Ruling on Case No. 41 O 140/25 ev

Democracy Reporting International gGmbH against X Internet Unlimited Company

Unofficial translation by DRI. Legal terms may not be accurate. Reference made by the Court to case law or academic literature is not included.

Berlin Regional Court II

Case No.: 41 O 140/25 eV

In the Name of the People

JUDGMENT

In the proceedings between:

1) Democracy Reporting International gGmbH, represented by the sole managing directors [redacted]

- Applicant -

2) [Redacted name of researcher]

- Applicant -

Legal representatives for 1 and 2: Law firm KM8, Moosdorfstraße 7-9, 12435 Berlin, File No.: [redacted]

against

X Internet Unlimited Company, represented by its directors [redacted], Ireland

- Respondent -

Legal representatives: White & Case LLP, Bockenheimer Landstraße 20, 60323 Frankfurt, File No.: [redacted]

The Berlin Regional Court II - Civil Chamber 41 - through the Presiding Judge [redacted], Judge [redacted], and Judge [redacted], based on the oral hearing of May 13, 2025, has ruled as follows:

RULING

1. **The preliminary injunction of February 6, 2025 – 41 O 140/25 eV – is revoked** and the application for a declaration that the preliminary injunction proceedings have been settled according to the application of February 4, 2025, is **rejected**.
2. **The applicants must bear the costs of the proceedings**.
3. **The judgment is provisionally enforceable**. The applicants can prevent enforcement by the respondent by providing security of 110% of the amount enforceable under the judgment, unless the respondent provides security of 110% of the respective amount to be enforced before enforcement.

FACTS

The parties disputed or have disputed the granting of unrestricted access to all publicly available data from the respondent's "X" platform, including real-time data, via their online interface for the period from February 4, 2025, to February 25, 2025, and subsequently disputed whether the matter had been settled after this period expired.

Applicant 1 is a non-profit organization headquartered in Berlin dedicated to research and support of democratic governance. It particularly undertakes research projects on elections. Applicant 1 is primarily funded through project-specific and general grants and donations. It has already evaluated existing social media data for research purposes in numerous elections worldwide.

Applicant 2 [details redacted].

The subject of the three-year project is the empirical investigation of political discourse on social media platforms in advance of elections in EU member states and elections to the European Parliament. In 2025, the German federal elections were to be empirically investigated.

The respondent, based in Ireland and a subsidiary of the US company X Corp., operates a real-time communication platform for users living in the European Union, EFTA states, or the United Kingdom ("X platform," formerly known as "Twitter service"). On the X platform, users can inform themselves about all aspects of a topic, discover news, share their views, and participate in public discussions and debates.

Timeline of Events

April 17, 2024: The applicants requested data access from the respondent under Article 40(12) of Regulation (EU) 2022/2065 (Digital Services Act), hereinafter "DSA". After review by the respondent, the respondent requested additional information via email on May 20, 2024.

June 3, 2024: This was provided, after which the respondent requested further clarification regarding the content to be investigated in the research project.

June 24, 2024: The applicants responded via email and announced they would file a DSA complaint if access was not granted by July 1, 2024.

July 5, 2024: The respondent announced review of the application.

November 21, 2024: The applicants inquired whether their application had been rejected.

November 28, 2024: This was confirmed and the reasons for rejection were explained by the respondent via email.

December 13, 2024 and January 9, 2025: A respondent employee, Mr. [redacted], contacted the applicants asking whether his Government Affairs team could support the applicants' activities on the respondent's platform during the 2025 federal election campaign.

January 21, 2025: A phone call occurred with the aforementioned employee, who could not comment on the data access denial.

January 22, 2025: The applicants again filed an application with the respondent on their online form for data access, limited to research on the 2025 federal election, combined with an email requesting a decision by January 27, 2025. This application has been under review by the respondent since January 29, 2025.

January 29, 2025: The applicants also demanded data access from the respondent via legal letter with a deadline until February 3, 2025. This remained unsuccessful.

The applicants are (essentially) of the opinion that the prerequisites for issuing the preliminary injunction were met; in particular, the Berlin Regional Court II was internationally competent under Article 7 No. 2 of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Comment DRI: henceforth cited by its German acronym: EuGVVO*), and there was both a claim for preliminary relief under Article 40(12) DSA for access to publicly available data and grounds for preliminary relief, since urgency in data access claims under Article 40(12) DSA should regularly be affirmed and no self-contradiction existed. Between the application of January 22, 2025, and the application for preliminary injunction on February 4, 2025, not even two weeks passed. In any case, urgency was present here since the intended research into systemic risks in connection with the German federal election on February 23, 2025, would have had to begin before this election, as the research objectives would otherwise be significantly endangered.

