REPUBLIC OF AUSTRIA
Vienna Higher Regional Court

11 R 153/20f, 154/20b

In the name of the Republic

The Vienna Higher Regional Court (Oberlandesgericht), as the Court of Appeal and Appeals Court, by the President of the Senate of the Higher Regional Court (Oberlandesgericht) as the presiding judge and the judges of the Higher Regional Court (Oberlandesgericht)

in the case of the applicant party

Maximilian Schrems,

represented by Lansky, Ganzger & partner Rechtsanwälte GmbH in Vienna, against the defendant **Facebook Ireland Limited, 4** Grand Canal Square, Dublin, Ireland, represented by Schönherr Rechtsanwälte GmbH in Vienna and Knoetzl Haugeneder Netal Rechtsanwälte GmbH in Vienna, lastly for declaratory judgment, injunction and conclusion of contract (in total EUR 31.000), information (EUR 1,000) and EUR 500, on the appeals of both parties against the judgment of the Regional Court for Civil Matters Vienna of 30 June 2020, GZ 3 Cg 52/14k-91, and on the appeal of the plaintiff party against the order of the Regional Court for Civil Matters Vienna of 11 November 2019, GZ 3 Cg 52/14k-80 (p 14 below), and decided as follows:

I. Both appeals are dismissed.

The contested judgment is confirmed with the proviso that point I.) reads as follows:

"The defendant is obliged to provide the plaintiff within 14 days in writing and free of charge with information about all personal data processed by it.

the purposes of the processing, the recipients to whom the personal data have been or will be disclosed and, where the personal data are not collected from the complainant, the origin".

The decision on the costs of the proceedings in the second instance shall be reserved until the dispute has been finally settled.

The ordinary appeal is **admissible.**

II. The appeal of the plaintiff is **dismissed.**

given.

In any case, the appeal is inadmissible.

D e s c r i p t i o n s a n d g r o u n d s:

The initial course of the procedure is shown at . Order of the Court of First Instance of 30 .6.2015 (ON 29), the Appeal decision of the recognising senate fro m 9.10.2015 (ON 33 = 11 R 146/15v), corrected on 29.1.2016 (ON 39), as well as the decision of the Supreme Court of 28.2.2018 (ON 43 = 6 Ob 23/18b). In order to avoid repetition, reference is made to the content of these three decisions.

Subsequently, the plaintiff essentially argued that the defendant had completely redrafted its terms of use and other general conditions, such as a data policy, after the entry into force of the GDPR. On the basis of the changed legal situation and the new contractual clauses, which the plaintiff had agreed to, he withdrew his original claims 5, 6, 12, 13, 15, 16, 19 and 20 in his written statement of 2 July 2018 (ON 49), waiving the claim (clarifying ON 57, p. 13). At the same time, the plaintiff reformulated his claims (summary ON 49, pp 61 - 64). In his pleading of 31.7.2019, the plaintiff modified the following

his (new) 5th claim and supplemented it with a contingent claim (file no. 73, p. 20f). The most recent counterclaims (for their admission, which has since become final, see: Order of the First Instance Court of 9 January 2019 [ON 60]; Appeal Decision of the Vienna Higher Regional Court of 14 March 2019 [ON 65 = 11 R 24/19h]; Appeal Decision of the Supreme Court of 23 May 2019 [ON 69 = 6 Ob 91/19d]) are altogether as follows:

"(1) It is established with effect between the defendant and the plaintiff that the plaintiff is the 'controller' within the meaning of Article 4(7) of the GDPR of the data applications operated by himself via the portal facebook.com for his personal purposes (profile, chronicle - including likes and comments - events, photos, videos, groups, personal messages, friends list and applications), while the defendant only has the function of 'processor' within the meaning of Article 4(8) of the GDPR in this respect.

2. It is established with effect between the defendant and the plaintiff that the defendant is the 'controller' within the meaning of Article 4(7) DSGVO of the data applications on the facebook.com portal which go beyond the data applications operated by the plaintiff himself via the facebook.com for his personal purposes (in particular profile, chro- nics - including likes and comments - events, photos, videos, groups, personal messages, friends list and applications) and thereby concern personal data of the plaintiff or personal data of third parties stored by him in his data applications, and for which the defendant determines the means and purposes itself (in particular the compilation and aggregation of content, the search function, advertising, user administration and similar data applications).

dations).

3. The defendant is obliged to refrain from processing, without or contrary to the instructions of the plaintiff, personal data of the plaintiff and/or of third parties which are stored and transmitted by the plaintiff for his purposes via the portal facebook.com in data applications for his personal purposes (profile, chronicle - including likes and comments - events, photos, videos, groups, personal messages, friends list and applications).

4. The defendant is obliged to enter into a written contract with the plaintiff within 28 days, otherwise execution will be granted, between the plaintiff as data controller and the defendant as data processor in accordance with the requirements of Article 28(3) DSGVO with regard to the data applications operated by the plaintiff himself via the portal facebook.com for his personal purposes (profile, chronicle - including likes and comments - events, photos, videos, groups, personal messages, friends list and applications).

4.1. In the alternative: it is established with effect between the defendant and the plaintiff that there is no effective contract, in accordance with Article 28(3) of the GDPR, between the plaintiff as data controller and the defendant as data processor with regard to the data applications operated by the plaintiff himself via the facebook.com portal for his personal purposes (profile, chronicle - including likes and comments - events, photos, videos, groups, personal messages, friends list and applications).

