

The Dentons logo is presented in a white, arrow-shaped box pointing to the right. The word "DENTONS" is written in a bold, uppercase, sans-serif font. The background of the entire page is a close-up photograph of a purple flower, with a dark purple semi-transparent shape in the upper left corner that serves as a backdrop for the logo and title.

**DENTONS**

# **Top 10 IP&TMT CJEU judgements of 2023**

Grow | Protect | Operate | Finance

April 2024



# Introduction

The Court of Justice of the European Union (“**CJEU**”) and its judgments play a pivotal role in harmonizing the legal principles of EU member states. Thus, for the fourth time, we present our bit-sized and curated guide to the most impactful CJEU judgments of the past year, each distinguished by its far-reaching implications and precedent-setting nature. The year 2023 has witnessed watershed decisions that have not only shaped legal landscapes but also significantly influenced the socio-economic fabric of the data protection, intellectual property and technology domains.

Chief among the list this year was the ruling in the *Österreichische Post* case, which, on the subject of using German citizens’ data to determine their political preferences, provided clarity on the criteria for compensation and emphasized the need to establish actual damage in compensation claims. In addition, the judges detailed the conditions under which individuals can seek compensation for violations of GDPR, including for non-material damage.

The other podium spots went consecutively to the rulings of *Google Ireland and others* as well as *Lännen MCE*. The runner-up ruling affirmed the country-of-origin principle, stating that a member state cannot impose general and abstract obligations on a communications platform provider based in another member state. The latter recalls giving guidance to businesses to protect themselves from unexpected lawsuits from jurisdictions that are not their target, especially in the context of using GoogleAds.

The remaining decisions which we delved into, featured privacy themes ranging from the basis of data processing in personalized advertising in social media and the legality of scoring in financial institutions to the scope of the right to access data. With the upcoming revamp of EU design law, we would also like to draw your attention to a judgment addressing the question of whether elements of a complex product, such as the underside of a saddle, that are invisible in normal use, can be protected as a design. Simultaneously, copyright subjects were significantly affected by the judges’ consideration of issues such as whether the mere installation of a sound system in the course of a business gives rise to an obligation to pay remuneration, and whether the mere provision of access to satellite signals, without actual control over the content or its introduction into the communications chain, does not constitute “communication to the public by satellite”, and which entities can claim fair compensation for private copying from collecting societies.

Answers and details on these questions will be found in the following pages of this legal brochure unfolding substantial points for entrepreneurs offering services to the information society and, at the same time, offering practitioners and stakeholders a nuanced understanding of the evolving legal precedents, through commentaries by experienced professionals from the IPTC practice of Dentons’ Warsaw office.



**Karol Laskowski**  
Europe Co-head of  
Technology, Media and  
Telecommunications

# Österreichische Post

4 May 2023

C-300/21

#gdpr #compensation #nonmaterialdamage

1

## Background

The Austrian Post, *Österreichische Post*, has been collecting information on the political preferences of the Austrian population since 2017. An algorithm, taking into account various social and demographic criteria, allowed it to identify “target group addresses”. The data thus collected led the administrator to determine that a particular citizen had a high preference for a particular Austrian political party. However, the processed data was not passed on to third parties.

One data subject claimed that he suffered damage to his reputation, as well as public exposure and confidence loss after data processing conducted by *Österreichische Post* which determined potential political affinities. As the processing was carried out without the data subject’s express consent, he claimed compensation for internal discomfort. The Austrian Supreme Court expressed doubts about the scope of the right to compensation that the EU General Data Protection Regulation (“**GDPR**”) provides for in the event of material or non-material damage due to a violation of the regulation. That referral court asked the Court whether a mere violation of the GDPR is sufficient to confer this right, and whether compensation is only possible if a certain threshold of the severity of the non-pecuniary damage suffered is exceeded.

## Judgment

The CJEU has detailed the conditions under which individuals can seek compensation for violations of the GDPR. The case involving Austrian Post’s processing of data related to political affiliations without consent involved key aspects of the right to compensation under Article 82 of the GDPR. The Court clarified that any violation of the GDPR’s provisions, in and of itself, does not give rise to a right to compensation, because a violation of the GDPR does not necessarily lead to damages. In order to establish its existence, three conditions must be met together: a violation of the GDPR, material or non-material damage resulting from the violation, and a causal link between the damage and the violation. The ruling rejected the imposition of a “seriousness” threshold for non-material damage, ensuring a uniform interpretation of the GDPR in all member states.

The ruling provided clarity on the criteria for compensation and emphasized the need to establish actual damage in compensation claims. In addition, the Court clarified that compensation amounts should be guided by applicable national laws, ensuring consistency with the EU legal framework. The Court pointed that it is therefore up to the legal order of each member state to determine the rules aimed at ensuring that legal entities protect their rights under the GDPR and the criteria for determining the extent of compensation due under that framework, subject to respect for the principles of equivalence and effectiveness.

## Experts' comments



**Aleksandra Danielewicz**

*The CJEU's judgment in the Austrian Post case clarifies (1) the conditions for seeking compensation under the GDPR, particularly regarding violations related to processing sensitive political data, and (2) the importance of adhering to strict data protection standards and obtaining explicit consent for such processing activities. For companies operating within the EU, this decision highlights the necessity of conducting thorough impact assessments and implementing robust data protection measures to mitigate the risk of potential liabilities. Additionally, judges highlighted the importance of the EU Directive 2020/1828 which aims to facilitate class action-style litigations for data protection breaches. This ruling is likely to lead to an increase in claims, as privacy groups welcome the broader scope for seeking redress. However, it also raises concerns about the potential exploitation of compensation claims by organizations seeking financial gain.*



