They are admissible for the reason given by the Court of Appeal.

[112]] On the appeal of the plaintiff:

[113]] I. On the budgetary exception

[114] Pursuant to Art 2(2)(c) GDPR, the Regulation does not apply to the processing of personal data for the exercise of private or family activities ("household exemption"). According to Recital 18 of the GDPR, the Regulation does not apply to the processing of personal data carried out by a natural person for the exercise of exclusively personal or family activities and thus unrelated to his or her professional or economic activities. Recital 18 also explicitly mentions as personal or family activities [...] the use of social networks and online activities in the context of such activities.

[115]] 1.2 With the budgetary exception (also: "household privilege" or "minor clause") is intended to avoid unnecessary expense for individuals (*Heißl* in *Knyrim*, DatKomm Art 2 DSGVO Rz 66). The state's regulatory power with regard to the protection of personal data should end when the data is processed in a private context and thus in the context of the general right of personality (*Ennöckl* in *Sydow*, Europäische Datenschutzgrundverordnung [2018] Art 2 Rz 10). Due to the explicit reference in the wording ("exclusively"), mixed use (private and professional) is also covered by the GDPR (*Heißl* in *Knyrim*, DatKomm Art 2 DSGVO Rz 75). It depends on whether the purpose of the data use is in the professional or private context of the data controller. Whether the purpose of the use is

private or professional use of data is to be assessed on a case-by-case basis according to objective criteria and the general view of the market (*Ennöckl* in *Sydow*, Europäische Datenschutzgrundverordnung [2] [2018] Art 2 marginal no. 11).

[116] The use of social networks and online activities only falls under the household exemption if it is restricted to a specific group of users (*Heißl* in *Knyrim*, DatKomm Art 2 DSGVO Rz 70).

The applicability of the household exemption is primarily based on the group of addressees, so that in the case of generally accessible publication without any restriction, this privilege cannot be claimed: If photos and videos are made accessible to a manageable number of friends on a private Facebook page, the household privilege applies; the same content on publicly accessible accounts, however, is no longer covered (*Heißl* in *Knyrim*, DatKomm Art 2 DSGVO Rz 71).

[117] According to *Ennöckl* (in *Sydow* , Europäische Datenschutzgrundverordnung [2] Art 2 Rz 13), the exception for social networks (Recital 18) only applies to the extent that users exchange data in closed groups that have no connection to their professional or economic activities. The publication of data via the internet, on the other hand, always falls under the provisions of the GDPR. Because of the associated decoupling of the information from a specific processing purpose, it always goes beyond the scope of personal use of information, without the intended recipient group of the website operator being relevant.

[118] 1.5 Also according to *Kühling/Raab* (in

Kühling/Buchner , DS-GVO BDSG3 [2020] Art 2 DSGVO Rz 25), the exception is only relevant as long as the use is made in such a way that only a limited group of persons obtains knowledge of information, such as in the context of individual or group messages. However, it does not apply to the publication of information to an undefined group of persons. Even a limitation to individual groups was not sufficient, as access could be multiplied by functions such as "sharing".

[119] The Austrian Court of Appeal already dealt with the household exception in its decision 6 Ob 131/18k. It stated that a personal or family activity is inimical to publicity, which is why the online posting of actually private family trees or personal information about other persons, whether they are relatives or friends, is not covered by the exception. Any data that is publicly accessible online is not privileged and is therefore subject to the applicability of the GDPR (recital 7.2.3.).

[120] The Court of Justice of the European Union (CJEU) ruled on the essentially identical Article 3(2), second indent, of Directive 96/46 ("Data Protection Directive") that the budgetary exception should be interpreted as referring only to activities which are part of the private or family life of individuals, which is obviously not the case for the processing of personal data consisting in their publication on the internet, so that these data are made accessible to an unlimited number of persons (CJEU C-101/01, *Lindqvist*, para 47).

[121] 3.2 In a subsequent decision, the Court confirmed the

The ECJ confirmed this case law and ruled that an activity cannot be considered exclusively personal or family-related within the meaning of this provision if its purpose is to make personal data accessible to an unlimited number of persons or if it extends even only partially into the public sphere and is thus directed at an area outside the private sphere of the person processing the data (ECJ C-25/17, *Jehovan todistajat* , para 42).

