

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **Inquiry and publication of individual-related data concerning income by the audit court**

Austrian Constitutional Court  
Judgement from November 11<sup>th</sup>, 2003  
VfSlg. 17.065 – 17.209

#### **Relevant Austrian law**

##### Federal Constitution (*Bundesverfassungsgesetz B-VG*)

Art. 121 and Art 127b B-VG constitute the competence of the Austrian audit court to inspect and control the accounting of the Federation, the federal states, communities, professional representation of interests and other legal entities.

Art. 126a B-VG frames the competence of the Austrian Constitutional Court in cases of disagreement concerning the responsibility of the audit court. The Constitutional Court decides – binding for all relevant legal entities – upon application of the federal government, a federal state government or the audit court.

##### Income Limitation Act ("*Bezügebegrenzungsgesetz*")

The Income Limitation Act limits the income of employees of public institutions. The relevant Section 8 rules that institutions which are subject to the control of the audit court have to transmit information on the income of employees if the income has reached a certain level.

The Federal Act concerning the Protection of Personal Data 2000 (*Datenschutzgesetz*) regulates the right to data privacy. Section 1 has the status of federal constitutional law and states the fundamental right to data privacy also referring to Art. 8 ECHR. Section 4 Federal Act concerning the Protection of Personal Data 2000 provides definitions on relevant terms concerning data privacy.

All Austrian law and rulings of all major Austrian courts can be viewed at <http://www.ris2.bka.gv.at/Judikatur/>, especially the decisions of the Austrian Constitutional Court: <http://www.ris2.bka.gv.at/Vfgh/> (only available in German).

#### **Facts**

The claimant (Austria's audit court) requested to allow inspection on information and data concerning income and pensions (access to checking accounts) from several institutions such as the ORF (Austrian Broadcasting), the Styrian Chamber

of Commerce and the federal state of Lower Austria in order to check and publish these data.

The relevant institutions transmitted data on income of its employees that had previously been anonymous. The Austrian audit court informed these institutions that individual-related data – i.e. name and income – would be needed in order to fulfil their notification requirements. Under reference to Art. 8 ECHR and directive 95/46/EC ("data protection directive") the transmission was denied, and staff of the audit court was barred from access to relevant and individual-related data.

As a consequence the Austrian audit court (claimant) filed a petition at the Constitutional Court in June 2000 with the request to check the legal possibility of the claimant to get access to and to publish individual-related data concerning income, pensions and the relevant checking accounts.

The claimant explained the petition with his comprehensive competence to inspect and control the accounting of such institutions and the connected authorization to get access to all relevant data such as correspondence, checking accounts, contracts, etc. All requested information and individual-related data were definitely necessary to carry out the financial and accounting check up. The audit court is obliged to name (and publish) all recipients of higher incomes and as a consequence all institutions being controlled by the audit court have to transmit the relevant individual-related data.

The parties of proceedings concerning disagreements of the audit court at the Austrian Constitutional Court were the claimant – i.e. the audit court –, the Austrian Federal Government and the opponent legal entity of the disagreement (Section 36c Constitutional Court Act). The parties have the right to exhibit a statement in written form declaring their position in the proceedings. The ORF and the Federal Government made a statement; the Federal Government proposing to obtain a preliminary ruling of the European Court of Justice (ECJ).

The Constitutional Court followed this proposal and filed a request for a preliminary ruling and asked whether European (data protection) regulations are opposed to national regulations stating an obligation to transmit and publish individual related data concerning income and if there were opposing rules whether they are directly applicable. The ECJ ruled (C-465/00) that Art. 6 and 7 of the (data protection) directive 95/46/EC are not opposed to the relevant national regulations if the data (name, income) are used adequately to control the proper usage and administration of public funds and that these Articles are directly applicable in the sense that an individual can refer to them in a national court procedure.

### **Assessment and ruling of the Austrian Constitutional Court**

After having received the preliminary ruling of the ECJ the Austrian Constitutional Court assessed that the petition filed by the audit court was admissible and the Court was competent to decide on the relevant disagreement.

Individuals receiving revenues from two or more institutions being subject to control of the audit court have to inform these institutions. All institutions being subject to control of the audit court have to provide the audit court with information on revenues exceeding a certain limit. If this information is refused

the audit court has to get access to records containing these data. The audit court has to sum up and publish these data in an "income report" (*Einkommensbericht*) – giving information (name, income) on individuals having an income over this limit.