5. It is hereby declared with effect between the Defendant and the Plaintiff that the Plaintiff's agreement to the Defendant's Terms of Use as amended on 19/04/2018 and as amended on 31/07/2019 together with the

of the associated data use guidelines (Data Policy, Cookie Policy), as well as the consent to (future) identical clauses in the defendant's terms of use (coupled declarations of consent) is not an effective consent to the processing of personal data pursuant to Art. 6 (1) in conjunction with Art. 7 DSGVO to the defendant as the controller.

5.1. In eventu: It is determined with effect between the defendant and the plaintiff that the plaintiff's consent to the defendant's terms of use in the version of 19 April 2018 as well as in the version of 31 July 2019 (in eventu: in the version of 19 April 2018) together with the associated data use guidelines (data guideline, cookie guideline) is not an effective consent to the processing of personal data pursuant to Art. 6 (1) in conjunction with Art. 7 DSGVO to the defendant as the responsible party.

6. The defendant is ordered to cease and desist from processing the plaintiff's personal data for personalised advertising, aggregation and analysis of data for the purpose of advertising.

7. It is hereby determined with effect between the Defendant and the Plaintiff that no effective consent has been given by the Plaintiff to the processing of the Plaintiff's personal data obtained by the Defendant from third parties for the Defendant's own purposes as set out in the Data Policy ./AN in

• Lines 69-74 ('Activities of others and information they provide about you. We also receive and analyse content, communications and information that others provide when they use our products. This may include information about you, for example, when others share or comment on a photo of you, send you a message, or send you a message.

upload, synchronise or import your contact information.'),

• Lines 126-143 ('Advertisers, app developers and publishers may send us information through the Facebook business tools they use, including our social plugins (such as the <like> button), Facebook Login, our APIs and SDKs, or the Facebook Pixel.' and 'We also receive information about your online and offline actions and purchases from third-party data providers who are authorised to provide us with your informa- tion') and

• Lines 166-168 ('This is based on the data we collect and learn about you and others (including any special protection data you provide to us for which you have given your explicit consent);').

described is present.

8. The defendant is obliged to refrain from the use of the plaintiff's data regarding the visit or use of third party sites (in particular through the use of 'social plugins' and similar technologies), unless technical data are processed solely for the purpose of displaying website elements, and unless the plaintiff has freely, informedly and unambiguously consented to a specific processing operation in advance ('opt-in'; e.g. by clicking on a 'social plugin').

9. The defendant is obliged to refrain from processing the plaintiff's personal data, which the defendant has received from third parties, for the defendant's own purposes in future, unless the plaintiff has given his unambiguous, free, informed and unambiguous prior consent to a specific processing operation ('opt-in').

10. The defendant is obliged to refrain from using the plaintiff's data in the context of the data application 'Graph Search' and similar techniques in the future, unless the plaintiff has given his unambiguous, free, informed and unambiguous prior consent ('Opt-In').

11. The defendant is obliged to provide the plaintiff within fourteen days with full information in writing and free of charge on all personal data of the plaintiff processed by it, stating the exact respective purpose, whenever possible the exact origin and, if applicable, the exact recipients of the data.

12. The defendant is obliged to pay the plaintiff the sum of € 500.00 within fourteen days with other execution to the attention of the plaintiff's representation.

For the sake of better clarity, the claims made by the plaintiff in relation to these requests will be presented to the extent relevant for the appeal proceedings when dealing with the legal complaints (below ad I.3.).

The defendant requests that these claims be dismissed because the plaintiff's claims are unjustified.

The defendant's arguments in dispute, insofar as they are relevant to the appeal proceedings, are also summarised in the section on the legal complaints (ad I.3. below).

In his written statement of 2 July 2018, the plaintiff - based on § 303 et seq. in conjunction with § 318 ZPO - requested that the defendant be provided with *"1. the contents of the database 'FaceBook' operated by the defendant, which contain personal data of the plaintiff, 2. the list of processing activities pursuant to Art. 30 DSGVO insofar as it concerns groups of persons to which the plaintiff belongs, 3. the list of processing activities pursuant to Art. 30 DSGVO insofar as it concerns groups of persons to which the plaintiff belongs".*

including the plaintiff" (ON 49, p. 60). In the meeting minutes of 11.11.2019, the plaintiff specified this request to the effect that *"the specific hard drives on which the plaintiff's data are located are to be submitted"* (ON 80, p. 14).

Also at the hearing on 11 November 2019, the court of first instance announced an order - which was not subsequently issued - by which it dismissed this application of the plaintiff (ON 80, p. 14 at the bottom [second order]).

In its judgement of 30 June 2020 (file no. 91), the court of first instance granted the 11th and 12th claims, dismissed all other claims and stated that the decision on costs was reserved until the dispute had been finally resolved. The trial judge made the findings set out on pages 14 to 32 and (dislocated) 10, 12 and 35 of the judgment, to which reference is made in order to avoid repetition. The parts that are relevant for the appeal proceedings will be returned to in the examination of the appeals. On the basis of these findings, the court of first instance affirmed in its legal assessment that the 11th and 12th claims were justified, while the other claims were not valid.

The present appeals of the parties are directed against these decisions.

The plaintiff's appeal (ON 93, point I., p. 4 - 79) aims to amend the contested decision on the grounds of procedural irregularity, incorrect findings of fact due to incorrect evaluation of evidence and incorrect legal assessment to the effect that his claims are granted in their entirety; in the alternative, a motion to set aside is filed. The appeal (which was not dismissed by the Court of Appeal) is also

The applicant's suggestion to submit five more detailed questions to the ECJ for a preliminary ruling (ON 93, point III., p. 81 - 85), which had been taken up, could be attributed to the case at hand.)