[122] With regard to the legal situation after the entry into force of the GDPR, some argue that the publication of personal data in social networks is also covered by the budgetary exception. This is supported by the fact that the European legislator, aware of the technical design of the Internet and social networks, expressly extended the budgetary exception to online activities and activities in social networks (*Schmidt* in *Taeger/Gabel* , DSGVO BDSG3 [2019] Art 2 DSGVO Rz 18 mwN).

[123] The legislative history of the GDPR points in this direction insofar as the European Parliament wanted to clarify that the budgetary exception only applies if the circle of recipients is likely to be limited. Even though this proposal did not find its way into the text, according to *Schantz* there is little evidence that the legislator intended to withdraw the scope of application of data protection law on this point (*Schantz* , Die Datenschutz-Grundverordnung - Beginn einer neuen Zeitrechnung im Datenschutzrecht, NJW 2016, 1841 [1843]).

[124]] 4.1 The question of whether private use is involved is usually a

case-by-case decision (*Zukic* in JB Datenschutz- recht 2019, 61 [83 ff]). The budgetary exception is to be interpreted restrictively (see only *Ennöckl* in *Sydow*, Europäische Datenschutzgrundverordnung [2] [2018] Art 2 Rz 10). In this context, it is primarily a question of whether the group of persons is limited or whether the information is or can be made publicly accessible. The decisive factor is therefore whether the potentially accessible group of persons is foreseeable from the outset and could not be exponentially increased by sharing (*Kühling/Raab* in *Kühling/Buchner* , DS-GVO BDSG3 [2020] Art 2 DSGVO Rz 25).

[125] According to the first instance findings, the plaintiff's Facebook profile is "private", so that only his friends can see his posts. It was precisely not established that the plaintiff also uses his Facebook account for professional purposes. According to *Zukic* (in JB Datenschutzrecht 2019, 61 [76]), a (Facebook) profile that is actually only accessible to the personal or family environment fulfils the household exception; only profiles related to a professional or economic activity are not to be excluded from the scope of the GDPR. It would theoretically be possible for friends of the plaintiff to share the plaintiff's content and thus for third parties to gain access to this content. However, this would have to be actively enabled by the respective user (see the point "Who can see when someone shares something I have posted"). If one of the original addressees wants to share a post that is restricted to a certain group of addressees, he or she can in principle only share it with persons who were already included in the original group of addressees, i.e. the group of addressees can only be shared with persons who were already included in the original group of addressees.

not extend (*Zukic* in JB Datenschutzrecht 2019, 61 [79]). It was not established that the plaintiff had enabled dissemination and that his content was therefore potentially publicly accessible.

[126] In this situation , the budgetary exception is fulfilled and the GDPR is therefore not applicable. The plaintiff did not dispute the applicability of the budgetary exception in principle in his appeal. Therefore, the question of whether the plaintiff is a "controller" within the meaning of Article 4 of the GDPR does not arise. The dismissal of claims 1-4 is therefore not objectionable for this reason alone. In view of the existing case law of the ECJ, it was not necessary to refer the matter to the ECJ again - contrary to the plaintiff's suggestion.

[127] II. the person of the "controller" within the meaning of Art. 4 of the GDPR

[128] Only for the sake of completeness, the question of the "distribution of roles under data protection law" between the parties to the dispute - which the Court of Appeal correctly emphasised as the main point of dispute - needs to be addressed.

[129] The plaintiff is in any case a data subject because his data are processed. He did not dispute this at any time during the proceedings. However, he is of the opinion that he is also the (fictitious) controller, especially since he determines the purpose of the processing of the data himself, for example by uploading content. With regard to his own data, the plaintiff was therefore both the data subject and the controller, and the defendant was the processor. As far as the plaintiff processed third party data (e.g. by posting a photo in which a third party could also be seen), he was only the data controller. According to

In the opinion of the plaintiff, he himself is the data controller for all data applications operated for his personal purposes (profile, chronicle - including likes and comments - events, photos, videos, groups, personal messages, friends list and applications) and the defendant is thus only a processor bound by instructions (cf. also *Feiler/Forgó* , EU-DSGVO [2016] Art 4 DSGVO Rz 13).

