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THE RULING AGAINST META PLATFORMS AND THE IMPACT ON THE DIVERSIFICATION OF AN ENTITLED PERSON ACCORDING TO ART. 263 TFEU (EX-ARTICLE 230 TEC)

As a general principle to avoid the Courts from being flooded with applications almost every judicial system of the majority of countries entitles natural and legal persons to initiate proceedings at a Court only if they can invoke the violation of a subjective right. The Treaty on the Functioning of the European Union (TFEU) also regulates the prevention of generating an *actio popularis*. [1]

According to Art. 263 of the Treaty on the Functioning of the European Union "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs* [of Art. 263 TFEU], *institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*"

Thereby art. 263 TFEU explicitly entitles natural and legal persons to initiating legal proceedings in case that they can invoke the violation of a subjective right. Accordingly to the above said, three alternatives come into consideration:

1) the natural and legal persons must either be the addressee of the act (Alt. 1) or
2) be directly and individually affected by the act (Alt. 2) or
3) the act is a legal act of a regulatory nature that directly affects them and does not entail any implementing measures (Alt. 3).

An applicant is directly affected by the act if his or her legal position is directly violated by the contested act. [2]

The basis for determining the individual concern of the person has been for forty years now the so called *Plaumann* formula. According to it, the applicant is of individual concern if the legal act affects him or her out of the circle of all other

persons and therefore individualises the person in a similar way as the addressee. [3]

Lately the European Court of Justice (ECJ) decided on 28.04.2022 in the Case No. C-319/20, *Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV* [4], that in Germany qualified consumer associations are entitled to initiate legal proceedings against a breach of data protection law by a company, irrespective of a specific violation of a subject's right to the data protection and without a corresponding mandate from such a person to initiate legal proceedings.

The Federal Court of Justice from Germany submitted initially the question whether an association for the protection of consumers' interests may bring an action against the alleged infringer without a corresponding mandate and irrespective of the violation of specific rights of the corresponding person. So basically whether the General Data Protection Regulation (GDPR) allows the Member States to empower certain associations to initiate legal proceedings regardless of a violation of certain subjective person rights. The ECJ answered affirmatively to the question. It stated that the GDPR provides an "opening clause" for the Member States to implement an additional, stricter or more restrictive national rules for securing the protection of personal data.

In the case mentioned above the Federation of German Consumer Organisations (vzbz) took yet again on Facebook because of the alleged lack of action for not providing sufficient information regarding which data was passed on and what happened to it. The District Court of Berlin ruled in favour of the vzbz. Thomas Koch, the judge of The Federal Court of Justice from Germany, questioned the entitlement of the vzbz.

As per general the decision to interpret the purpose of the GDPR as of allowing Member States to implement such far-reaching measures is very welcomed for the regular costumer. It arises the question whether it comes to the limits of an *actio popularis* or not at all, because an organisation could always initiate legal proceedings as it wishes.

A contrary indication to this fact is that the ECJ stated, arguing based on the formulation of Art. 80 (2) GDPR "if it considers" and of recital 142 of GDPR "it

has reasons to consider", that the Regulation aimed to ease data protection through a non-for-profit body. Nevertheless the non-profitable organisation has to consider that the data processing complains may affect the rights of identified or identifiable natural persons. This could be seen as a barrier and a parallel to requested violation of a subjective right in Art. 263 TFEU.

The understanding of the Luxembourg Judges is that non-profitable organisation act in the public interest. This because it pursues the goal of guaranteeing the rights of consumers. Therefore a violation of consumer protection could go hand in hand with a violation of data protection.

The current decision will ensure that non-profitable organisations are more courageous. The vzbz alone initiated already approximately 20 legal procedures regarding a potential violation of GDPR – more than some supervisory authorities.

Corresponding to the prudent substantiation of the ECJ it also eliminates the risk of an occurrence of *actio popularis*. It remains clear that the aim is to ensure a high level of protection of personal data, which could be seen *inter alia* in the "Schrems II" decision.

Eventual companies must now increasingly expect to be sued by consumer associations for possible data protection violations. They must take greater care to ensure that the information on the processing of personal data that is easily accessible through a website or otherwise doesn't lead to a risk of violating the data protection. This specifically to the information that is provided according to Art. 13 and 14 of the GDPR, meaning the request for consent to the use of cookies and other technically unnecessary technologies for example.

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