Following the ECJ and by interpreting the relevant rule the Court assessed that an enumeration of incomes in the income report of the audit court without attribution to their recipients would not have the necessary information value for the parliament or the public. The refusal of the ORF to transmit the requested data and the offer to give the relevant information just under the condition that it would not be published was not justifiable. The institutions being controlled by the audit court have to transmit the requested (individual related) data regardless of otherwise existing obligations of secrecy. This does not lead to a comprehensive duty to furnish information but the audit court has to maintain a consideration of interests between interests of data privacy and public interest to publish the results of the auditing.

Section 1 Federal Act concerning the Protection of Personal Data 2000 has the status of federal constitutional law and states the fundamental right to data privacy also referring to Art 8 ECHR. According to Section 1 (1) and Art 8 ECHR everybody has the right to secrecy of all relevant individual-related data as far as they concern "interests worth being protected" – i.e. especially individual-related data regarding the right to respect for private and family life. The restriction of this fundamental right by state authorities is only acceptable on the basis of a legal Act which describes the possibilities of restriction accurately, precisely and completely. The mode and extent of the administrative interference must be clearly noticeable from the particular legal Act.

Summing up the Constitutional Court ruled that the ORF wrongly refused to transmit data to enable the audit court to fulfil its duties to inspect and control the accounting ("*Gebärungsprüfung*") of the ORF whereas the request to obtain data for the purposes of Section 8 Income Limitation Act ("*Bezügebegrenzungsgesetz*") was dismissed. This clause states the right of the audit court to publish individual related income data of institutions being controlled by the audit court. According to EC law this rule is only applicable if the publication of individual related data such as name and income is necessary and appropriate to control the correct usage of public funds. These criteria had to be denied. Although knowledge of cost structures (e.g. personnel costs) of institutions is an important element in order to fulfil auditing tasks the audit court has to respect data protection rules (Section 1 Federal Act concerning the Protection of Personal Data 2000) and trade secrets which may lead to an obligation to make individual-related data anonymous (see also VfSlg. 15.130/1998). The Constitutional Court assessed that the additional publication of incomes and their recipients as required in Section 8 Income Limitation Act was not necessary and appropriate: The publication of names and incomes is a severe intervention to the rights guaranteed by Art. 8 ECHR. There is no necessity or appropriateness for such measures especially because there is no listing of the (names of the) institutions granting the published incomes but only the names of the recipients and because the publication does not show any differentiation of the incomes according to the personal and familial situations of the recipients. Furthermore the goal to ensure the efficient usage of public funds can already be reached by the general control

of the accounting ("*Gebahrungskontrolle*") so that there is no need for further measures.

In the opinion of the Court it can be concluded that the results of the general control of the accounting ("*Gebahrungskontrolle*") give sufficient information on the efficient usage of public funds so that the publication of names and income is neither necessary nor appropriate as required by the ECJ. The regulations of the data protection directive 95/46/EC are directly applicable and are opposing to the rule of Section 8 Income Limitation Act which would make a publication of names and income possible and legal. The Constitutional Court has to accept the priority of EC law over national law and, therefore, had to reject the application of the audit court.

### Future projects

The data protection problem if and under which conditions individual-related data concerning name and income related data may be published was recently topic of an opinion of Advocate General Juliane Kokott as part of a preliminary ruling procedure at the ECJ (ECJ C-73/07). The questions posed by a Finnish court related to the application area of the data protection directive 95/46/EC concerning individual related data in income and tax matters.

In her opinion from May 8<sup>th</sup> 2008 Advocate General *Juliane Kokott* proposed that a task has to be qualified as the processing of personal data in the sense of Art. 3 directive 95/46/EC if the data of individuals concerning their income and capital

- are being detected on the basis of public documents of state authorities and processed in order to being published,
- are published in a print product sorted alphabetically and by income,
- are circulated on a CD-Rom in order to use them commercially or
- are used by mobile network operators for a short message service (SMS) program.

Furthermore she stated that the qualification of data as private data or as data of a public nature lies within the competence of national authorities. Income and tax related data should be transmittable (and published) if this is necessary in order to reach a superordinated goal – such as the control of public funds. Even the ECHR does not qualify tax related data as compulsory private data in the sense of Art. 8 ECHR.

With this opinion the operating range of national authorities concerning the treatment of income related (individual) data is definitely widened; especially when there is a public interest in publishing these data to grant transparency e.g. to give an audit court (and simultaneously the public) the possibility of controlling income and tax matters of relevant institutions.

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