[130] As far as can be seen, the constellation alleged by the plaintiff has not been dealt with in detail in literature and case law. According to *Feiler/Forgó,* the wording of the definition of "controller" allows a natural person to be the controller of his or her own personal data. If a data subject entrusts his or her own personal data to a third party (e.g. a hosting provider) so that the latter processes the personal data exclusively on the instructions of the data subject and exclusively for his or her purposes, the third party would only be subject to obligations to ensure the security of the personal data if the third party is a processor, which in turn conceptually presupposes (cf. Art 4 No 8 GDPR) that the data subject is to be classified as a controller. If the data subject in this constellation is treated as the controller of his or her own data, the third party is to be assessed as a processor and is subject to the provisions of the GDPR. The data subject (= controller), on the other hand, could invoke the exemption of Art 2(2)(c) - insofar as only his or her own personal data were processed - which is why he or she is not subject to any obligations under the GDPR, which are also not necessary because no interests of third parties are affected.

(*Feiler/Forgó* , EU-DSGVO [2016] Art 4 DSGVO Rz 13).

[131] Pursuant to Art. 4 No. 7 of the GDPR, the "controller' means the natural or legal person, public authority, agency or other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its designation may be provided for under Union or Member State law. According to Article 4(8) of the GDPR, a "processor" is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

[132] The controller is thus any natural or legal person, public authority, agency or any other body (personal aspect) which alone or jointly with others (pluralistic control), determines the purposes and means of the processing of personal data (decision-making function [see *Hödl* in *Knyrim*, DatComm Art 4 GDPR margin note At 80]).

Responsible about thatPerson or action

Entity responsible for ensuring that the data protection provisions of the GDPR are complied with. This means that the controller is the addressee of the obligations under the GDPR; the term serves to assign responsibilities (*Hödl* in *Knyrim*, DatKomm Art 4 DSGVO Rz 77).

[133] 2.3 The interpretation of the concept

The ECJ ruled on the "*data* controller" within the meaning of Directive 95/46 (C-210/16, *Unabhängiges Landeszentrum für Datenschutz*

Schleswig-Holstein Wirtschaftsakademie Schleswig-Holstein GmbH), it should be examined whether and to what extent the operator of a publicly accessible fan page maintained on Facebook (in this case, the Wirtschaftsakademie), together with Facebook Ireland and Facebook Inc., contributes to the decision on the purposes and means of the processing of the personal data of the visitors of this fan page and can thus also be considered a "controller" within the meaning of Art 2 lit d of Directive 95/46 (ECJ C-210/16, para 31). Even if 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, the operator of a fan page maintained on Facebook, by setting up such a page, gives Facebook the opportunity to place cookies on the computer or any other device of the person who has visited his fan page, irrespective of whether that person has a Facebook account (ECJ C-210/16, para 35). Therefore, the ECJ qualified the operator of a fan page together with Facebook as a "responsible person" within the meaning of Art 2 of Directive 95/46 (ECJ C-210/16, para 39).

[134] In a subsequent decision (C-40/17, *Fashion ID GmbH & Co KG)*, the ECJ had to assess a case in which the operator of a Facebook page, by embedding Facebook Ireland's "Like" button on its website, enabled personal data of visitors to its website to be obtained. This possibility arose from the moment of accessing such a page, and independently of it,

whether these visitors are members of the social network Facebook, whether they have clicked on the "Like" button of F acebook or also whether they are aware of this operation (ECJ C-40/17, para 75). Taking into account this information, the personal data processing operations for which Fashion ID can decide jointly with Facebook Ireland on the purposes and means are, within the definition of "processing of personal data" in Article 2(b) of Directive 95/46, the collection of the personal data of visitors to its website and their disclosure by transmission. On the other hand, according to this information, it is prima facie excluded that Fashion ID decides on the purposes and means of the personal data processing operations carried out by Facebook Ireland after the transmission of these data to it, so that Fashion ID cannot be considered responsible for these operations within the meaning of Article 2(d).