The plaintiff's appeal (ON 93, point II., p. 79 - 81) is filed *"out of lawyer's prudence and possibly on the* above-mentioned *ground of appeal of the defectiveness of the proceedings"* against the above-mentioned decision of 11.11.2019 (ON 80) and aims at amending this decision to the effect that the underlying application is granted.

In the defendant's response to the appeal (ON 95, p. 5 - 92 above and 92 below - 103), which also contains a challenge to the evidence, it is requested that the application for a preliminary ruling be dismissed and that the applicant's appeal be dismissed.

The response of the defendant (ON 95, p. 92) aims at rejecting the plaintiff's appeal as inadmissible.

In the defendant's appeal (ON 94), the application is made to amend the judgment on the grounds of incorrect findings of fact as a result of incorrect assessment of the evidence and incorrect legal assessment to the effect that the 11th and 12th claims are also dismissed; in the alternative, an application for annulment is made.

The plaintiff's response to the appeal (ON 96), in which a preliminary ruling procedure is also suggested (which was also not taken up by the Court of Appeal), aims at not upholding this appeal.

All three appeals are unjustified.

I. On the appeals of both parties: 1.
on the plaintiff's notice of defects:

The plaintiff argues that the court of first instance did not grant its request for referral by order of 11.11.2019 (ON 80, p. 14 at the bottom [second decision]) was wrongly dismissed. Thus, the plaintiff correctly contests this order - which cannot be appealed separately pursuant to § 319 (2) ZPO - in the context of the appeal pursuant to § 462 (2) ZPO (*Sloboda* in *Fasching/Konecny*, Komm IV/1³, § 515 ZPO Rz 13 mwN).

However, the court of first instance was correct in not granting this application, if only because it did not meet the requirements of certainty prescribed by hJud (cf. *G. Kodek* in *Fasching/Konecny*, Komm III/1³, § 303 ZPO Rz 23/1: indeterminacy of an application for the production of the 'entire correspondence').

Furthermore, the defendant does not show in his appeal which concrete procedural results favourable to him could have been expected if the application had been granted (see on this requirement RIS-Justice RS0043039 [T4]).

The present notice of defects therefore does not prevail.

2. On the evidentiary objections of both parties: 2.1 The plaintiff's evidentiary objection:

2.1.1. (Appeal ON 93, point 5.1 [p 65ff])

Contested finding:

"Because the Plaintiff has not consented to this (not in dispute), the Defendant does not process any of the Plaintiff's personal data obtained from partners about activities outside of Facebook products for the purpose of displaying personalised advertisements to the Plaintiff."

(UA p 23, last para)

Requested substitute determination:

"Although the plaintiff has not consented to it (out of dispute), the defendant processes personal data of the plaintiff obtained from partners on activities outside-

half of Facebook products for the purpose of displaying personalised advertisements to the plaintiff."

The statements of the plaintiff (ON 83, p. 48ff) and the witness Cecilia Alvarez (ON 83, p. 41f; supplemented p. 46f) contradict each other in this area. From the documents cited by the plaintiff, Exhibits ./CE, ./DE, ./DF and ./DI cannot, in the opinion of the court, be deduced on their own with the certainty required in civil proceedings as to whether the "Custom Audience" tool was used or not. A reliable clarification could only have been achieved by an expert opinion, which was not requested by either party. The objection to evidence therefore does not succeed on this point.

2.1.2. (Appeal ON 93, point 5.2 [p 68f])

Contested finding:

"Whether, when, in what way, advertisers will use the It is not possible to ascertain whether the plaintiff used 'Custom Audience' or the other business tools, or whether the companies shown in ./DI obtained consent from the plaintiff to transfer the data to the defendant within the scope of these tools."

(UA p 24f)

Requested substitute determination:

"Numerous advertisers who forwarded data about the plaintiff to the defendant did not obtain consent for this."

The appeal is only based on Exhibit ./DK on this point. However, the discerning senate agrees with the first court's assessment of the evidence (UA p. 36, last paragraph), according to which this volume is not at all meaningful. New aspects are not raised in the appeal. Therefore, there are no objections to the statement challenged here.

2.1.3. (Appeal ON 93, point 5.3 [p 69f])

Contested findings:

"Apart from the fact that the legal relevance for the claims is not recognisable, it was not possible to reliably determine the significance of advertising for Facebook users on the basis of the commissioned studies submitted. It can be assumed that the majority of users prefer personalised advertising to non-per- sonalised advertising and consciously accept being able to use the platform 'for free', although this is also not considered to be relevant for the decision".

(UA p 35, penultimate para [dislocated]) Requested substitute findings:

"On the basis of the commissioned studies presented, it can be stated that advertising is of secondary importance to the users of Facebook. It can be assumed that the majority of users prefer non-per- sonalised advertising to personalised advertising".

The plaintiff correctly points out that the dislocated findings objected to here are insufficiently substantiated, especially since the general reference to unspecified commissioned studies is far too vague and, in particular, there is no argumentative discussion of the study of November 2019 (Exhibit ./CY), which contradicts these statements. The findings at issue here are therefore not adopted by the Court of Appeal due to the implicitly relevant lack of reasoning by the plaintiff (*Rechberger/Klicka* in *Rechberger/Klicka*, ZPO5, § 272 ZPO Rz 3 mwN). However, this has no effect on the outcome of these appeal proceedings (see below ad 3.).

