecutors were published in this way in 2019. As a result, the IVSS was fined 2000 Bulgarian Lev (BGN). It is not known whether that decision was the subject of a judicial review or whether it has become final.

5 In publicly available judgment No 260704/25.02.2022, given in the appeal proceedings in civil case No 3611/2021, the Sofiyski gradski sad (Sofia City Court sitting in its appellate jurisdiction) confirmed the dismissal on 9 August 2019 of the official responsible for the non-anonymised publication of those declarations. The [web]site of the Varhoven kasatsionen sad (Supreme Court of Cassation) contains no information on any appeal in cassation brought against that judgment.

6 Following the expiry of the deadline for judges and public prosecutors to submit their annual declarations of assets, liabilities and income for 2022, the IVSS asked the referring court to lift the banking secrecy covering data (account balance information) relating to six judges and public prosecutors permanently resident in Sofia, as well as to their spouses and minor children.

7 The referring court has no knowledge of whether the reasons that led to the unlawful publication of personal data were removed or what measures the IVSS took to avoid any further risks. Up until now, moreover, it has not been customary for the courts to obtain such information.

Succinct presentation of the reasoning in the request for a preliminary ruling

First question referred for a preliminary ruling

8 First, the referring court must examine the power of the IVSS (as represented by its inspectors) to make applications [for the lifting of banking secrecy] at the time when the applications in question were made. In the view of the referring court, this question is directly concerned with judicial independence, since [that power] enables the IVSS to acquire knowledge of data concerning the assets and liabilities of judges and their family members and to use those data in the context

of its powers to propose the imposition of disciplinary penalties on judges and public prosecutors.

9 The referring court notes that, according to the settled case-law of the Court of Justice, all questions relating to the independence of the courts fall within the scope of Union law for the purposes of the second subparagraph of Article 19(1) TEU, whether or not other provisions of EU law are affected (see the judgment of 11 May 2023, *Inspecția Judiciară*, C-817/21, EU:C:2023:391, paragraph 42).

10 Furthermore, it is the settled case-law of the Court of Justice that questions relating to the independence of any institution able to bring disciplinary proceedings against judges who apply EU law and have the power to make a request for a preliminary ruling under Article 267 TFEU fall within the scope of EU law and must be examined in any pending proceedings involving such an institution (see the judgment of 11 May 2023, *Inspecția Judiciară*, C-817/21, EU:C:2023:391, paragraphs 47 and 49). That examination must also cover the procedure for appointing the officials of that institution, including the safeguards against any political interference in the performance of their duties (see the judgment of 11 May 2023, *Inspecția Judiciară*, C-817/21, EU:C:2023:391, paragraphs 50 and 51).

11 In the present case, the terms of office of both the Inspector General and all the inspectors respectively have expired and no new persons have been appointed to those positions. The decision concerning the election of new members of the IVSS falls to the Bulgarian parliament (the Narodno sabranie, National Assembly), which has not discharged that obligation for two years in the case of inspectors and not for more than three years in the case of the Inspector General.

12 In that time, the Konstitutionen sad (Constitutional Court) of the Republic of Bulgaria has held, by judgment No 12/27.09.2022, that '*the Inspector General and the inspectors of the IVSS must continue to perform their functions, after the term of office for which they were elected has expired, until the National Assembly elects a [new] Inspector General and [new] inspectors*'. In that judgment, the court discussed at length the need to strike a balance between the requirements of legal certainty and the risks of an abuse of power inherent in extending the term of office of institutions provided for in the constitution, and came to the conclusion that, in this case, preserving the functions of the supervisory authority outweighs the risks of abuse by members whose terms of office have expired and the end of whose activities is now dependent on the decision of the National Assembly (as a political entity). Although it raises the question of the independence of the IVSS from the legislative body in this case, the judgment of the Constitutional Court takes no account of the role of the supervisory authority within the justice system. It contains no examination of whether the members of the IVSS, who remain in post notwithstanding that their terms of office have expired, exert too much influence over the justice system.

13 For those reasons, the referring court is uncertain whether the interpretation so adopted by the Constitutional Court, which is concerned with the functioning of State institutions, is compatible with EU law, in other words, whether the requirements which EU law attaches to safeguards to preserve the independence of State institutions supervising the justice system are stricter than those established by the Bulgarian Constitutional Court. This calls for an indication of whether such an extension of the term of office is capable (under EU law) of jeopardising the safeguards to preserve the independence of the IVSS as an institution with the power to call for the imposition of disciplinary penalties on judges, and, if it is capable of doing so, what criteria are to be used to assess whether extending the term of office of such an institution is permissible, and, if so, for how long (first question referred for a preliminary ruling).

Second question referred for a preliminary ruling

14 The framework for the processing of personal data in the European Union and the rules governing the supervision of such processing are set out, in essence, in the GDPR. That regulation imposes certain obligations on the persons who process or are responsible for processing personal data, and on the supervisory authorities.

15 In the present case, it must be examined whether and, if so, to what extent the activities of the Bulgarian courts in allowing access to certain categories of data which are subject to secrecy protected by law in Bulgaria (data concerning account balances), fall within the scope of the GDPR for the purposes of verifying the assets and liabilities of judges and public prosecutors. Article 2(2) in particular provides that that regulation does not apply to [the processing of data] in the course of an activity which falls outside the scope of Union law.