[135] Thus, the assessment of the Court of Appeal is to be upheld (§ 510 para. 3 ZPO). It follows from the cited decisions of the ECJ that the mere use of 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 this network. However, the operator of a fan page set up on Facebook is to be judged 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 visited the fan page, regardless of whether this person has a Facebook account. The operator of such a

Fanpage therefore contributes to the processing of the personal data of the visitors to its page and thus enjoys a position of responsibility with regard to this data. The same applies to the operator of a Facebook page who integrates a "Like" button into it (website). Since F acebook obtains personal data of every third party who merely calls up this page through such a "social plugin", the operator of such a page is (also) to be classified as a data controller with regard to these data.

[136] It follows from this, however, 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 the co-responsible party or sole responsible party.

[137] 3.3 Insofar as the plaintiff sees in this view a "legally incorrect reverse conclusion", this cannot be followed. According to the plaintiff, the previous case law of the ECJ differs from the case at hand in that it concerns the distribution of roles between the defendant and private users of private Facebook pages. In contrast to the ECJ decisions, there is no community of purpose, because in these cases the defendant and the entrepreneurs each pursued a common purpose. In the present case, however, the plaintiff was the responsible party because he alone determined the purpose.

[138] In fact, according to the case law of the ECJ, the decisive factor for a position of responsibility is, in particular, whether a natural or legal person has F acebook

enables to obtain not inconsiderable amounts of data of the visitors (in particular also third parties who do not use Facebook at all). It is irrelevant whether the respective person has access to the data collected by Facebook (cf. ECJ C-40/17, para 82). However, this requirement is not fulfilled in the present case. The plaintiff did not enable Facebook to obtain personal data of third parties through his private profile. The mere use of the Facebook service does not make the plaintiff a data controller within the meaning of Article 4(7) of the GDPR. Otherwise, every Facebook user would be a data controller within the meaning of the GDPR. It is obvious that this is not in line with the intention of the GDPR.

[139] The Court of Appeal correctly pointed out that a person cannot have several roles at the same time (person concerned and person responsible).

[140] In summary, the opinion of the lower courts is therefore to be agreed with, according to which the plaintiff is the data subject and the defendant is the controller within the meaning of the GDPR. Thus, only the defendant has to ensure that the data protection provisions of the GDPR are complied with and is thus the addressee of the obligations under the GDPR. T he defendant is the controller and not merely the processor. The dismissal of claims 1, 3, 4 and 4.1 by the lower courts is therefore not objectionable.

[141] III. on the legal interest of the claim point 2

[142] This claim was (also) dismissed by the Court of Appeal on the grounds of lack of legal interest, especially since the defendant had not submitted its

The appeal argues that there is a legal interest because the legal position of the plaintiff vis-à-vis third parties is more favourable. In this regard, the appeal argues that there is a legal interest because the legal position of the plaintiff vis-à-vis third parties is thereby made more favourable; the rights of the persons concerned result from his position as the person concerned.

[143] In principle, the declaratory judgement only becomes res judicata in the relationship between the parties, but not vis-à-vis third parties (RS0039068). From this follows as a rule the lack of a necessary interest in a declaratory judgement (RS0039068 [T2]; see also *Frauenberger-Pfeiler* in *Fasching/Konecny* ³ III/1 § 228 ZPO Rz 64). Thus, the legal position of the plaintiff vis-à-vis third parties cannot be improved by the declaratory judgement sought here against the defendant.

[144] In addition, the legal relationship made the subject of an action for a declaratory judgement must have a direct legal effect on the legal position of the plaintiff; it must therefore be suitable to end the impairment of the legal sphere by the opponent and to avoid further litigation in the future. However, an action for a declaratory judgement and a declaratory judgement can only fulfil this preventive effect if there is a current reason for such a preventive clarification (RS0039071).

[145] Apparently, from the point of view of the plaintiff, request point 2 is intended to clarify, in a way complementary to request point 1, that the defendant is only responsible for the data processing mentioned in request point 2, while the plaintiff is responsible for the data processing mentioned in request point 1. The defendant, on the other hand, is of the opinion that it is always only itself

"Controller" for the relevant processing activities

so that there is no contradiction between the legal positions of the parties in relation to the data processing mentioned in claim 2.

[146] IV. Request for information (Art. 15 GDPR)

[147] The lower courts affirmed a breach of the defendant's duty to provide information. According to the court of first instance, the defendant violated its duty to provide information pursuant to Article 15 of the GDPR vis-à-vis the plaintiff, who repeatedly requested information after having received a PDF file several years ago. This resulted in the obligation to provide information at reasonable intervals about all personal data which are the subject of processing and not only about those which the defendant considers relevant and interesting for the user. As a result of the breach of this obligation to provide information, the plaintiff does not have an overview of all the data stored about him and cannot, for example, exercise his right of rectification (recital 65).