The applicants filed an application for preliminary injunction received by the court on February 4, 2025, requesting that the respondent be ordered to grant them immediate

and unrestricted access to all publicly available data from the "X" platform, including real-time data, via their online interface until February 25, 2025.

The chamber then - after transferring the decision to a single judge - issued the requested preliminary injunction on February 6, 2025, ordering:

1. The respondent is ordered to grant applicant 1 and applicant 2 immediate and unrestricted access to all publicly available data from the "X" platform, including real-time data, via their online interface until February 25, 2025.
2. The respondent shall bear the costs of the proceedings.
3. The procedural value is set at €6,000.00.

February 13, 2025: The respondent filed an objection to the preliminary injunction via their legal representatives.

March 14, 2025: The applicants declared the proceedings settled overall and requested that the respondent bear the costs of the litigation. The proceedings had been settled by expiration of time, since the application for data access and the issued preliminary injunction were limited until February 25, 2025.

March 28, 2025: The respondent objected to the settlement declaration.

Current Applications

The applicants now request: Declaration that the preliminary injunction proceedings have been settled in the main matter.

The respondent requests: Rejection of the application with revocation of the preliminary injunction of February 6, 2025.

The respondent challenges the international jurisdiction of Berlin Regional Court II and is of the opinion that the preliminary injunction was issued incorrectly. The right to procedural equality had already been violated by failing to hold a hearing before issuing the preliminary injunction, and there were no grounds for preliminary relief due to lack of urgency. Moreover, there was no claim for preliminary relief, among other reasons because the required delegated legal act of the Commission under Article 40(13) DSA was missing. Furthermore, the requirements of Article 40(12) DSA were not met.

For further details on the facts and dispute, particularly the legal positions represented by the parties, reference is made to the exchanged briefs and submitted attachments. The litigation was taken over by the chamber by resolution of April 1, 2025.

GROUNDS FOR THE DECISION

The applicants' current application seeking declaration that the preliminary injunction proceedings have been settled, which constitutes a permissible application amendment under § 264 No. 2 civil procedure law, is unsuccessful.

Such a declaratory application is only justified when the original application for preliminary injunction was admissible and justified and became inadmissible or unjustified through an event occurring after the case became pending. These prerequisites are not present here. While the court was competent for such an application (1.), the prerequisites for issuing a preliminary injunction were not met because in any case a (required) ground for preliminary relief did not exist (2.), so the issued preliminary injunction was also to be revoked.

1. Jurisdiction

The applicants' request of February 4, 2025, for preliminary injunction was admissible.

Berlin Regional Court II has international jurisdiction under Article 7 No. 2 EuGVVO, since the applicants assert tortious liability within the meaning of the aforementioned article in this court district.

The special jurisdiction under Article 7 No. 2 EuGVVO exists when a tortious act or an act equivalent to a tortious act, or claims from such an act, form the subject of the proceedings. Action can then be brought before the court of the place where the harmful event occurred or threatens to occur. Article 7 No. 2 EuGVVO applies to all types of actions, including performance and declaratory actions, but also actions for injunction of already commenced tortious acts.

The substantive scope of application of tortious acts or acts equivalent to them within the meaning of the provision is opened here. The concept of "tortious act" is autonomous and to be interpreted broadly. According to consistent ECJ case law, the phrase "tortious act or act equivalent to a tortious act, or claims from such an act" in the sense of Article 7 No. 2 EuGVVO refers to every action with which tortious liability of the defendant is to be asserted and which does not connect to a "contract or claims from a contract" in the sense of Article 7 No. 1 lit. a EuGVVO, that is, is not based on a legal obligation that one person voluntarily entered into toward another.

If a plaintiff refers in their complaint to the rules on liability from tortious acts or an act equivalent to tortious acts, that is, to a violation of a legal obligation, and it does not appear essential to examine the content of a contract concluded with the defendant to assess whether the behavior attributed to them is lawful or unlawful, since this obligation of the defendant exists independently of this contract, then a tortious act or an act equivalent to a tortious act, or claims from such an act, form the subject of the action in the sense of Article 7 No. 2 EuGVVO.

The wording of Article 7 No. 2 EuGVVO thus opens a wide scope of application for the jurisdiction, since in addition to tortious acts, acts equivalent to tortious acts are expressly highlighted. Therefore, all (alleged) interferences with subjective rights, legal interests, and asset positions come into consideration, for example also claims for injunction.

