

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Protection of economic data

Austrian Constitutional Court
Judgment of 28 November 2001
(Case B2271/00 – VfSlg 16.369/2001)

Circumstances of the case

The Telekom-Control GmbH¹, which is the Austrian regulating authority for phone companies, decided to request from the complaining company some economic data.

The requested data included business details such as trade accounts, profit & loss accounting, information about the staff, transaction volume, number of clients, infrastructure and quality of services. By means of these data the Telekom-Control GmbH could find out facts about the present market situation (dominating company, change of relevant market situation), also if new licenses are to be awarded, withdrawn or canceled and furthermore if there is a need of new universal services. The Telekom-Control GmbH argued that all this information is necessary for fulfilling the regulation aims which are for example the establishment of a fair, non-discriminatory and functional competitive market, the promotion of newcomers at the market, the abidance of the principles of an open network provision and access and the prevention of abuses of power by dominating companies.

The decision of the Telekom-Control GmbH was based on section 83 (2) and (3) Federal Act of Telecommunication (TKG) which states the duty to provide information.

As far as some issues for reaching the regulation aims were subject to the other controlling body, the so-called Telekom-Control-Commission (*Telekom-Control-Kommission*), the decision was based on section 109 TKG. The Telekom-Control GmbH argued to be assigned by the Telekom-Control-Commission to collect for the Commission regularly some data about the Austrian telecommunication market. On this account the Telekom-Control GmbH wanted to build up a "data warehouse" which should be based on a regularly data collection without an own administrative procedure.

1 GmbH (*Gesellschaft mit beschränkter Haftung*) is a limited liability corporation.

Against this decision the claiming company filed a complaint with the Austrian Constitutional Court alleging an infringement of some constitutionally guaranteed rights – among others – also of the right to data protection.

Relevant law at the point of the judgment

Federal Act of Telecommunication (Telekommunikationsgesetz, TKG)

Section 83 (2) TKG determines that telecommunication services companies are obligated to provide information to the supervising Telekom-Control GmbH. According to section 83 (3) TKG the Telekom-Control GmbH is legitimated to make arrangements based on international obligations or national laws which have to be followed by the telecommunication services companies.

Section 109 TKG contains the clause that the Telekom-Control-GmbH is responsible for all issues which are not subject to the Telekom-Control-Kommission.

Section 111 TKG states in a closing enumeration the issues which are alienated to the Telekom-Control-Kommission.

Federal Act concerning the Protection of Personal Data 2000 (FAPPD; *Datenschutzgesetz* 2000)

This Act regulates the right to data privacy. Section 1 has the status of federal constitutional law and states the fundamental right to data protection.

According to section 1 (1) FAPPD everyone has the right to his/her personal data privacy, if he/she had an interest that is worthy of protection. Worth of protection did not exist, if data are generally available or anonymous.

Section 1 (2) FAPPD contains a limitation clause [*Eingriffsvorbehalt*]. Consequently limitations are permitted because of other predominant interests and they must be based on a law which was enacted due to one of the reasons according to Art 8 (2) ECHR. Finally section 1 (2) states the principle of proportionality which means that the concrete interference is only allowed, if it is the most gentle measure to reach the purpose.

Art 8 European Convention on Human Rights (ECHR)

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court's assessment

First of all, according to the permanent jurisdiction of the Austrian Constitutional Court the right to data protection can include personal data

privacy as well as the right to economic data privacy, if the concerning person had an interest which was worthy of being protected (VfSlg 12.228/1989; 12.880/1991). Furthermore in the Court's opinion the collection of economic data is only allowed, if a law grants the information request, if this request is necessary due to one of the reasons in section 1 (2) FAPPD and Art 8 (2) ECHR, if it is limited to its purpose and proportional in a democratic state. Moreover the Austrian Constitutional Court points out that laws which are basis for such interferences have to be formulated with sufficient precision. In the present case the Austrian Constitutional Court states that the complaining company has an interest that is worthy of being protected, because the requested data belongs to the most valuable trade secrets and are cornerstone of entrepreneurial activity.

Regarding the "legal quality" of section 83 TKG, which was used as legal basis for the decision by the Telekom-Control GmbH, the Austrian Constitutional Court arrived at the conclusion that the concerning provision is not formulated with sufficient precision. Referring to the jurisdiction of the European Court of Human Rights the Austrian Constitutional Court assessed that a rule must be foreseeable which means that it must be formulated with sufficient precision to enable any individual to regulate his conduct (EGMR 16.2.2001, Amann, Z 55, ÖJZ 2001/1). In the face of the range of section 83 this provision is not precise enough and it is not foreseeable for everyone under which conditions information about protected data is required to fulfill administrative issues. Consequently such a universal request of economic data which is separated from certain regulatory procedures cannot be based on section 83 TKG.

In regard to the order by the Telekom-Control-Kommission which wanted the Telekom-Control-GmbH to collect dates for the Kommission the Austrian Constitutional Court supposed that the Telekom-Control-GmbH is not allowed to set concrete legal orders against providers of telecommunication services in the name of the Telekom-Control-Kommission. On the one hand this is rooted in the fact that the Telekom-Control-GmbH is only an administrative supporting institution of the Telekom-Control-Kommission and on the other hand section 109 TKG does not grant the Kommission any rights of access to information. There is no efficient legal basis that would be in accordance to section 1 FAPPD.

Thus the decision violated the right to data protection because there was no (precise enough) law that the ruling could have been based on.

Note

The Austrian Constitutional Court commented on the protection of economic data even before the Federal Act concerning the Protection of Personal Data 2000 was enacted. Concerning this matter the first judgment was in 1989, where the Court argued that economic data could be personal data in the sense of section 1 Federal Act concerning the Protection of Personal Data 1978. The argumentation was based on systematical considerations (systematische Überlegungen) and was/still is in accordance with the prevailing doctrine.

Like many other fundamental rights the right to data protection is not an "absolute" right, but is subject to limitations. The right to data protection contains a limitation clause referring to the reasons of Art 8 ECHR. This limitation clause makes high demands on laws which should legitimate interferences. Beside

the preconditions mentioned in section 1 (1) and (2) Act of Federal Act...2000 the Austrian Constitutional Court emphasizes in the present case the importance of the sufficient precision of laws that should become the basis for acceptable interferences. The principle of sufficient precision of laws arises from Article 18 (1) Federal Constitutional Law (B-VG). In the context with the right to data protection a law has to define preconditions and the certain purpose of data collection. Only in accordance with these needs laws will cope the requirements of a high level of protection.

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