[148] In contrast, the defendant argues that the right of access is neither unlimited nor absolute. The court of appeal did not examine whether the allegedly missing data were "personal data" of the plaintiff. The right of access only extends to "personal data" of the data subject requesting information, as defined in Art 4(1) GDPR. Moreover, by misapplying Article 15 of the GDPR, the Court of Appeal imposed on the defendant an obligation to provide information that was too far-reaching.

[149] According to Recital 63 of the GDPR, a data subject should have the right of access to personal data concerning him or her that has been collected and to exercise this right easily and at reasonable intervals.

be able to perceive in order to be aware of the processing and to be able to verify its lawfulness.

[150] According to the case law of the ECJ on the protection of the right of access, it is sufficient if the applicant receives a complete overview of these data in an understandable form, i.e. in a form that enables him to take note of these data and to check whether they are correct and processed in accordance with the Directive, so that he can, if necessary, exercise the rights conferred on him in Art 12 of the Directive (ECJ C -141/12, para 59). Although this case law was handed down in relation to the Data Protection Directive (Directive 95/46), it can also be applied to the new legal situation because the text of the provisions is essentially identical.

[151] 2.3 To the extent that the defendant complains that the lower courts did not address the question of whether the defendant fulfilled the duty to provide information on the basis of the exceptions or limitations recognised by Article 15 of the GDPR, it should be noted that it would be up to the defendant to show that it fulfilled its duty to provide information.

[152] The defendant apparently takes the view that the information provided (PDF file and CD with further PDF files amounting to 1,222 pages in 2011, then reference to information and download tools) is sufficient. However, it overlooks the fact that, according to the findings of the lower courts, the information provided was incomplete. Rather, the defendant only provided information on the personal data that it itself needed for its own purposes.

considered "relevant". For example, click data (relating to the plaintiff in each case), which companies had shared data with the defendant, and which companies had not shared data with the defendant were not disclosed.

EFIX data. The fact that the duty to provide information cannot depend on the mere self-assessment of the defendant ("relevant") does not require further explanation.

[153] It is also not sufficient that the plaintiff could obtain parts of the data to be provided via online tools provided by the defendant. According to the findings, the plaintiff would have to search at least 60 data categories with hundreds, if not thousands of data points, which would require several hours of work. Even with this, the plaintiff would not be able to obtain complete information. The plaintiff rightly points out that the GDPR is based on a one-time request for information, not on an "Easter egg search".

[154] The plaintiff rightly complains about the lack of information about the purposes of the processing. As far as the defendant claims that the provision of information could interfere with the rights of third parties, it must be pointed out that the defendant has not shown which specific rights would be involved. As far as the defendant's advertising customers are concerned, it would be up to the defendant to reach agreements with these customers so that the defendant is able to fully comply with its duty to provide information to the users.

[155] To the extent that the defendant raises concerns about the scope of the requested information, it must be countered that in the case of current data, there is hardly a conceivable case in which the controller could refuse a request for information on the grounds of excessive scope ("excessiveness" as defined in Art 12 (5)), especially since the data subject has a mere obligation to specify his or her request for information (*Haidinger* in *Knyrim*, DatKomm Art 15 DSGVO

para. 48). Contrary to the legal opinion of the defendant, the fact that the plaintiff submitted five requests for information to the defendant within nine years is by no means to be classified as "excessive". Rather, this corresponds to the "reasonable intervals" referred to in recital 63.

[156] The Court of Appeal obliged the respondent to provide information on "recipients to whom the personal data have been or will be disclosed".

[157] This wording could also be understood in the sense of an obligation to provide information in the future. However, possible data processing in the future is not subject to information (*Haidinger* in *Knyrim*, DatKomm Art 15 DSGVO Rz 28). The plaintiff did not request such information with regard to future data.

[158] It is true that the court of higher instance is also entitled and even obliged to give the judgement a clearer and clearer wording that deviates from the claim, provided that this is clearly based on the claimant's allegations and essentially corresponds to the claim (RS0038852 [esp. T16]).