**Paulina Węgrzynowicz**

*The Court's ruling in Case C-300/21 significantly sets a precedent for compensation claims arising from data protection violations under the GDPR. By emphasizing that a mere violation of the GDPR does not automatically entitle individuals to compensation, the Court ensures that claims must demonstrate actual harm. Judges outlined the clear criteria that provide guidance for individuals whose data privacy rights were violated. However, the judgment also underscores the importance of individual member states' legal systems in determining compensation criteria, ensuring compliance with EU principles while accommodating local differences. Ultimately, this prejudication highlights the ongoing evolution of data protection law in Europe and the delicate balance between harmonization and national autonomy.*

# Google Ireland and others

9 November 2023

C-376/22

#socialmedia #platformprovider #relevantlaw

2

## Background

The case concerns the actions of Austria's communications regulator, *Kommunikationsbehörde Austria* ("**Komm Austria**"), which can impose fines for violations based on Austria's *Kommunikationsplattformen-Gesetz*. It obliges domestic and foreign providers of online platforms in particular to establish a notification and control procedure for illegal content, to compile and publish regular transparency reports on the handling of relevant notifications, and to appoint responsible representatives and agents for service. Komm Austria concluded that platforms such as Google, Facebook, Instagram and TikTok should be subject to Austrian legislation, despite being registered in Ireland. The online platform providers in question objected to these obligations and filed a complaint with the court. The corporations invoked the principle of freedom of movement of information services and the country of origin. In their view, nowhere outside Ireland (where they have European headquarters) can general obligations be imposed on them that go beyond Irish legislation. As a result of their revision appeals, the case went to the Austrian Administrative Court, which raised doubts about the compatibility of Austrian law applied in the case with EU law.

## Judgment

In a watershed decision with implications for digital platforms, the CJEU ruled in favor of major technology companies, including Google and Meta Platforms, challenging Austria's law on illegal content. The ruling affirmed the country-of-origin principle, stating that a member state cannot impose general and abstract obligations on a communications platform provider based in another member state.

According to the CJEU, the possibility that these member states could adopt such general and abstract obligations would undermine the principle of control in the member state of origin of the service in question, on which the directive is based. If the member state of destination (in this case, Austria) were authorized to adopt such measures, this would constitute interference with the regulatory competence of the member state of origin (in this case, Ireland). In addition, it would undermine mutual trust between member states and run counter to the principle of mutual recognition. Moreover, the platforms in question would be subject to different regulations, which would also violate the freedom to provide services and thus the proper functioning of the internal market.

The ruling gained additional significance in the context of the European Union's recently enacted Digital Services Act, indicating a key moment in shaping the regulatory landscape for the EU's major technology players. The Court stressed the importance of consistency in the application of EU law to information society services, thereby setting a precedent with implications for the legal framework governing technology companies.

## Experts' comments



**Paweł Gruszecki**

*The Court's rationale is a fervent reminder of the significance of the "country of origin" principle. The CJEU timely clarified the scope of the limited exception, according to which Member States may target certain measures at online platforms registered in other Member States to some extent only as they cannot impose general obligations on a communications platform provider based in another member state. Decision in question is highly material for the Irish outlook, as many of the major online platforms within Europe are headquartered in Ireland: the majority of the 17 very large online platforms (VLOPs) and 2 very large online search engines (VLOSEs) recently appointed by the European Commission under the Digital Services Act. The ruling is also significant in that it calls into question any national regulations on service providers that enforce their jurisdiction regardless of the provider's seat, and does not ease the already difficult dilemma of providing an effective mechanism for notice and takedown / notice and take action procedures.*



**Marcin Przybysz**

*The decision of the CJEU highlights that the leading online platforms and search engines are chiefly governed by Irish law and are under the authority of the Irish regulators. Although the EU institutions had been encouraged to harmonise the EU legal framework for digital services with the adoption of the Digital Service Act, the fairly recent, albeit sometimes contradictory, national rules were bound to contribute to legal uncertainty of the high altitude. Judges have correctly recognised that the exception to the "country of origin" rule under Article 3(4) of the Directive 2000/31 does not allow the above-mentioned national content moderation provisions to apply to service providers located in other countries. This is required to ensure the free movement of services across Europe and the attractiveness of the EU internal market, and may also ensure protection and legal certainty in the context of national drafts of statutes which may e.g. raise concerns as to envisaging politically motivated obligations, such as the draft bill on the protection of freedom of speech in social media proposed by the previous government that has recently been ousted from power in Poland.*

# Lännen MCE

27 April 2023

C-104/22

#onlineinfringement #IPenforcement

#digitalenforcement

3

## Background

A subsequent case resulted in a milestone trademark infringement ruling with major implications for the jurisdiction and territorial scope of European Union law. The plaintiff, the Finnish company Lännen MCE Oy ("**Lännen**"), produces and distributes amphibious dredges under EU trademark no. 3185758 "WATERMASTER". Defendants Berky GmbH ("**Berky**") and Senwatec GmbH & Co. KG ("**Senwatec**") are located in Germany and belong to the same group of companies. Lännen alleged that Senwatec infringed its EU trademark in Google Ads on google.fi because the following ad title surfaced when a user with a Finnish IP address searched for "watermaster" on google.fi: "Watermaster - multifunctional amphibious dredgers - senwatec.de". Lännen brought a suit against Berky and Senwatec in a Finnish court, alleging that the infringing actions through the use of the mark in online advertising took place in Finland, and therefore based international jurisdiction on Article 125(5) of the Regulation on the European Union trademark ("**EUTMR**"). The defendants challenged the international jurisdiction of the Finnish court, arguing that they neither target the Finnish market nor sell their products in Finland.

The Finnish court has referred questions to the CJEU, essentially asking for guidance on whether it has international jurisdiction in the circumstances described above. The Court had to determine whether an online advertisement placed by a foreign company headquartered and operating in another country, can be considered to be directed at Internet users in general, meaning that it is not limited to a specific territory, especially if such territory is not indicated in the advertisement itself.