2.1.4. (Appeal ON 93, point 5.4 [p 70ff]

Contested finding:

"The defendant did not store the plaintiff's facial recognition templates and therefore does not use them."

(UA p 25, last paragraph)

To the extent that the plaintiff also criticises the statements on UA p. 33, last paragraph, he is not contesting any independent, additional findings, but is in fact only objecting to the interpretation of the evidence that forms the basis of the statement just quoted.

Requested substitute determination:

"The defendant processes the biometric data of the plaintiff, such as in particular facial recognition data.

The plaintiff testified that the defendant also uses facial recognition (ON 80, p. 16, supplemented p. 26; ON 83, p. 48). The witness Cecilia Alvarez denied such a procedure (ON 80, p. 30f; ON 83, p. 32f). The Exhibit ./DO referred to in the appeal does not, in the view of the discerning senate, permit any permissible conclusions; here, too, the request for an expert opinion, which could perhaps have clarified this problem, was not made. The objection to evidence is therefore not valid on this point.

2.1.5. (Appeal ON 93, point 5.5 [p 72f])

Here, the plaintiff seeks the insertion of *"in his opinion"* before the phrase *"relevant contents"* (UA p. 12, para. 3). By requesting a supplementary finding, the plaintiff asserts a deficiency in the findings (secondary deficiency in the proceedings) within the meaning of § 496 para 1 subpara 3 of the Code of Civil Procedure (ZPO), which is not relevant for the outcome of these appeal proceedings (see ad 3. below), so that these statements are to be assigned to the legal complaint.

2.1.6. (Appeal ON 93, point 5.6 [p 73f])

Contested finding:

"Plaintiff, having previously had his account suspended, accepted the new Terms of Use dated 19/04/2018 (./AM = ./41) by clicking (active), knowing the linked Data Policy (./AN = ./43), Cookie Policy (./AP = ./44) and Legal Basis Informa- tion (./AO = ./45) so that he could continue to use Facebook."

(UA S 14, para 2)

Requested substitute determination:

"Plaintiff, having previously had his account suspended, accepted the new Terms of Use dated 19/04/2018 (./AM = ./41) by clicking (active), knowing that the Data Policy (./AN = ./43), the Coo- kie Policy (./AP = ./44) were linked, so that he could continue to use Face- book. The legal basis information (./AO = ./45) was linked in the data policy (./AN = ./43)."

It cannot be explicitly deduced from the plaintiff's statement whether he had read the content of the guidelines in question or not (ON 80, p. 23f). However, according to general life experience (section 269 of the Code of Civil Procedure), it must be assumed that he had read through them, especially since the lawsuit between the parties was already pending on 19 April 2018 and the plaintiff therefore undoubtedly paid great attention to the form of the contractual relationship between the parties. The contested finding therefore does not meet with any reservations.

2.1.7. (Appeal ON 93, point 5.7 [p 74f])

Contested finding:

"The personalisation or personalised experience is what sets Facebook apart from other social networks."

(UA p 10, penultimate para)

Requested substitute determination:

"Facebook is personalising its content."

This comparison shows that the plaintiff in fact only seeks the omission without substitution of the part of the findings in which a comparison is made between Facebook and other social networks. Therefore, the objection to evidence is not legally developed in this point (RS0041835 [T3]).

2.1.8. (Appeal ON 93, point 5.8 [p 75])

Contested finding:

"Search results are based solely on a user's activities within the Facebook service."

(UA p 21, penultimate paragraph) Requested substitute determination:

"Search results are based on, among other things, a user's activity on the Facebook service."

The defendant has explicitly stated the sentence challenged by the plaintiff here (ON 77, p 113f [margin note 368]). Subsequently, the plaintiff did not comment specifically on this assertion, although it would have been easy for him to do so (e.g. ON 78, p. 36, para 140: specific reply to ON 77, p. 114f, para 370, but not also para 368). The court of first instance therefore correctly assumed a conclusive concession in this point within the meaning of § 267 (1) ZPO (RS0039927), so that the objection to evidence does not prevail in this point.

2.1.9. (Appeal ON 93, point 5.9 [p 76])

The plaintiff challenges the trial court's statement, embedded in the findings, that the defendant did not violate its policies, conditions and information when processing the plaintiff's data.

(UA p 32, last paragraph). Instead, he seeks a "finding" that the defendant sometimes even violates its guidelines, conditions and information when processing the plaintiff's data.

However, the impugned passage in the judgement is - in terms of content - an assessment to be assigned to the legal assessment. The plaintiff's remarks directed against it are therefore also to be classified as part of his appeal on points of law.

2.2. On the defendant's evidentiary challenge:

2.2.1. (Appeal ON 94, point 1.2.1 [p 19ff]

Contested findings:

"In these tools, not all processed data are visible, but only those that the defendant considers interesting and relevant for the users.

[…]

The tools were created to give users access to up-to-date data in what the defendant considers to be a reasonable framework.

[…]

The defendant only makes available in its tools a part of the data it processes about the plaintiff, namely only those that it considers interesting and relevant for the user".

(UA p 15, para 3; p 31, para 2)

Requested substitute determination:

"The defendant grants the Plaintiff access to his personal Information toolsAccess to Data."