Nevertheless, the case is not yet ready for decision:

[159] The wording chosen by the Court of Appeal is obviously based on the wording of the Regulation, without, however, taking up the wording "categories of recipients" used in Article 15 GDPR. According to Article 15(f) of the GDPR, the data subject has the right to be informed about "the recipients or categories of recipients to whom the personal data have been or will be disclosed".

[160] There is disagreement in the literature as to whether the controller has a right of choice or whether the data subject can decide on the type of information. For this reason, the Court of Appeal referred this question to the ECJ on 18 February 2021 (6 Ob 159/20f). As the facts of the case are comparable in this respect, the same legal questions arise here:

[161] If the controller's right to choose were affirmed, the controller (and thus in the present case the defendant) could also fulfil its obligation under Article 15 GDPR by merely disclosing the recipient groups. If, on the other hand, the processor's right to choose in this regard were denied, the defendant has not sufficiently fulfilled its obligation to provide information.

[162] The Supreme Court must assume that the preliminary ruling of the European Court of Justice has a general effect and apply it also to cases other than the immediate case. For reasons of procedural economy, the present proceedings must therefore be interrupted in this respect (RS0110583; *Kohlegger* in *Fasching/Konency* ³ Anh § 190 ZPO Rz 262).

[163]]V. On the claim for damages

[164] The lower courts awarded the plaintiff damages of EUR 500 on the basis of Article 82(1) of the GDPR. The defendant's appeal disputes in particular the existence of damage. In such a context, the Austrian Supreme Court has only recently (6 Ob 35/21x) stated:

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

controller or against the processor. This establishes an independent liability standard under data protection law, i.e. in addition to the national damages regime. Consequently, not only the term "non-material damage" in Art 2 (1) GDPR is to be determined autonomously by the Union. Rather, the formulation of the other conditions for liability pursuant to Art 2 leg cit, as well as questions of the assessment of the claim for compensation, must primarily be governed by Union law; the liability regime of the Member States is superimposed in this respect (see recital 146 p 4 and 5 of the GDPR; cf. further *Frenzel* in *Paal/Pauly*, DSGVO-BDSG3 Art 82 DSGVO Rz 1; *Wybitul/Haß/Albrecht* , Abwehr von Schadensersatzansprüchen nach der Datenschutz- Grundverordnung, NJW 2018, 113; *Paal*, Schadensersatz-ansprüche bei Datenschutzverstößen - Voraussetzungen und Probleme des Art 82 DS-GVO, MMR 2020, 14). For this reason alone, the principles of case law developed for the compensation of immaterial damages in the national damages regime cannot be relied upon without further ado (cf. *Schweiger* in *Knyrim*, DatKomm Art 82 DSGVO Rz 2).

2. According to Recital 146 S 3 to the GDPR, the concept of damage should be interpreted 'broadly and in a manner consistent with the objectives of this Regulation' in the light of the case law of the ECJ. Data subjects should receive full and effective compensation for the harm suffered (recital 146 S 6 on the GDPR). From this, in light of the ECJ's case law on

compensation payments for breaches of Union law, it is primarily deduced that the obligation to pay compensation must be assessed in such a way that it is proportionate, effective and dissuasive, taking into account the principle of effectiveness under Union law (cf. *Schweiger* in *Knyrim*, DatKomm Art 82 DSGVO Rz 13; in detail *Wybitul/Haß/Albrecht* , NJW 2018, 115).

The amount awarded must go beyond purely symbolic compensation (cf. *Frenzel* in *Paal/Pauly* , DSGVO-BDSG3 Art 82 DSGVO Rz 12a, who, however, at the same time emphasises the necessary restraint in quantifying immaterial damages). With regard to the compensatory function of liability addressed in this way, it is sometimes emphasised that, with regard to the non-material disadvantages suffered, compensation is intended as satisfaction for alleviation, which is of equal importance to compensation for material losses (cf. *Dickmann*, Nach dem Datenabfluss: Schadenersatz nach Art 82 der Datenschutz-Grundverordnung und die Rechte des Betroffenen an seinen personenbezogenen Daten, r+s 2018, 345 [352 f], etc.).