## Judgment

The CJEU held that paying for Google ads on google.fi, which are linked to the Senwatec website, is a sufficient connecting factor for the jurisdiction of the Finnish courts.

Separating the determination of jurisdiction from the merits of the action, the CJEU acknowledged that evidence giving rise to a reasonable presumption that an infringement or threatened infringement may have occurred in the territory of a member state is sufficient to confer jurisdiction under 125(5) EUTMR. This provision requires active conduct by the defendant linking it to a specific member state. Infringements by way of online advertising and online product offers are committed where the consumers to whom the ads and offers are addressed are located. Courts in such member states have particular jurisdiction to assess whether an infringement has occurred.

Article 17(1)(c) of the Brussels I Regulation was found to be particularly relevant to the interpretation of Article 125(5) of the EUTMR. The Court listed the following non-exhaustive list of indications from the *Pammer and Hotel Alpenhof* judgment (C-585/08) on Article 17(1)(c) of the Brussels I Regulation that are relevant to assessing whether an activity is directed to a particular EU member state: (1) the international nature of the business; (2) the payment of the web referral service to facilitate access to the company's website (e.g., Google Ads); (3) the mention of an international clientele consisting of customers residing in different member states. In addition, the CJEU stated that the nature of the products in question and the extent of the geographic market of the infringer's business in individual cases may also play a role as in the present case.



## Experts' comments



**Aleksandra Politańska-Kunicka**

*The CJEU's landmark ruling in *Lännen MCE Oy v. Berky and Senwatec* clarifies the jurisdictional reach of EU trademark law in the context of online advertising. This decision is crucial for entities engaged in cross-border online activities, especially in the European Union. One must be even more vigilant about the fact that paying for Google ads linked to a specific member state's domain is – in the Court's view – a substantial connecting factor for jurisdiction. Taking another step in the CJEU's delineation of the frontiers of legality in the cyber arena establishes reinforcement of the principle that infringements through online advertising are committed where the targeted consumers are located. The CJEU's decision in question concerns not only the realm of digital marketing, but it also has implications for all entities targeting a multinational audience with their online advertising. Services enabling better positioning of their goods online, such as Google Ads, SEO and metatags, are an increasingly vital and challenging sector for twenty-first century businesses.*



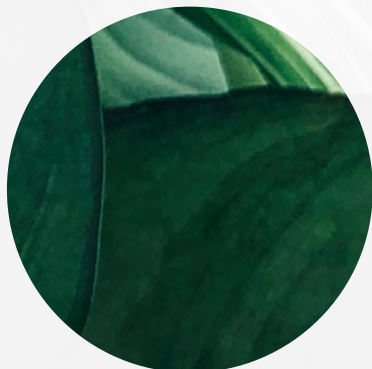
**Marta Stefanowicz**

*The recent CJEU ruling in Case C-104/22 provides guidance to national EU trademark courts in defining the connecting factors for online EU trademark infringement cases, thereby facilitating the determination of national jurisdiction.*

*It clarifies that paying search engines with a national top-level domain (TLD), such as Google Ads on *google.fi*, is enough to establish jurisdiction in the targeted Member State. Importantly, even if the alleged infringer doesn't sell the advertised goods in that targeted country, jurisdiction may still apply if national TLD ads are used on search engines.*

*Furthermore, the court distinguished between paid referencing and natural referencing, particularly regarding the use of trademarks as metatags or keywords on platforms like *Flickr.com*. While paid referencing targets specific member states, establishing a connection to national jurisdiction; natural referencing with metatags lacks such targeting, focusing instead on search engine optimization for image identification.*

*The decision provides vital guidance on the longstanding issue of jurisdictional aspects in EUTM online infringement, stressing the importance of the target audience, especially pertinent in today's user-centric ecosystems. By clarifying the connecting factors, it eases the process for companies to establish connections with national jurisdictions, facilitating simplified IP enforcement in digital realms.*



# Pankki

22 June 2023

C-579/21

#privacy #datarequest #accessright

4

## Background

The complainant JM, an employee and also a customer of the Finnish bank Suur Savon Osuuspankki (“Pankki”), who, during his work, accidentally acquired information that the latter was investigating him as to whether JM owed money to another customer, and therefore had a conflict of interest. Given this, JM requested that the bank inform him of the identity of the people who were reviewing his personal information. The identities could be verified by user logins. Pankki refused to provide the applicant with the requested login information, arguing in particular that it did not concern his personal data. Faced with the institution’s refusal to provide him with this information, the applicant pursued the appropriate legal remedies and requested the Finnish Data Protection Authority to order Pankki to provide him with the requested information, which also refused to grant the request. As a result, JM took legal action, challenging the authority’s decision. In particular, the national court raised doubts about whether the right to receive information about data recipients under Article 15(1)(c) of the GDPR covers the identity of the controller’s employees performing operations on data belonging to the applicant and asked the CJEU to resolve the issue.

## Judgment

The Court’s ruling closely parallels the position of the Advocate General, establishing the broad right of access granted by the GDPR and the far-reaching consequences thereof. According to the ruling, first and foremost, information regarding a person’s personal data access operations, relating to the dates and purposes of those operations, constitutes information that the person has the right to obtain from the data controller under Article 15 of the GDPR, but access to other data can be requested under several conditions.

The CJEU pointed out the restrictions on disclosure, emphasizing their necessity for the effective exercise of rights under the GDPR. Article 15 of the GDPR does not grant the right to obtain information about the identity of the controller’s employees who have carried out operations on the data (they are not data recipients within the meaning of Article 4(9) of the GDPR). However, such a right may be granted provided that it is necessary for the exercise of the data subject’s rights and provided that the rights and freedoms of these employees are taken into account. This balancing act is extended to consider the rights and freedoms of others, ensuring that the right of access is used responsibly and does not unduly infringe the privacy and interests of third parties, including considerations of professional secrecy and protection of confidential information.