It should be noted in advance that the findings challenged here clearly refer to the plaintiff's personal data in the required overall consideration of the judgement (see in particular UA p. 39, last paragraph).

The combated statements are not only related to the

The statements made by the plaintiff (ON 80, p. 27), but can also be deduced from the testimony of the witness Cecilia Alva- rez. First of all, she stated that the relevant tools enabled *"users to access [...] up-to-date data within a reasonable framework"* (ON 83, p. 27).
23 above). She went on to say: *"Of course we try to give the user meaningful information and accordingly we highlight the points that give the user a meaningful understanding. [...] This is not an explanation intended for a mathematician, this is not a mathematical explanation to the last detail, but we try to bring together explicability and relevance to enable the average user to understand. To give all the data would be nonsensical and meaningless."* (ON 83, P
28 above). This description suggests the conclusion drawn by the court of first instance that the information provided by the defendant by way of the tools does not include all the personal data of the person requesting information, but that the defendant makes a selection that appears reasonable to it. In view of the last-mentioned statement of an informed witness, from whom the trial judge was able to gain a personal impression, the Exhibit ./AA, which was also referred to in the assessment of the evidence and challenged in the present appeal, is of no significance. The same applies to the information tools listed in the appeal, especially since their existence does not allow any reliable conclusions as to whether they actually allow access to all personal data processed.

The findings contested here therefore do not meet with the

- Contrary to the appellant's argument, there are no concerns.

2.2.2. (Appeal ON 94, point 1.2.2 [p 27f]

Contested finding:

"There is [...] no profiling data in the tools."

(UA S 31, para 2)

Requested substitute determination:

"Profiling data is visible in the tools."

The defendant correctly points out that the contested finding contradicts other statements from which it emerges that the defendant provides information on profiling measures (UA p. 19, para. 2). The plaintiff does not question this in his response to the appeal either, but takes the view that not all profiling data are covered by the information (ON 96, p. 22f). This inconsistency causes a deficiency in the findings (RS0042744), which leads to the fact that all the statements just quoted have to be omitted from the legal assessment; however, this does not affect the result of the appeal proceedings (see below ad 3.).

2.2.3. (Appeal ON 94, point 1.2.3 [p 28f])

Contested finding:

"In October 2019, only the IP address and the place and time of the upload were visible in the download tool, but not the EFIX data [appellate court note: correctly EXIF data] *of the photo, such as recording device and storage location."*

(UA p 32, para 1)

Requested substitute determination:

"There was no evidence that the Defendant had EXIF data for the photograph in Exhibit ./DD in October 2019 and the Defendant could not provide access to data that it did not have."

This comparison shows that there is no logical contradiction between the contested finding and the construction demanded by the defendant. For the contested finding does not in any case bring

that the defendant did not provide EXIF data in the download tool despite their availability. Therefore, the defendant is in fact seeking a supplementary finding here and thus - in terms of content - asserts a defect in the finding (secondary procedural defect) within the meaning of § 496 para 1 subpara 3 ZPO which is to be assigned to the legal complaint; here, too, however, there is no relevance for the outcome of the appeal proceedings (see ad 3. below).

2.2.4. (Appeal ON 94, point 1.2.4 [p 29f])

Contested finding:

"Whether all of the plaintiff's data that the defendant had processed in the course of this product was irretrievably deleted is not ascertainable."

(UA S 26 above)

Requested substitute determination:

"The Partner Categories product was discontinued in the EU in May 2018 and the personal data associated with Partner Categories was deleted prior to the date of the Claimant's access request."

In its assessment of the evidence, the court of first instance justified the non-liquidity finding contested here by stating that the witness Cecilia Alvarez had been too vague on this point (UA p. 36, para. 2). In fact, the testimony of this witness is fraught with uncertainties insofar as it refers to deletion processes (ON 80, p. 29 middle: *"I have no information to the contrary on this."*; p. 31 bottom: *"I am not a technician."*). Since the first judge was also able to gain a personal impression of the witness, the objectionable statement does not meet with any reservations.

2.2.5. (Appeal ON 94, point 1.2.5 [p 30f])

Contested finding:

"In the 'Activities outside Facebook' tool, you can see the companies that have sent data,

but not what data the companies sent and you don't see the raw data."

(UA S 31, para 3)

Requested substitute determination:

"Defendant provides users with a summary of the data it receives from third-party websites and apps based on users' activity outside of the Facebook service."

The court of first instance based the contested finding on the plaintiff's testimony (ON 83, p. 50 below). In the appeal, only an excerpt from a document is cited against this (Exhibit ./94, pp. 172 - 178). However, these passages are not suitable to refute the plaintiff's statements, especially since they do not show beyond doubt whether the information actually also completely includes the aspects covered by the contested statement. Therefore, the objection to evidence cannot be successful on this point.

2.2.6. (Appeal response ON 95, point VI. [p 86f])

Findings contested:

"The plaintiff regularly received advertisements targeting homosexual persons and invitations to corresponding events, although he had not been interested in the specific event beforehand and did not know the venue. These advertisements and invitations were not directly oriented towards the sexual orientation of the plaintiff or his 'friends', but towards an analysis of their interests.

(UA p 27, penultimate paragraph) Requested substitute findings:

"The plaintiff alleged that he had received invitations to Face- book 'events' targeting homosexual persons, although before that he had been interested in the specific

The invitations were not directly based on the plaintiff's sexual orientation. These invitations were not directly based on the plaintiff's sexual orientation, but rather may have been suggested to him based on various factors relevant to the personalisation of the service, such as an interest of the plaintiff's friends in the event, the plaintiff's interests in 'dance' or 'techno' and/or whether the plaintiff (or his friends) were interested in similar events.