These prerequisites are present here. This results both with regard to a potential claim under Article 40(12) DSA (a.) and in view of a demand under Articles 54, 40(12) DSA in conjunction with § 823(2) BGB (b.). The place of damage occurrence or threatened damage occurrence is also located in this court district (c.).

a. DSA Data Access Claim

In the present proceedings, the applicants rely on a claim under Article 40(12) DSA for data access and thus on a legal obligation. It is not a legal obligation voluntarily entered into by the respondent. The content of any contract between the parties is not to be examined, but only the obligation resulting from Article 40(12) DSA for granting data access.

With the claim under Article 40(12) DSA, the applicants also demand - contrary to the respondent's view - "tortious liability" in the sense of Article 7 No. 2 EuGVVO. The claim for data access established in Article 40(12) DSA also contains a significant injunctive aspect. With the assertion of this claim, the cessation of obstruction of access to the data is simultaneously sought.

Originally, only a corresponding obligation of very large online platform providers was proposed to refrain from restrictions and obstructions of access to public data for researchers, which was then merely extended to an action obligation with Article 40(12) DSA. The injunctive dimension is also shown in Recital 98 DSA, according to which providers of very large online platforms must not prevent researchers who meet the criteria from using this data for research purposes when this contributes to detecting, determining, and understanding systemic risks.

Article 40(12) DSA is factually less about an access claim than about a claim for non-prevention of access. The subject of the access claim is thus the obligation of providers not to hinder researchers entitled under Article 40(12) from data use and to enable this for them in real-time where possible. In addition, there is then a subjective right to data access under Article 40(12) DSA.

Here too, the applicants' demand for data access is equally about warding off the alleged attack on the legal order by the respondent, namely the non-compliance with the action obligation under Article 40(12) DSA to immediately grant data access, and thus enforcing non-prevention of access. The non-granting of data access, particularly through the rejection of the applicants' original request by the respondent via email of November

28, 2024, therefore represents from the applicants' perspective an interference with their right to data access.

Between the non-granting of data access, the consequently non-existing access to the desired data as damage, and the assertion of the claim for data access under Article 40(12) DSA, there is a causal relationship. The alleged tortious act of the respondent is thus reacted to with the judicial assertion of the data access claim by way of applying for the preliminary injunction, and tortious liability is asserted to that extent. The respondent should be obligated to grant data access and thus refrain from preventing access.

b. Alternative Legal Basis

Additionally, the assertion of tortious liability can also be based on Articles 40(12) in conjunction with 54 DSA and § 823(2) BGB, so that the scope of application of Article 7 No. 2 EuGVVO is also established in this respect.

Article 54 DSA contains a right to compensation as a secondary claim, according to which damages can be demanded due to violation of due diligence obligations from the DSA by providers of intermediary services. This private law damage claim is an incomplete liability norm that should be applied "in accordance with EU law and national law" according to the wording.

The background is that the DSA establishes special due diligence regulations between intermediary services and users, but does not fully harmonize the underlying legal relationship, but leaves it otherwise untouched; its further design thus results from the national law applicable to the legal relationship otherwise.

While there is usually a contractual legal relationship between users and the intermediary service, this may not be the case individually under applicable law, so that the (user-related) special due diligence obligations of Chapter III of the DSA (Articles 11 ff. DSA) can then cause a special extra-contractual legal relationship to arise, at least for German law.

In addition to the requirements of Article 54 DSA, the requirements of the damage claim norm of the respectively applicable national law must also be used, whereby Article 54 DSA then shares the legal nature of these damage claim norms and represents a contractual, a (quasi-)contractual, or a tortious damage claim depending on the legal relationship between user and intermediary service.

Decisive here are therefore § 823(2) BGB and §§ 280(1), 241 BGB if establishment of a legal relationship by law is assumed. At least § 823(2) BGB is applicable in EU law-compliant interpretation for violation of all obligations of the DSA. The basically required protective law character in the sense of § 823(2) BGB is fulfilled by the due diligence obligations of the DSA when the violated norm serves at least also to protect individuals

or individual groups of persons against violation of a specific legal interest, which is the case here, so that a (tortious) damage claim is present here, so that the applicability of Article 7 No. 2 EuGVVO is opened.

Not directly contained in Article 54 DSA is an injunctive claim. However, Article 54 DSA shows that the DSA does not oppose private law enforcement, so that it corresponds to the spirit of the DSA when injunctive claims in German law are then based on §§ 12, 862, 1004 BGB analogously in conjunction with § 823(2) BGB.