In addition, the CJEU stressed that on the issue of timeframes, Article 15 of the GDPR applies when the processing operations to which a specific request relates were carried out before the date of application of the GDPR, but the request was made after that date.

## Experts' comments



**Aleksandra Danielewicz**

*The ruling in question is another signpost for all entities responding to the request for data access clarifying the broad scope of the right from Article 15 of the GDPR, while marking the fundamental rights of others as a counterbalance. What is worth noting in Court's judgment is that even if the request reaches an organization of the regulated sector, the type of business conducted does not differentiate the scope of the right of access to data. However, it should be emphasized that under national legislation there may be a per se access right - external to the EU data protection regime with a varying scope as provided by the member state. Given the need to distinguish whether a request was made under the GDPR or other applicable legislation, organizations should regularly audit response procedures regarding individuals' requests to provide them with actions compliant with European jurisprudence, of equal importance to EU legislature.*

*Importantly, the CJEU highlighted the need for a careful balance between the data subject's right of access and the protection of the privacy and interests of third parties, including considerations of professional secrecy and confidential information. The judgment underscores the responsible use of the right of access, ensuring that it does not unduly infringe on the rights and freedoms of others.*



**Jakub Kubit**

*The recent judgment in the Pankki case developed further depths to the interpretation of Article 15 GDPR, and strengthens its internal consistency. Importantly, the ruling highlights the broad applicability of the subject's right of access, regardless of the type of organization or the status of the individual making the request. This has significant implications for organizations operating in regulated industries, such as healthcare, where patient rights are protected by specific legislation. By acknowledging the complexities involved in deciding on data access requests, the decision underscores the importance of a nuanced approach towards the role of controllers and supervisory authorities. While broadly aligning with the Opinion of Advocate General Campos Sánchez-Bordona, the Court diverged slightly on certain points, particularly regarding the balance between the data subject's right to access and the protection of employees' rights.*

# Blue Air Aviation and UPFR

20 April 2023

Joined Cases C-775/21 and C-826/21

#copyright #communicationtothepublic

#airplane #train

5

## Background

A Romanian music collective rights management organization has sued the now-defunct Blue Air airline, demanding back payments and penalties for making musical works available to the public on board planes. The airline pointed out that, after obtaining the relevant license, it had made only one song available on 14 of its airplanes in its fleet of 28 aircraft, only 22 of which had a sound system. The plaintiff argued that the mere existence of a sound system was already sufficient to assume that copyrighted works were made available on board all 22 aircraft.

Relying on similar argumentation, another organization for the collective management of related rights to phonograms similarly sued a railroad carrier, seeking payment of outstanding salaries and penalties for making musical works available to the public on trains.

The courts hearing the case referred preliminary questions to the CJEU regarding the scope of communication to the public: (1) whether “communication to the public” includes the broadcasting of songs as background music on public transportation and (2) whether “communication to the public” includes the mere installation of sound systems and related software in public transportation that can be used to play musical works as background music on board.

## Judgment

The Court held that the concept of communication to the public includes broadcasting musical works as background music on airplanes and trains.

The CJEU found that both the premise of the mere act of communication by intervening to make a protected work available to its customers, with full knowledge of the consequences of its behavior, was met. It also found that the premise of public character was also met by broadcasting background music during flights on half of Blue Air’s airplanes to a group of passengers who were simultaneously or consecutively taking those flights.

In the context of the second question, the Court stated that the notion of public communication does not include the mere installation of sound systems that allow this background music to be played on board. The judges reiterated their distinction between an operator merely supplying the relevant technical systems, which, according to recital 27 of the Directive 2001/29/EC (“**InfoSoc Directive**”), is not in itself an “act of communication”, and the actual installation of those systems - which may normally constitute an “act of communication”. The CJEU distinguished this situation from its decisions on other scenarios, such as pubs and hotels, in which service providers intentionally transmit protected works to their customers by distributing television or radio signals from receivers installed in their premises.

## Experts' comments



**Karol Laskowski**

*The Court of Justice continues to define the concept of “communication to the public” for the umpteenth time. Having considered a similar scenario in hotel rooms (C-306/05), rehabilitation centres (C 117/15) and dental waiting rooms (C-135/10), thus now the means of mass transport are called to the front. As is well known, the interpretation of this autonomous concept is the result of an individual and factual assessment of the case in question, but the conclusions of this judgment are valid for all entrepreneurs utilising either television or radio systems on site or in the course of their business. Importantly, the judges clarified the relevant function of the user facilitating access to copyrighted works. Within background hereof, judges rightly had no choice other than to consider the mere installation of devices enabling the communication of works as insufficient to give rise to copyright claims.*



**Kamil Januszek**

*The judgment in question deals with the broadcasting of background music in a means of passenger transport. At this time - in contrast to the rental of motor vehicles equipped with radio receivers (C-753/18, Stim and SAMI) - the judges considered that there was a communication of works to the public. However, they rightly safeguarded the participants' economic interests by not creating a presumption that mere broadcasting facilities could give rise to remuneration. From the commercial standpoint, the Court presented nothing but a logical approach. To some extent, it is a consistent and reasonably rational tactic of the Court to prevent individual member states from having their copyright holders obtain broader protection in respect of “communication to the public”. That level of balance between the interests of the rights holders (and in fact also the interests of the collecting societies themselves) and the interests of the different branches of the business in the internal market is eminently advisable.*



# SCHUFA Holding

7 December 2023

C-634/21 as well as Joined Cases

C-26/22 and C-64/22

#gdpr #scoring #parallelretention

6

## Background

Another case arose out of a plethora of complaints filed with the administrative court in Wiesbaden, Germany, against the refusal of the competent data protection commissioner to take action against certain activities of SCHUFA Holding (“SCHUFA”), which is a private credit information bureau whose clients are, in particular, banks.