'dance' or 'techno' events had participated."

In reality, however, there is no logical contradiction between the findings cited at the beginning and the statements sought by the defendant. In particular, it should be emphasised that both the trial court and the defendant denied the relevance of the plaintiff's homosexual orientation and considered the interests of the plaintiff's friends as the decisive factor, whereby there is no relevant difference between the terms "advertising" and "invitation" in this context. The evidentiary complaint therefore comes to nothing on this point.

3. On the legal complaints of both parties: 3.1 On the legal complaint of the plaintiff:

3.1.1. With regard to claims 1, 2, 3, 4 and 4.1:

One of the main points of contention in this process is the allocation of roles between the parties to the dispute under data protection law.

The plaintiff takes the view that he is the responsible party within the meaning of Article 4(7) of the GDPR with regard to the data applications operated for his personal purposes; in this area, the plaintiff is also the data subject. On the other hand, the defendant was (only) the controller with regard to the other data applications that went beyond this. The plaintiff had a legal interest in

the establishment of this division of tasks (claims 1 and 2). In the plaintiff's area of responsibility, the defendant was a processor. In this function, it was therefore not allowed to carry out any data applications without or contrary to the plaintiff's instructions (claim 3). Between the plaintiff (in his function as data controller) and the defendant (in its position as data processor), no contract meeting the requirements of Article 28(3) of the GDPR had been concluded so far. The plaintiff was entitled to the conclusion of such an agreement (claim 4), and possibly to a declaration that such an agreement did not currently exist (claim 4.1).

The defendant replies that it is the sole responsible party in relation to the plaintiff. The plaintiff lacks an interest in declaratory relief for claims 1 and 2. Claims 3, 4 and 4.1 were also unjustified because they were based on the incorrect premise that the plaintiff was responsible.

The ECJ has already clarified that the mere fact of using a social network such as Facebook does not in itself make a Facebook user jointly responsible for the processing of personal data carried out by that network. However, the operator of a fan page set up on Facebook is to be assessed differently, especially since setting up such a page gives Facebook the possibility to place cookies on the computer or any other device of the person who has visited the fan page, regardless of whether this person has a Facebook account. The operator of such a fan page therefore contributes to the processing of the personal data of the visitors to his page and thus enjoys the status of controller with regard to these data (ECJ C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein*, esp. para. 35, 36 and 41.

as well as point 1). The same applies to the operator of a Facebook page who integrates a "Like" button into this page. Since Facebook, through such a
If a "social plugin" obtains personal data of any third party who merely accesses this page, the operator of such a page is (also) to be classified as a data controller with regard to these data (ECJ C-40/17, *Fashion ID GmbH & Co KG, para.* 64).
85 [esp. paras. 75, 78, 81, 83 and 84] and point 2).

It can be clearly derived from this case law that a Facebook user can only be classified as a co-responsible party within the meaning of Article 4(7) of the GDPR with regard to the personal data of third parties under certain conditions. In contrast, he is - only - a data subject with regard to his own personal data. In both constellations, Facebook remains co-responsible or the sole responsible party.

With his request 1, the plaintiff seeks to establish that he is the person responsible in an area in which he is the data subject, i.e. with regard to his own personal data. This request is therefore already unjustified on the basis of the considerations just mentioned.

With his claim 2, the plaintiff seeks a declaration that the defendant is responsible in the area not already covered by claim 1. However, a legal interest of the plaintiff as required by § 228 ZPO is not recognisable here, especially since the defendant never contested its position of responsibility anyway.

Claims 3, 4 and 4.1 also fail because they are based on the incorrect premise that Claim 1 is justified.

3.1.2. With regard to claims 5, 5.1 and 7:

The plaintiff seeks a declaration that more closely

that declarations of consent by the plaintiff referred to above were not to be classified as effective consent within the meaning of Articles 6(1) and 7 of the GDPR (claim 5, and possibly 5.1) and that there was no effective consent by the plaintiff to more specific data processing carried out by the defendant (claim 7).

The defendant requests that these claims be dismissed because the data processing complained of by the plaintiff was lawful and the plaintiff also has no interest in a declaratory judgment.

According to established high court jurisprudence, a legal act cannot be the subject of a claim for a declaratory judgement pursuant to section 228 ZPO, because it does not concern a right or legal relationship, but only a preliminary question for its existence (RS0038804). Therefore, the declaration of the invalidity of a statement cannot be demanded (RS0039087; esp. also RS0039036 on the termination of an employment relationship and RS0038933 on the termination of a tenancy agreement).

The claims at issue here were therefore correctly dismissed for the sole reason that they do not fulfil the requirements of § 228 ZPO.

3.1.3. On claims 6, 8, 9 and 10:

The plaintiff essentially argues that he did not validly consent to the defendant's measures covered by these claims. The defendant could also not successfully invoke other grounds of justification.

The defendant essentially replies that this data processing is justified by Article 6(1)(b) DSGVO.

Data processing is lawful, inter alia, if it is necessary for the performance of a contract to which the data subject is a party, in accordance with Art 6(1)(b) DSGVO.

is necessary. The extent to which processing is to be considered necessary is determined on the basis of a case-by-case assessment of the contractual purpose arising from the content of the contract and what is necessary to fulfil the contractual obligations or the exercise of rights (*Kastelitz/Hötzendorfer/Tschohl* in *Knyrim*, DatKomm Art 6 DSGVO Rz 36).