Even in Union damage law there is natural restitution as a legal consequence, which can consist in ordering specific action or omission. By way of natural restitution, the damage claim from Article 54 DSA can also obligate to withdraw a decision or to undertake an action, for example for restoration by reversing a deletion.

The applicants can therefore basically also rely on Article 54 DSA. It must still be noted that the damage claim can only be asserted by users of intermediary services in the sense of Article 3 lit. b DSA when the latter have violated user-related due diligence obligations of the DSA. Not entitled to claims are third parties who do not use the intermediary service to obtain or make accessible information.

User according to Article 3 lit. b DSA is any natural or legal person who uses an intermediary service, particularly to obtain or to make information accesible. Provider and user do not have to be contractually connected and the concept of use as such is conceivably broadly defined; it covers any use of an intermediary service.

Liability ground is then a violation by the intermediary service against the special obligations from the DSA, particularly the due diligence obligations of Chapter III. The damage claim is only applicable to constellations in which the intermediary service violates user-related obligations from the DSA, that is, such due diligence obligations that have been imposed on it specifically toward users.

However, as researchers, the applicants in the present case are also users of intermediary services in the sense of Article 3 lit. b DSA. They want to use the online platform "X" of the respondent specifically to obtain information in order to then be able to examine it. Use should thus occur specifically as users. Moreover, with the violation by the respondent against Article 40(12) DSA in dispute, there is a violation against a special obligation of the DSA that is also user-related in the present case. A violation of the obligation to grant data access toward the applicants affects them as potential users.

Therefore, via Article 54 DSA and § 823(2) BGB as damage claim norm of national law for the legal relationship by law between the parties, the violation of the obligation from Article 40(12) DSA can be used. As legal consequence, natural restitution and thus the ordering of specific action or omission can be demanded here - according to the applicants' view - the granting of data access or the omission of prevention of data

access. The applicants' demand is therefore also based on tortious liability in this respect.

c. Place of Damage

The place of damage or the place of threatened damage is located in this court district. With regard to the possibility of suing at the "place where the harmful event occurred or threatens to occur," both the place of realization of damage success and the place of the occurrence causative for the damage are meant, so that the plaintiff can choose to sue before the court of one of these two places.

The place of realization of damage success is, according to ECJ case law, the place where the alleged damage concretely manifests. Applicant 1 has its headquarters and applicant 2 has his residence in Berlin, as sufficiently demonstrated, so that the place of the harmful event is also located in Berlin. The research project by them is coordinated and conducted in Berlin. Through the non-granting or prevention of data access by the applicants, they cannot conduct their research in Berlin. Thus the damage manifests in this court district.

2. Lack of Grounds for Preliminary Relief

The application of February 4, 2025, for preliminary injunction was not justified.

Upon the respondent's objection, the preliminary injunction of February 6, 2025, was therefore to be revoked and the declaratory application rejected because in any case grounds for preliminary relief in favor of the applicants did not exist. Whether a claim for preliminary relief existed can therefore remain open.

The ground for preliminary relief is the danger immediately threatening the realization and enforcement of rights in the main proceedings. The issuance of a preliminary injunction must be so urgent that without an immediate measure, enforcement of the claim for preliminary relief would be thwarted or significantly impeded. Grounds for preliminary relief only exist when the applicant faces concrete, serious impairment of their legal interests without the requested preliminary regulation, so that waiting for the main matter decision is not reasonable.

A once basically given ground for preliminary relief (urgency) can, however, also lapse again when the applicant waits with an application after occurrence of the endangerment and thus contradicts the ground for preliminary relief through their procedural behavior. It is generally recognized that the necessity (urgency) for a regulatory injunction lapses as a result of self-contradiction through longer "urgency-damaging waiting" with knowledge of all circumstances justifying issuance of the injunction or through failure to pursue the main proceedings.

This is based on the consideration that hesitant application or procedural conduct can indicate that the applicant's interest in a preliminary regulation is not sufficiently great to justify issuing a preliminary injunction. The so-called urgency period is set in motion when the applicant has knowledge of the violating act and the person responsible for it and possesses all information and means of substantiation to be able to apply for issuance of a preliminary injunction with prospect of success.

For determining the time span for self-contradiction, the particularities of the individual case are decisive, considering the difficulty of factual and legal nature. Even if it is not regularly seen as urgency-damaging when the application for preliminary injunction is filed within 6 weeks of gaining knowledge, urgency can be lacking in individual cases when filing an injunction application does not occur within one month after knowledge of the circumstances used for its justification. Regularly, however, no more than one to two months are granted.