The applicants objected firstly to the “scoring” process. This process is a mathematical statistical method that makes it possible, based on probability, to determine future behavior, such as the future repayment of a loan by a customer, particularly of a financial institution.

Secondly, their complaints related to the storage of information regarding the release of the remainder of the debt seized from public records. The information regarding the discharge of the remainder of the debt is stored in the German public bankruptcy register for six months, while the code of conduct of German credit information bureaus stipulates a retention period of three years for their own databases.

The administrative court asked the Court of Justice to clarify the scope of the data protection provided by the GDPR.

## Judgment

The Court of Justice of the European Union has ruled that while “scoring” is permitted only under certain conditions, the prolonged storage of information relating to the granting of relief from remaining debts is contrary to the GDPR.

The CJEU’s decision rejected SCHUFA’s view that credit scoring does not constitute a decision-making process, since any adverse effects on the data subject result from independent decisions by the entity using the score. Instead, the Court took the position that creditworthiness calculations made by a credit agency count as automated decision-making under Article 22 of the GDPR if a third party “draws strongly on that [score] to establish, implement or terminate a contractual relationship”. This article prohibits the use of personal data for fully automated decision-making that results in legal or “similarly significant” consequences for data subjects, unless the data subject consents to the automated processing or certain other conditions (including the need to perform a contract) are met. The CJEU tasked the referring court with determining whether German federal law contains an exception to the prohibition on automated processing that is compatible with the GDPR. If the referral court finds no exceptions, credit rating agencies in the EU will have to obtain the explicit consent of consumers before calculating their creditworthiness and provide consumers with the opportunity to object to a credit assessment.

As for information on the discharge of outstanding debt, the Court found it contrary to the GDPR to keep such data longer than the public bankruptcy register, i.e. for more than six months. After this period, the data subject has the right to delete such data, and the bureau is obliged to delete it without undue delay. In addition, it is for the national court,

weighing the relevant interests, to assess the legality of the parallel retention of the above data for a period of six months. If such retention is unlawful, the data subject will have the right to object to the processing of his or her data and the right to erasure, unless SCHUFA demonstrates the existence of overriding legitimate grounds.

## Experts' comments



**Paweł Gruszecki**

*The Court's judgment in Case C-634/21 marks a landmark shift in interpreting Article 22 of the GDPR, particularly concerning the role of automated decision-making and the responsibilities of the entities involved. By emphasizing the "determining role" of automated profiling and rejecting a narrow definition of automated decisions, the Court ensures greater protection for individuals' rights and clarifies responsibilities in decision-making involving multiple stakeholders. This decision underscores the need for transparency and accountability in automated profiling practices, urging providers like SCHUFA to uphold data subjects' rights while requiring decision-makers, such as banks, to exercise discretion rather than solely relying on algorithmic recommendations. Moreover, the ruling's broader implications extend beyond the credit sector, impacting various industries that rely on score-based processes. It also prompts a broader reevaluation of score-based processes across industries, signaling a shift towards greater accountability and compliance with GDPR principles.*



**Paulina Węgrzynowicz**

*The recent CJEU ruling on SCHUFA Holding's practices holds significant implications for credit information bureaus and financial institutions while it can also affect telecom or e-commerce companies operating within the EU. Notably, judges clarified that credit scoring constitutes automated decision-making under GDPR, subject to specific conditions and requiring explicit consent from consumers. This decision imposes a heightened responsibility on businesses to obtain explicit consent for AI-driven assessments and allows consumers the right to object to such evaluations. It underscores the importance of aligning data processing practices with GDPR mandates, impacting the entire landscape of credit information management in the EU. Time will tell whether, in fact, this ruling will only have an economic and social impact or a legal one as well. For now, businesses should reevaluate their AI-driven decision-making systems and make sure that any use of AI respects privacy.*

# AKM and Canal+

25 May 2023

C-290/21

#IP #communicationtothepublic #satellite

7

## Background

The case involves Canal+ Luxembourg Sàrl (“**Canal+**”), a television operator based in Luxembourg. The programs provided by Canal+ are accessible not only in Luxembourg, but also in other EU member states, including Austria. Some of them were encoded and therefore payable, while other unencoded channels could be accessed for free using a standard satellite TV set-top box. According to the Austrian collecting society for musical works (“**AKM**”), Canal+ committed a serious infringement by failing to apply for a separate authorization for the use of content covered by intellectual property rights on Austrian territory. AKM filed a lawsuit in an Austrian court seeking to stop Canal+’s continued broadcasting in Austria and an award of damages in its favor.

The case reached its conclusion before the Austrian Supreme Court, which decided to refer a question to the Court of Justice for a preliminary ruling on the interpretation of Directive 93/83, specifically Article 1(2)(b) thereof. According to this provision, communication to the public by satellite occurs only in a member state where the signals carrying the program are fed under the control and responsibility of the broadcasting organization into a closed transmission chain leading to the satellite and back to Earth.

## Judgment

The Court’s comprehensive analysis delved into the nuances of the directive, clarifying the scope and conditions under which the provision of satellite packages falls within the scope of “communication to the public by satellite”. The ruling clarified that the mere provision of access to satellite signals, without actual control over the content or its introduction into the communications chain, does not constitute “communication to the public by satellite”. The ruling emphasized the importance of the authorization granted by the member state where the signals are introduced, stressing the need for a holistic and contextual evaluation of the various elements.