The contract concluded between the parties was initially based on the terms of use of the defendant of 19.4.2018 (Exhibit ./AM) accepted by the plaintiff (UA p. 14, para. 2) during the period relevant for these appeal proceedings. Point 4 contains, among other things, the following passage:

"4. additional provisions
1. update our terms of use [...]
Unless otherwise required by law, we will give you at least 30 days' notice (e.g. by email or via our products) before we make any changes to these terms of use. You will then be given the opportunity to review them before they come into effect. Once any updated Terms of Use come into effect, you will be bound by them if you continue to use our products.
[…].“

Subsequently, the plaintiff continued to use Facebook even in the knowledge of the terms of use updated on 31 July 2019 (Exhibit ./CA) (UA p 14 below), which differ only slightly from the original terms (Exhibit ./AM) in terms of content. They read in extracts as follows:

"Terms of Use Welcome to
Facebook! […]
We do not charge you for using Facebook or the other products and services covered by these Terms of Use. Instead, companies and organisations pay us to show you ads for their products and services. By using our products, you agree that we may show you ads that we think are relevant to you and that match your interests. We use your personal information to determine which advertisements we show you.

We do not sell your personal information to advertisers, and we do not share information that directly identifies you (such as your name, email address or other contact information) with advertisers without your explicit consent. However, advertisers may tell us, for example, which audience they want to see their ads. We then show these ads to people who may be interested in them.

[…]

1. Services offered by us

Our mission is to enable people to build communities and bring the world closer together. To further this mission, we provide you with the products and services described below:

• We provide you with a personalised experience: [...] To personalise your experience, we use the data we have - for example, about the connections you make, the options and settings you choose, and what you do on and off our products.

• We connect you with people and organisations that matter to you: We help you find and connect with people, groups, businesses, organisations, etc. that are important to you on the Facebook products you use. We use the information we have to make suggestions to you and others - for example, about joining groups, attending events, subscribing or messaging pages, watching shows, and people you may want to add as friends.

[…]

• We help you discover content, products and services that might interest you: We show you ads, offers and other sponsored content to help you discover content, products and services offered by the many businesses and organisations that use Facebook and other Facebook products.

[…]

2. How our services are funded

Instead of paying to use Facebook and the other products and services we offer, by using the Facebook products covered by these Terms of Use, you agree that we may show you ads that companies and organisations pay us to highlight within and outside of the Facebook companies' products. We use your personal information, such as information about your activities and interests, to show you advertising content that is more relevant to you.

Protecting people's privacy and data was central to the design of our advertising system. This means we can show you relevant and helpful ads without letting advertisers know who you are. We do not sell your personal data. We give advertisers the opportunity to tell us, for example, what their business objective is and what type of audience they want to see their ad (e.g. people aged 18-35),

who are interested in cycling). We then show their adverts to people who might be interested.

[…].

4. disputes

[...]

If you are a consumer and are a permanent resident of a Member State of the European Union, the laws of that Member State will apply to any claim, cause of action or dispute you have against us arising out of or relating to these Terms of Use or the Facebook Products ('Claim')."

[…].“

The contract concluded between the parties to the dispute is to be assessed according to Austrian law pursuant to Art 6 (1) Rome I Regulation, especially since no deviating choice of law - permissible under certain conditions pursuant to Art 6 (2) Rome I Regulation - was made under point 4 of the terms of use.

This is an atypical contractual obligation not expressly regulated in the Austrian legal system (see generally *Bollenberger/P. Bydlinski* in KBB, ABGB6, § 859 ABGB Rz 15 mwN). Its content essentially consists in the fact that the defendant provides the Facebook user with a "personalised" platform, i.e. individually tailored to his interests and settings, on which he can communicate with other Facebook users. Although the Facebook user does not owe any money for access to this forum, he accepts that the defendant processes all the user's personal data available to it. The processing of this data serves to send personalised advertising to the user. For this purpose, the defendant does not pass on the data of its users to third parties without their express consent, but sends the advertising on behalf of advertisers to specific target groups which remain anonymous vis-à-vis the advertisers and which it filters out from the data. Through

The sale of these advertisements generates income for the defendant.

The essence of this Facebook business model and the contractual purposes associated with it (from the point of view of the Facebook user, above all: gaining access to a personalised communication platform - also through customised advertising - without having to pay money for it; from the point of view of the defendant, in particular: Achievement of revenue through personalised advertising, made possible by the personal data of Facebook users) is explained in the terms and conditions in a way that is easily understandable for any reader who is even moderately attentive. This model is also neither immoral within the meaning of § 879 para 1 ABGB nor unusual within the meaning of § 864a ABGB. In particular, it is legitimate for a company operating in a market economy, which does not charge money for certain services, to resort to other sources of financing within the framework of the law. Finally, the contractual purposes are not obscured by the appearance of the terms of use, which is contrary to the transparency requirement of § 864a ABGB, but are clearly illustrated in the overall structure of this set of rules. The terms of use in question were therefore agreed in an unrestrictedly effective manner.

The processing of personal user data is a supporting pillar of the contract concluded between the parties to the dispute. This is because only this data utilisation enables tailor-made advertising, which substantially shapes the "personalised experience" owed by the defendant and at the same time provides the defendant with the income necessary to maintain the platform and to make a profit. This data processing is therefore necessary for the performance of the contract.