3. There is agreement that, notwithstanding the principle of effectiveness under EU law, compensation under Art 82 GDPR is only due if (non-material) damage has actually occurred, due to the central idea of compensation behind liability just mentioned (cf. recital 146 p 6.):
'for the damage suffered').

4. In connection with the question of a claim for damages in the event of an incomplete

the Supreme Court held that non-material damage can only be assumed if the person concerned has suffered a disadvantage (6 Ob 9/88). The fact that the person obliged to provide information does not fulfil his legal obligation to disclose the origin of data does not in itself constitute non-material damage to the person concerned (6 Ob 9/88; 1 Ob 318/01y). The infringement per se therefore does not constitute non-material damage, but there must be a consequence or consequence of the infringement which can be qualified as non-material damage and which goes beyond the annoyance or emotional damage caused by the infringement per se (*Schweiger* in *Knyrim*, DatKomm Art 82 DSGVO Rz 26; *G. Kodek*, Schadenersatz- und Bereicherungsansprüche bei Datenschutzverletzungen, in *Leupold*, Forum Verbraucherrecht 2019 [2019], 97)."

[165] In the case underlying the decision 6 Ob 35/21x, the plaintiff based his claim exclusively on the "loss of control over personal data" or the "processing of political opinions" as such. In this factual situation, the discerning senate decided that the claim made by the plaintiff, even in the appeal proceedings with reference to an

"loss of control" was entirely indeterminate. For this reason, he submitted the question to the ECJ as to whether it is a prerequisite for a claim for damages under Art 82 GDPR that the plaintiff has suffered damage or whether already the violation of provisions of the GDPR as such is sufficient for the awarding of damages.

damages is sufficient.

[166] In the present case, on the other hand, the court of first instance made explicit findings on the (non-material) damage suffered by the plaintiff. According to this, the plaintiff was harmed by the defendant's data processing.

"massively annoyed", but not psychologically impaired. There is data stored and processed about him by the defendant over which he has no control because it is not displayed in the tools. For him, neither advertising nor the research factor are relevant when using Facebook. He finds it problematic that his data is used for research and he is not comfortable that his data is collected and used by his

"friends" can be viewed. In view of these differences from the facts underlying the decision 6 Ob 35/21x, the decision in the present case does not depend on the question submitted to the ECJ whether the violation of provisions of the GDPR as such is already sufficient for the award of damages.

[167] Emotional impairments resulting from the infringement, such as fears, stress or states of suffering due to an actual or even only threatened exposure, discrimination or similar, can lead to a claim for damages under Art 82 GDPR as non-material damage (6 Ob 35/21x [Recital 7]). In this context, it is rightly emphasised that a particularly serious impairment of feelings will not be required (*Paal*, MMR 2020, 16), if only because Recital 146 S 3 of the GDPR calls for a broad interpretation of the term "damage", without differentiating between material and immaterial disadvantages.

(*Frenzel* in *Paal/Pauly*, DSGVO-BDSG3 Art 82 DSGVO Rz 10, according to which the concept of damage, which is "already broad under Art 82 (1) DSGVO, is interpreted broadly in cases of doubt").

[168] 3.2 The Package Travel Directive and the related case law concerning the compensation of the

In contrast, the term "loss of holiday enjoyment" does not provide any guidance in the present context. In the (new) Package Travel Directive (2015/2302/EU), compensation is explicitly limited to "significant effects" of the lack of conformity or "lost holiday enjoyment as a result of significant problems" (cf. Art 13(6) and Recital 34 leg cit; as already correctly stated by *Fritz/Hofer* , MR 2020, 83 f; critically also *Wirthensohn*, jusIT 2020/56). However, there is no such restriction in the area of the GDPR. The aforementioned circumstance that the EU legislator deliberately insisted on a broad interpretation of the (already broadly defined) concept of damage under Art 82 (1) GDPR rather suggests that, in principle, also non-material disadvantages of rather lesser weight should be taken into account. Recourse to the Package Travel Directive to fill in the concept of non-material damage is therefore out of the question (6 Ob 35/21x [Recital 8]).

[169] In assessing the damage, it is not the conduct of the wrongdoer that is important, but only the effects on the injured party, whereby these will be directly related to the category of data, the severity and duration of the breach and any third parties to whom data have been transmitted (*Schweiger* in *Knyrim*, DatKomm Art 82 DSGVO Rz 32 and 37).