In essence, the Court’s ruling in *AKM v. Canal+* provided a balanced interpretation of the directive in question, weighing the rights of copyright holders against the principles of free movement of services within the legal framework of the European Union. The Court stated that, as a general rule, an organization making legally protected works available to new audiences must obtain permission from the authors. Identical consent, however, does not have to be given in each of the member states to which the satellite signal reaches. On the other hand, in the context of remuneration for creators, all aspects of the broadcast, such as the actual and potential number of its audience, must be taken into account. Then, in the case of broadcasting to more than one country, the sum of remuneration for authors of works should be proportionally higher. The situation is different when an intermediary is involved in the process of capturing and transmitting the signal to another country. The CJEU indicated that the authorization granted to the original broadcaster does not automatically extend to its counterparties, who must apply for separate approval.



## Experts' comments



**Karol Laskowski**

*The recent judgment in AKM v. Canal+ holds particular significance for television operators like Canal+ providing cross-border broadcasts within the EU. The ruling clarifies the nuanced conditions under which the provision of satellite packages falls within the scope of “communication to the public by satellite”. At the same time, judges emphasize that providing access to satellite signals alone, without control over content introduction into the communications chain, does not constitute “communication to the public”. Such a balanced interpretation aligns copyright holder rights with the EU’s free movement of services principles. The ruling in question is pivotal for ensuring legal clarity in cross-border broadcasting operations within the EU.*



**Kamil Januszek**

*Bearing in mind the multinational and cross-border character of EU media companies, the ruling in question touched an issue of a grave importance for the European satellite broadcasting market. CJEU established guidelines for organizations making protected works available to new audiences, stressing the need for permission from authors and proportional remuneration in multi-country broadcasts, thereby shaping the legal landscape for cross-border satellite transmissions in the European market by sticking to a so called Country of Origin Rule. The relevance of this issue to the system of rights management by national collecting societies should not be overlooked, although it is equally important for the TV broadcast providers as well. In attempt to not favour the use of one technology, the ruling ensures high-level of protection of right holders providing that authorization granted to the original broadcaster doesn’t automatically extend to affiliates, requiring separate approval.*

# Monz Handelsgesellschaft International

16 February 2023

C-472/21

#designs #visibility #normaluse

8

## Background

German company Monz Handelsgesellschaft International (“**Monz**”) is the owner of German design No. 40 2011 004 383-0001, registered with the German Patent and Trademark Office for bicycle or motorcycle saddles. The design is composed of a singular drawing showing the underside of the saddle. The German company Büchel applied to the German Patent and Trademark Office for its invalidation arguing that the underside of the saddle is not visible during normal use, and that’s the reason why it could not be protected under Article 3(3)(a) of the Directive 98/71 (“**Design Directive**”). The German Patent and Trademark Office declared the design valid, while the German Patent Court considered it invalid after an appeal, pointing out that only riding a bicycle is recognized as normal use, not excluding dismounting and getting on. Thus, the underside of the saddle is not objectively visible to the end user and to third parties. Monz has appealed this ruling to the *Bundesgerichtshof* (German Federal Court of Justice) which considers that the resolution of the dispute in the main proceedings depends on the interpretation of the concepts of “visibility” and “normal use” within the meaning of Article 3(3) and (4) of the Design Directive and has referred related questions to the CJEU for a preliminary ruling.

## Judgment

Article 3(3) specifically addresses the requirement of visibility of a registered community design, and in this context, the CJEU has explained and emphasized in detail that appearance is a decisive element of a design and that visibility is an essential feature of design protection. Importantly, the judges confirmed that the saddle is a component part of a complex product.

The CJEU found that the visibility requirement cannot be examined *in abstracto*, i.e. in isolation from any practical situation of use. Indeed, a component part of a complex product must rather be visible to the end user or an outside observer during “normal use”. The judges adduced that the component part does not have to remain completely visible during the entire time the complex product is in use. Reading the intent of the legislature, it was pointed out that the assessment of “normal use” of a complex product cannot be exclusively dependent on the intent of the manufacturer of the component part or the complex product.

Addressing the question of what is “normal use” by the end user, the judges pointed out that the Design Directive does not specify the type of use covered by Art. 3(4) of the Design Directive, suggesting a broad interpretation of “normal use”. Thus, “normal use” includes all activities before, during and after the use of a complex product for its main function, including storage and transportation, with the exception of use in connection with maintenance, servicing and repair (excluded by Article 3(4) of the Design Directive).

Overall, the Court found that Articles 3(3) and 3(4) of the Design Directive together impose an assessment of the “visibility” requirement for normal use of the composite product, ensuring that the component part, once incorporated, remains visible during

such use. This comprehensive interpretation, taking into account both the perspective of the user and that of an outside observer, provides clarity on the conditions for design protection under the EU legal framework.

## Experts' comments



**Bartosz Dobkowski**

*The recent CJEU ruling in the Monz v. Büchel case is crucial for design owners, particularly in the bicycle and motorcycle industry. Design owners, especially in industries where complex products are involved, now have a clearer understanding of the criteria for securing design protection under the EU legal framework. The requirement of “visibility” applicable only to elements of complex products should not be confused with the rationale of visual perceptibility, which relates to design protection outside the complex product. Elements such as the lining of a coat or the inside of a jacket sleeve do not need to be visible during normal use, but it is sufficient that the user can see them at any time to obtain protection as registered community designs, meeting the criteria of novelty and individual character.*



**Jakub Kubit**

*The first CJEU ruling on “visibility” and “normal use” for complex products brings clarity for EU design rights holders. It strengthens the position of spare parts manufacturers as well, especially automotive industry players currently having a greater opportunity for protection of elements previously considered as not visible at first sight. On the other side, this judgment may hinder traders whose business models depend on excluding invisible components from design protection. Formerly, protection under “normal use” had been defined by the product’s principal function (as only cycling for bicycles), but currently the Court has expanded this notion to include any acts that are customary from the perspective of the end user (as storage or transportation). Given the casuistic approach towards “normal use”, it is crucial to stay updated on CJEU and EUIPO decisions, especially with upcoming package of the pivotal EU design regulation. The 25-year protection is worth monitoring, as registered community design offers broader protection than some national designs.*