Even if there might have basically originally been grounds for preliminary relief here, the applicants contradicted this through too late application for preliminary injunction, so that the required urgency was lacking.

Already in advance of the preliminary injunction proceedings, the application for data access was not pursued with the required urgency. The applicants filed their first application for granting data access under Article 40(12) DSA already on April 17, 2024, with the respondent. Its review was finally announced by the respondent on July 5, 2024. Only four months later, on November 21, 2024, and without having heard anything from the respondent in the meantime, did the applicants then inquire whether the application had been rejected. The rejection of the application was then confirmed to them on November 28, 2024.

Already at this point, the applicants should have become active. Based on the rejection of their application for data access of April 17, 2024, by the respondent on November 28, 2024, they should have promptly filed an application for preliminary injunction with the court and not wait until February 4, 2025, thus longer than two months, with initiating judicial steps. Nevertheless, the applicants waited until January 22, 2025, thus almost two months, to then only file another (restricted) application for data access with the respondent.

Moreover, urgency was justified here primarily by the fact that the intended research into systemic risks in connection with the German federal election on February 23, 2025, should occur and would have had to begin before this election, since the research objectives would otherwise be significantly endangered.

With regard to the federal election, however, it should be noted that the Federal President already set the date for election of the Bundestag to February 23, 2025, with an order on December 27, 2024. That there would be new elections of the Bundestag

was even clear earlier. Thus, (former) Chancellor Scholz already announced in a government statement on November 13, 2024, that he would bring the confidence question on December 11, 2024, so that the Bundestag could decide on December 16, 2024, and thus the new elections could take place on the date agreed by the democratic factions at the end of February, on February 23, 2025.

The urgency and endangerment of enforcement of the claim for data access existed here for the applicants as a result already from knowledge of the new elections of the Bundestag, thus with the government statement on November 13, 2024, the vote of no confidence on December 16, 2024, or at least (at the very latest) with the ordering of the date for new election on December 27, 2024. But even after the election date announcement of December 27, 2024, the applicants did not immediately become judicially active, but only on February 4, 2025.

The applicants had since the rejection of the application and the announcements regarding new election of the Bundestag also knowledge of all circumstances justifying issuance of a preliminary injunction and could thus have applied for it earlier. The waiting until February 4, 2025, was urgency-damaging and indicates that the applicants' interest in a preliminary regulation was not sufficiently great to justify issuing a preliminary injunction.

The renewed application for granting data access with the respondent on January 22, 2025, represented only a specification of the original application and cannot on its own establish new urgency. Thus it states in paragraph 36 of the applicants' application brief of February 4, 2025, itself that the renewed application was limited to research on the 2025 federal election. This already shows that the renewed application represented only a restriction of the original application and, according to the applicants' understanding, should not represent a new application.

The applicants should also not have relied on now having success with this renewed application with the respondent and this even until the federal election in a period of only one month from application, after the procedure according to the original application of April 17, 2024, had already dragged on unsuccessfully for over half a year.

Additionally, even the further application of January 22, 2025, with the respondent was filed almost one month after the election date order of December 27, 2024, and more than two months after the government statement of November 13, 2024. It is not apparent why after rejection of the original application on November 28, 2024, such a long wait occurred with the renewed application against this background.

The contact by the respondent's employee, Mr. [redacted], does not change this, since this apparently had no reference to the application for data access. Therefore this changes nothing with regard to the self-contradiction applying here. He merely offered support for the applicants' activities during the election period on the respondent's

platform. The desired data access was not mentioned and should consequently have been pursued judicially by the applicants due to urgency.

The proceedings were also not to be stayed here under Article 82(3) DSA. According to this, national courts should avoid making decisions that could contradict a decision that the Commission intends to make in proceedings initiated by it under this regulation. For this purpose, they should examine the necessity of staying the proceedings pending before them. An intended decision by the Commission on a potential violation by Twitter International against Article 40(12) DSA has no relevance for these proceedings. A deviation of this judgment from a potential Commission decision in the form of contradictory legal consequences is not to be feared here - since urgency is already lacking here.

PROCEDURAL COSTS

The procedural ancillary decisions are based on §§ 91(1), 708 No. 6, 711 civil procedure (ZPO).

Presiding Judge [redacted]
Judge [redacted]
Judge [redacted]

Berlin Regional Court II
41 O 140/25 eV

Announced on May 13, 2025
JBesch
as Court Clerk

For the correctness of the copy
Berlin, May 23, 2025
JBesch
Court Clerk