[170] In the case 6 Ob 247/08d - even before the entry into force of the GDPR - EUR 750 in non-material damages were awarded for unlawful inclusion in a publicly accessible creditworthiness database.

[171] Recital 146 of the GDPR, according to which data subjects should receive "full and effective compensation", argues that the compensation should not be too tight; an artificially low amount with a symbolic effect is not sufficient to ensure the practical effectiveness of Union law (cf. *Frenzel* in *Paal/Pauly* , DS-GVO BDSG³ Art 82 DS-GVO Rz 12a). The damages must be noticeable in order to contain a preventive and deterrent effect (cf. *Boehm* in *Simitis/Hornung/Spiecker* gen *Döhmann*, Datenschutzrecht Art 82 DSGVO Rz 26; *Bergt* in *Kühling/Buchner* , DS-GVO/BDSG³ Art 82 DS-GVO Rz 17 f).

[172] However, the effectiveness criterion is only of limited significance in the present context, because the GDPR provides for high penalties anyway. It is precisely these high penalties that have shaped the discussion and at least the public perception of the GDPR. Therefore, it cannot be argued without further ado that the effectiveness of the GDPR also requires high damages for non-material damage (*Kodek*, Schadenersatz- und Bereicherungsansprüche bei Datenschutzverletzungen, in Leupold , Forum Verbraucherrecht 2019, 97 [103]; *Spitzer*, Schadenersatz für Datenschutzverletzungen, ÖJZ 2019, 629). Here, there would be the danger of an "effectiveness spiral" (*Spitzer* , loc.cit. 635 f mwN).

[173] 4.1 According to the findings, the plaintiff in the present case is affected by the defendant's data processing.

"massively annoyed", but not psychologically impaired. The assessment of the lower courts that this is sufficient to justify a claim for damages does not appear to require correction, but is in line with the requirements of Union law. Contrary to the position of the appeal, the claim for damages is not based on the mere infringement of the law, but on the fact that the plaintiff was

is "massively annoyed", whereby the word "massively" also expresses that there is actually a noticeable and objectively comprehensible immaterial damage. The fact that there is no psychological impairment and no "deep insecurity" does not harm because such circumstances are not required by Art 82 GDPR (see also *Gola/Piltz* in *Gola*, DSGVO² Art 82 Rz 12 f).

[174] With regard to causality, the court of first instance found that the plaintiff is "massively annoyed by the data processing" of the defendant. In this context, the court of first instance also found that the plaintiff is annoyed by the fact that he is informed about part of the data

"has no control because they are not displayed in the tools". This (arg "because") also establishes a clear connection to the non-response to the requests for information. In this context, reference should also be made to Recital 85 of the GDPR, according to which the loss of control over one's own data and the associated restriction of data subjects' rights can constitute non-material damage; precisely this case is also cited in the literature as an example of non-material damages (*Bergt* in *Kühling/Buchner* , DS-GVO/BDSG³ Art 82 DS-GVO Rz 18b f).

[175] 4.3. alsotheamount (vgldazu *Kerschbaumer- Gugu*, Damages for Data Protection-

violations [2019] 60 et seq.) does not raise any concerns at EUR 500. Based on the fact that the plaintiff had no control over his data for a longer period of time due to the fact that the request for information was not completely fulfilled, there is no room for a reduction here. An (even) lower amount would no longer comply with the principle of effectiveness required by Union law. Thus, the claim for damages can be decided independently of the answer to the question whether the processing of the plaintiff's data by the defendant was unlawful due to lack of consent.

[176] VI. result and decision on costs

[177] In summary, the plaintiff's appeal against the confirmation of the dismissal of points 1 to 4 of the plaintiff's claims and the defendant's appeal against the confirmation of the granting of the claim for damages (point II of the first judgement) were not justified. In this respect, therefore, the appeals were to be decided by partial judgment (cf. 6 Ob 35/21x). In all other respects, the proceedings were to be interrupted until the decision of the ECJ on the reference for a preliminary ruling submitted under 6 Ob 159/20f.

[178] The reservation of costs is based on § 52 (4) ZPO.

Supreme Court of
Vienna, on 23 June 2021