# Meta and Bundeskartellamt

4 July 2023

C-252/21

#gdpr #targetedad #sensitive data

9

## Background

Germany's competition authority, the *Bundeskartellamt*, has found that Meta Platforms Ireland ("**Meta**"), which manages services offered on the online social network Facebook (the "**Service**" or "**Facebook**") in the European Union, collected data from services affiliated with the Service, as well as third-party websites and applications ("**non-Facebook data**"), and linked it to Facebook user accounts, without obtaining valid consent under GDPR. In the case of non-Facebook data, this involves, firstly, data on third-party websites and applications viewed and, secondly, data on the use of other online services belonging to the Meta group (such as Instagram or WhatsApp). The data collected in this way make it possible to personalize targeted advertising messages to Facebook users.

Meta referred to the consent of users of the Service, expressed during registration, to the processing of their data (in particular, by confirming the rules of Meta's use of data and cookies). However, due to the conditioning of the possibility of using the Service on this consent and Meta's dominant position, the *Bundeskartellamt* doubted the voluntariness of such consent required by the GDPR and found a violation of the GDPR rules being a manifestation of Meta's dominant position.

The Düsseldorf referring court before which the decision was challenged asked the CJEU about the intricacies of the intersection of competition and data protection law, namely whether national competition authorities can carry out checks on this processing's compliance with the requirements of the GDPR.

## Judgment

The Court first clarified the power of national competition authorities to assess GDPR compliance in the context of abuse of dominance cases. Competition authorities can analyze a dominant company's (in)compliance with the GDPR, but such assessments do not replace the role of the data protection authorities and are carried out only to determine abuse of dominance. In addition, competition authorities assessing the legality of data processing activities must seek cooperation. The national competition authority, before necessarily examining the compliance of this company's behavior with the GDPR, should check whether this conduct or conduct similar to it has already been the subject of an adjudication by the competent data protection authority or by the court. If this is the case, it cannot deviate from it in terms of the data protection regime, but it remains free to draw its own conclusions from this situation from the perspective of applying competition law.

In addition, the CJEU confirmed that the processing of personal data involving the collection of data on a user's interactions with social networks, websites or other applications, and the linking of such data to the user's social network account and the use of such data may constitute the processing of special categories of personal data. Therefore, the court determined that the use of online services (browsing, responding to posts, creating accounts on websites and applications) may lead to the disclosure of special category data. However, it also cannot be interpreted as the user (data subject) making special category data public as a matter of course (Article 9(2)(e) of the GDPR).

## Experts' comments



**Paweł Gruszecki**

*The CJEU's judgment regarding Meta's data practices has significant implications for dominant online platforms and the intersection of competition and data protection law. The ruling in question poses a significant challenge for companies with data-driven business models, especially market giants such as Meta. In addition, the decision establishes material complexity for them in basing the processing of personal data on the legal grounds of contract performance or legitimate interest. The CJEU's new interpretation (that the performance of the contract must be objectively necessary for a purpose related to the contractual obligation significantly) narrows the scope of Article 6(1)(b) of the GDPR. Nevertheless, the ruling leaves sufficient room for interpretation and does not completely exclude the predominance of the legitimate interest of the social media platform (as regards first-party data).*



**Paulina Węgrzynowicz**

*This ruling underscores the importance of voluntary consent under GDPR and challenges practices where consent is coerced due to a company's dominant position. By clarifying the role of national competition authorities and acknowledging the potential processing of special categories of personal data, the judgment sets a precedent for ensuring that companies with dominant positions adhere to both competition and data protection regulations. This has broader ramifications for the digital ecosystem, influencing how user data is handled, consent is obtained, and privacy standards are maintained within the competitive landscape. The ruling also strengthens the view of the authorities on the processing of special categories of personal data in relation to the use of mobile apps and interaction with them. Any user-oriented online business should bear in mind the responsibility and special requirements that such processing entails.*

# Seven.One Entertainment Group GmbH

23 November 2023

C-260/22

#copyright #privatecopying #compensation

10

## Background

Seven.One Entertainment Group GmbH (“**Seven. One**”) produces and broadcasts a private television program throughout Germany. It asked Corint Media, a German collecting society, to pay fair compensation for the broadcast reproduction made by individuals for private use. Under the agreement between the parties, Corint Media assumed the obligation to enforce the applicant’s right to receive the above compensation. Nevertheless, in the course of litigation, Corint Media responded that it could not remit the dues because German law excludes broadcasters from the right to fair compensation for personal use.

The German referring court’s question for a preliminary ruling concerned the interpretation of Articles 2(e) and 5(2)(b) of the InfoSoc Directive. It grants radio and television organizations the exclusive right to reproduce broadcasts of their programs. On the other hand, under Article 5(2)(b) of the InfoSoc Directive, member states may choose to limit the exclusive reproduction right provided for in Article 2 of that Directive by establishing an exception for private reproduction, provided that the rights holders receive fair compensation. Specifically, the referring court sought an answer to the question of whether national law could establish an exception for private use reproductions of broadcasts while excluding broadcast organizations from the right to receive fair compensation.

## Judgment

The CJEU found that Seven.One, as a broadcasting organization, could not be excluded from fair compensation for personal use copying if it suffered a potential harm that could not be classified as “minimal”.

Responding to preliminary questions, the Court held that EU law does not allow national legislation to deprive selected groups of right holders of compensation for authorized personal use on their own. In its view, radio and television organizations are in a similar position to other entities that have the exclusive right to reproduce works. The differential treatment, in the CJEU’s view, of these radio and television organizations and other rights holders should therefore be based on an objective and reasonable criterion and be proportionate to the objective pursued by the treatment in question.