16 The referring court notes that the regulation of declarations of the assets and liabilities of judges and public prosecutors and their disclosure does not take place in the course of an activity which is directly governed by Union law. At the same time, the Court of Justice has held in settled case-law that not all activities which are carried out by State authorities in the course of their powers under public law are to be excluded from the scope of the GDPR, only those which are concerned with national security or defence (see the judgment of 22 June 2021, *Latvijas Republikas Saeima* (Penalty points), C-439/19, EU:C:2021:504, paragraphs 65 and 66). Consequently, in so far as it concerns an activity carried out under public law with a view to determining the status and safeguarding the probity of judges and public prosecutors, this case calls for a clear answer to the question whether that activity falls within the scope of the GDPR (second question referred for a preliminary ruling). For the sake of completeness, the referring court notes that the account balance disclosure applications made to it concern not only judges and public prosecutors but also their family members, who are not themselves judges or public prosecutors.

Third and fourth questions referred for a preliminary ruling

17 Next, the referring court examines the role of the court as the authority which grants the IVSS access to the personal data of the persons under review. The GDPR does not expressly specify the legal status of, or the obligations incumbent on, the court, which cannot access the personal data directly but has a duty to give formal access permission to the authority that will process those data.

18 It should noted here that the consensus of opinion is that, in proceedings under Article 62(7) of the ZKI in conjunction with Article 175e(6) of the ZSV, the courts exercise a purely formal review that is confined to determining whether individuals affected by the disclosure of data covered by banking secrecy have the status of persons required to make a declaration [of assets and liabilities] within the meaning of the ZSV, that is to say whether they are judges or public prosecutors, or persons who are related to, family members of, or in an intimate relationship with, judges or public prosecutors. It would seem, on an uncritical application of the national rules, that the courts must always permit the disclosure of data covered by banking secrecy. The position would be otherwise, however, if the court were to be classified as controller in respect of the personal data to which it grants access, since Articles 32 to 34 of the GDPR impose on the controller a number of obligations aimed at ensuring the security of data, including a minimum level of supervision in relation to the security measures in place.

19 According to the definition contained in Article 4(7) of the GDPR, a ‘controller’, ‘alone or jointly with others, determines the purposes and means of the processing of personal data’. The following special rule applies: ‘Where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law’.

20 Bulgarian law does not determine who the controller is in the procedure under Article 62(7) of the ZKI in conjunction with Article 175e(6) of the ZSV. The provisions of Article 17 et seq. of the ZZLD govern the tasks of the IVSS as supervisory authority for data protection in court proceedings, as provided for in Article 23(1)(f) of the GDPR in conjunction with recital 20 thereof. In the main proceedings, however, it is not the court that collects personal data under the supervision of the IVSS, but precisely the opposite: as part of its statutory powers, the IVSS collects and processes personal data for the purposes defined in Articles 175e and 175d of the ZSV (collection and verification of information concerning the assets and liabilities of judges and public prosecutors for the purposes of ensuring the transparency and independence of court proceedings). The court exercises a power of review in respect of that process, by permitting or refusing to permit access to the data in question.

21 Thus, although the courts do not have direct access to personal data forming the subject of an application for disclosure (this is not necessary in order for a person

to be capable of being regarded as a 'controller'; see the judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 3 [of the operative part]), they do in a sense determine the purposes of the processing by permitting or prohibiting access to personal data subject to banking secrecy. It therefore seems possible, by interpreting the legislation in a certain way, to regard the court as an authority which determines the purposes of the data processing.

22 It should also be noted that the Bulgarian legislature has not made use of its power to determine which authority has the rights and the obligations of controller in this particular situation, in which the purposes of the processing of personal data are listed in law. In those circumstances, it must be clarified whether the court which permits access may be regarded as acting jointly with the IVSS as controller in respect of personal data (third question referred for a preliminary ruling).

23 Given that the national legislation is unclear, an answer is also needed to the question whether the judicial authority which lays down the conditions governing access by another State authority to personal data subject to banking secrecy may also be regarded as a supervisory authority exercising some of the powers provided for in the GDPR in the confined area of supervision of access to data (fourth question referred for a preliminary ruling).

Fifth and sixth questions referred for a preliminary ruling

24 In the main proceedings, it is a matter of public knowledge that the IVSS committed a data breach in the past by disclosing in a published declaration of the assets, liabilities and income of a judge (M.T.) some of that judge's personal data which should not have been published. This happened in 2019, the commission of that breach having been an act of gross negligence (in the published file, the administrative official, who was later dismissed, stated that, since 'nothing [in the file] [could] be deleted', the information could not be redacted). According to a statement by the principal supervisory authority in Bulgaria (KZLD), established in accordance with Article 51 of the GDPR, the IVSS was fined for that breach.

25 In those circumstances, in particular in the light of the publicly available information on the absence of any measures to protect personal data (as is apparent from the grounds of the court's judgment in the dispute concerning the dismissal of the official responsible [for the aforementioned breach], who appears to have been the only one to bear any responsibility for that incident), the court, if it held the role of controller or supervisory authority, would probably permit access to data covered by banking secrecy only after having obtained information on the security measures applied and after having satisfied itself that those measures, at least at first sight, provide protection against a further breach of the security of personal data (fifth question referred for a preliminary ruling).

26 In addition, an answer is also required to the question whether it is permissible for a court empowered under national law to allow access to personal data subject to banking secrecy, even if it cannot be classified as a controller in respect of

personal data or as a supervisory authority, to carry out such reviews on the basis of Article 79 of the GDPR in order to ensure effective judicial protection (sixth question referred for a preliminary ruling). In actual fact, that provision is intended for cases in which the person concerned explicitly seeks the court's protection. Where, however, the procedure for the disclosure of data takes place without the participation of the person concerned and national law has expressly introduced a judicial review remedy, it would seem that the court may also intervene of its own motion. This might also be inferred from the right of persons to an effective remedy under Article 47 of the Charter. In the absence of that duty, the court's task would be confined to conducting a formal examination and confirming the conduct of the administration, which would seem to be contrary to the objectives of Article 79 of the GDPR.