"necessary" within the meaning of Art 6 (1) (b) DSGVO.

The provisions of Article 5(1)(b), (c) and (e) of the GDPR, which are the subject of the appeal, cannot be examined in more detail in these proceedings because the requests for action are not aimed at enforcing these provisions.

The applicant's argument that the defendant is guilty of a breach of Article 9(1) of the GDPR also fails, if only because the complaints do not even implicitly refer to this provision.

Nothing can be gained for the plaintiff's point of law from the ECJ judgment C-673/17, *Planet49 GmbH*, cited in the appeal, because the justification of Article 6 (1) (b) of the GDPR was not to be examined in this decision, apparently because the defendant had not invoked it in the proceedings on which it was based (see in particular paragraph 13 of this judgment, where only Article 6 (1) (a) - but not also (b) - of the GDPR is cited in the course of listing the relevant legal provisions). In fact, the legal basis in question here also includes - lege non distinguente - personal data obtained through cookies, social plugins, cookies and comparable instruments.

It follows from what has been said so far that the defendant can successfully rely on Art 6(1)(b) DSGVO.

Claims 6, 8, 9 and 10, which wrongly seek to prohibit the processing of the applicant's personal data, are therefore unfounded.

3.2. The defendant's legal complaint:

3.2.1. On the plea 11:

In essence, the plaintiff argues in this regard that it last filed a request for information based on Article 15 of the GDPR in 2019.

The complainant had addressed a request for information to the defendant, which had not been answered in accordance with the law. He was therefore entitled to be provided with information in accordance with Article 15 of the GDPR.

The defendant replies that it has properly fulfilled its duty to provide information.

According to the findings, the plaintiff last addressed a request for information to the defendant in 2019 based on Article 15 of the GDPR, referring him to relevant online tools (UA p 30f in connection with Exhibit ./DG). However, the defendant only made available part of the (personal) data it had processed about the plaintiff (UA p 15, para 3 and p 31, para 2; see above ad 2.2.1. for these findings, in particular also for their interpretation).

According to these statements, from which the legal complaint of the defendant (in a manner not in conformity with the law: RS0041585) is far removed, the defendant has violated its duty to provide information, which is rooted in Article 15(1) of the GDPR. The plaintiff therefore has a right of action pursuant to Art.

The plaintiff is still entitled to information on his personal data processed by the defendant and on the purposes of processing (paragraph 1(a) of the Regulation), on the recipients or categories of recipients to whom the personal data have been or will be disclosed (paragraph 1(b) of the Regulation) and on the origin of the data if they were not collected from the plaintiff (paragraph 1(g) of the Regulation). Therefore, paragraph I., which grants the claim, is to be confirmed with the proviso that a slightly different wording is chosen, which is more closely oriented to the wording of the ordinance. This new wording remains within the framework set by § 405 ZPO (see on admissibility RS0039357 et al.); in particular, the wording of the claim 11 in the complaint has not been changed.

The vague words and phrases *"exactly", "whenever possible"* and *"if necessary"* contained in the text and now eliminated do not have an exequable substrate.

3.2.2. On the plea 12:

The plaintiff claims that the uncertainty about the processing of his data caused emotional distress, which is why he is also entitled to non-material damages of EUR 500 (insb ON 78, p. 38 [para. 149] in conjunction with ON 80, S 3).

The defendant counters that the plaintiff has not made any conclusive allegations regarding his claim for damages.

Pursuant to Article 82(1) of the GDPR, any person who has suffered material or non-material damage as a result of a breach of this Regulation shall be entitled to claim damages from the controller or processor.

In casu, the plaintiff - as just explained - alleged non-material damage caused by the breach of the duty to provide information. This discomfort is also reflected in the findings (which are not contested in this respect) (UA p. 32, para. 3). Since the requested amount of EUR 500 harmonises with the minor extent of this discomfort, the award made by the court of first instance proves to be justified.

3.3. Therefore, the legal objections of the parties do not prevail either, so that the appeals as a whole cannot be successful.

4. The second-instance reservation of costs is based on

§ 52 para 3 sentence 1 ZPO.

5. A valuation ruling must be omitted (RS0042418 [esp. T18].

6. The ordinary appeal is admissible pursuant to § 502 (1) ZPO, because the legal

The legal questions to be resolved may also be significant for many other similar contractual relationships that the defendant has concluded with Facebook users in Austria (cf. RS0121516 on the assessment in the association proceedings, which are similar in this respect). This applies in particular to the following legal question:

Can the defendant successfully rely on the justification in Article 6(1)(b) of the GDPR if it processes personal data of its contractual partners (Facebook users) in order to generate income from the personalised advertising thereby made possible?

II. On the appeal of the plaintiff:

The defendant unsuccessfully contested the order of 11.11.2019 (ON 80, p 14 at the bottom [second order]) with his objection (see above ad I. 1.) and contests this decision, if necessary, also with the present appeal, which is admissible according to part of the case law (*Sloboda* in *Fasching/Konecny*, Komm IV/1 ³ § 515 ZPO Rz 12 **mwN**).

However, this appeal is also unsuccessful because the underlying application of the plaintiff is too vague (see above ad I. 1.).

Separate appeal response costs were not recorded.

The appeal is inadmissible in any case pursuant to section 528(2)(2) of the Code of Civil Procedure.

Vienna Higher Regional Court 1011 Vienna, Schmerlingplatz 11 Dept. 11, on 7 December 2020

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