The only reason for differential treatment could be a finding that the degree of harm suffered by TV stations from authorized personal use is minor. This, however, would have to be proved by the state on the basis of objective criteria.

Despite the imprecision or possibility of indirect mechanism of remuneration systems for private use copies, it is not justified, according to the CJEU, to exclude an entire category of copyright holders from the right to fair compensation when they suffer harm. The existence and extent of such damage is a question of fact, the determination or non-determination of which is a matter for the referring court.

## Experts' comments



**Karol Laskowski**

*The CJEU judgment on fair compensation for private use copying, particularly involving broadcasting organizations like Seven.One Entertainment Group GmbH, has far-reaching implications for copyright holders and the broadcasting industry. The ruling clarifies that EU law prohibits national legislation from excluding specific groups, such as broadcasters, from fair compensation for authorized personal use, but it safeguards the rights of broadcasting organizations, ensuring they are not unjustifiably deprived of fair compensation. It establishes a precedent for a more equitable approach to remuneration systems, underscoring the need for proportional treatment of copyright holders within the evolving landscape of digital content consumption.*



**Barbara Domańska**

*The judgment in question serves as an important benchmark that can help further establish the boundaries of what member states can and cannot do when transposing EU directives into their domestic law. In reaffirming its earlier position that member states cannot completely exclude broadcasting organizations from fair compensation under Article 5(2)(b) of Directive 2001/29, the CJEU established a framework for evaluating fair compensation, ensuring a balanced approach between the rights of broadcasters and users of protected content.*

## Key upcoming CJEU judgments

Case reference	Summary	Opinion of the AG (yes/no)
Sony and Datel (C-159/23)	<p>The case began with a lawsuit filed more than a decade ago in a Hamburg court by Sony. The defendants were Datel and affiliates, whose software allowed players of the PS portable console to make changes to games. The defendants' software allows users to bypass restrictions in the plaintiff's computer games, modifying data in the game console's working memory. The plaintiff alleges that this constitutes an impermissible modification under Article 69c(2) of the UrhG (German Copyright Act). At issue is whether the adoption of a modification within the meaning of Article 4(1)(b) of Directive 2009/24/EC and Article 69c(2) of the UrhG requires a change in the substance of the software in the form of source code or object code. One view, supported by the German court of first instance, indicates that interference with the course of operation of software is sufficient for modification. The other approach advocated by the referring court argued that without interference with its substance, modification always requires interference with the source code or object code and, in this sense, with the substance of the software.</p>	No
Mio and others (C-580/23)	<p>In 2021, the Asplund filed a lawsuit claiming that the respondent, MIO, infringed its copyright by copying its own dining table. The respondent submitted that the Palais Royal dining table would not be protected by copyright since it is not sufficiently original. The design was largely attributable to functional and technical considerations and based on simple variations of previously known designs that are part of the general design repertoire. The Swedish Patents and Market Court ("<b>SPMC</b>") held that the shape of the dining table was the result of the author's own intellectual creation and therefore sufficiently original. The respondent, however, subsequently appealed the decision and SPMC has decided to stay the proceedings and refer the following questions to the CJEU whether the scope of protection correlates with the level of originality of work in the light of unclear rules from previous judgments in the <i>Painer</i> case (C-145/10) and the <i>Cofemel</i> case (C 683/17).</p>	No



Case reference	Summary	Opinion of the AG (yes/no)
Merck Sharp & Dohme (C-149/22)	<p>The case concerns the eligibility criteria for Supplementary Protection Certificates - SPCs for “combination products” containing two or more active ingredients. The referral has been made by the Irish Supreme Court where Merck Sharp &amp; Dome’s (“MSD”) cholesterol-reducing drug has been challenged by another company – Clonmel. MDS obtained an SPC for monotherapy supported by Ezetrol and for a combination therapy of the drug with another product – simvastatin. The first SPC expired at the time when Clonmel produced a competing drug containing two ingredients protected as a combination therapy. After an infringement claim lodged by the MSD, SPC counter-claimed for revocation of the second SPC. The question concerns the notion of product and what can be protected in the file of active medical ingredients.</p>	No
La Quadrature du Net and others v Premier ministre, Ministère de la Culture (C-470/21)	<p>The case has emerged in the French Council d’Etat and concerns the retention and access to internet users’ data. More specifically, the issue revolves around the general and indiscriminate retention of IP addresses, pointing to their connection source, for a limited period and for the purposes of crime investigation and prosecution. The request for a preliminary ruling is aimed at confirming that the EU law does not preclude national provisions according to which national authorities can access the data which would enable the identification of persons suspected of online copyright infringements. Advocate General Szpunar suggested that the French graduated response mechanism is compatible with the EU law requirements in the field of personal data protection.</p>	Yes
Pelham II (C-590/23)	<p>The dispute saga involving the Kraftwerk group and the alleged unauthorized sampling of their song <i>Metall auf Metall</i> in the song 'Nur mir' has gone through various legal stages in Germany, including appeals and referrals to the Federal Constitutional Court, which eventually led to the case being referred to the CJEU for a preliminary ruling. Again, the CJEU was asked this time by the German court, on whose decision the success of the appeal depends, whether the sampling in question qualifies as permissible pastiche. The first question seeks clarification on the provision limiting use for the purpose of pastiche, i.e., whether there are limiting criteria for pastiche, such as the requirement of humor, stylistic imitation, or tribute. The second one aims to clarify when use is considered "for the purpose" of pastiche. The referring court suggests that it should be sufficient to determine pastiche if it is recognizable to a person familiar with the referenced copyright subject matter and possessing the intellectual understanding required to perceive the pastiche.</p>	No

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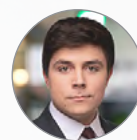
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