

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **The Protection of Personal Data by the Austrian Constitutional Court**

The protection of personal data by law has a rather long tradition in Austria. Soon after some German federal states implemented the first data protection laws of the world, Austria followed suit in 1978 with its Federal Act concerning the Protection of Personal Data<sup>1</sup>. Part of this Act was a constitutional amendment guaranteeing the right to secrecy of personal information. Thus, years before the German Federal Constitutional Court established a "Right to informational self-determination" in 1983<sup>2</sup>, the Austrian citizens had an explicit constitutional right to data protection. As the Austrian Constitutional Court is empowered to scrutinize the constitutionality of laws and acts of authorities and to rescind unconstitutional acts, the right to data protection has been subject to the Constitutional Court's jurisdiction from that moment on. The right to data protection has to be respected by citizens as well as by the state. Nevertheless, citizens violating the fundamental right may not be sued at the Constitutional Court but before the civil courts.

The adoption of Directive 95/46/EC on the protection of personal data<sup>3</sup> in 1995 obliged the Austrian legislator to adapt the national provisions according to the European law, which resulted in the revision of the Federal Act concerning the Protection of Personal Data in 2000<sup>4</sup>, consisting of constitutional provisions concerning the right to data protection and further non-constitutional provisions concerning the processing and sharing of personal data. Furthermore, many Acts related to data protection, which regulate matters for which the processing of personal data is a necessity, have been amended or supplemented with data protection provisions since then.

Even though structure and substance of the national Data Protection Act complies in most aspects with the European directive and most of the non-constitutional provisions respect the constitutional requirements arising from the constitutional right to data protection, there were and still are some deviations. There are different ways the Constitutional Court has to deal with these

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1 Federal Law Gazette No. 565/1978.

2 "Volkszählungsurteil" BVerfGE 65, 1.

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Union of October 25, 1995, Vol. L 281, pp 31-50.

4 Federal Law Gazette No. 165/1999.

deviations. Whenever there is room to interpret the apparently deviating legal regulation in a way it complies with the constitutional and European law, this interpretation is mandatory. In the same way apparently deviating constitutional provisions have to be interpreted in a manner complying with European law. If a national provision of law violates the right to data protection and therefore the Constitution, the Constitutional Court has to rescind it,<sup>5</sup> while he simply has to ignore the national (legal or constitutional) provision that discounts European law and apply the European provision instead.<sup>6</sup>

According to the Austrian Constitution the right to data protection implies four guarantees. Core of the provision is the right to confidentiality according to which everybody shall have the right to confidentiality for the personal data concerning him or her, especially with regard to his or her private life.<sup>7</sup> This fundamental right guarantees that in principle no personal information may be processed. Thereby not only personal information of natural persons is protected but data of legal entities such as certain corporations as well. To safeguard the right to confidentiality, everyone shall furthermore have the right to obtain information on the following: the identity of the processor, the kind of data, where the data originated, for which purpose they are used, as well as to whom the data are transmitted and the right to rectification of incorrect and to erasure of illegally processed data<sup>8</sup>. These two aspects of the right to data protection are guaranteed only concerning data destined for automatic processing or for processing in filing systems and can only be asserted in the way provided by law. Such law cannot derogate the scope of the constitutional guarantees but only provide for procedural regulations concerning the assertion of the right.

Evidently these comprehensive rights cannot be guaranteed in an absolute manner. Interferences with the fundamental right may be constitutionally justified if the use of the data is in the vital interest of the data subject, with his or her consent or to safeguard overriding the legitimate interests of another.<sup>9</sup> An interference with the right by an authority can only be justified if it is permitted by laws necessary for the reasons stated in Art. 8 para. 2 of the European Convention on Human Rights<sup>10</sup>. Such law has to determine precisely under which

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5 Same applies to a national provision that violates both Constitutional and European Law.

6 Like the Constitutional Court other Courts and Authorities are obliged not to apply a national provision that is inconsistent with a European provision. Therefore the review of a provision by Constitutional Court may not be admissible, in case the actual application of a provision in a pending case is a precondition for the Constitutional Court's competence to review this provision ("concrete judicial review"); See *Faber*, The Austrian Constitutional Court – An Overview, ICL-J 2008, 49 (50).

7 Art 1 para. 1 of the Federal Act concerning the Protection of Personal Data.

8 Art 1 para. 3 No. 1 and 2 of the Federal Act concerning the Protection of Personal Data.

9 See Art 1 para 2 of the Federal Act concerning the Protection of Personal Data.

10 These reasons are 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 such as the freedom of expression or the freedom of science and arts. A recent example for restrictions in the interest of national security and public safety is the planned introduction of online surveillance measures in the fight against organised crime and terrorism.

circumstances an authority may process what kind of data.<sup>11</sup> A provision that authorises the authority to use any data necessary for the fulfilment of its duties would not define the power of the authority in an adequate manner and would therefore not be a sufficient basis for the justification of interference. Furthermore these justifying laws have to fulfil the proportionality test which means that the processing of data must not only suit to pursue the public interest in question, it must also be the mildest of all possible means and methods in regard to the fundamental right position of the data subject and the benefits justify interfering with the exercise of the right have to be significant.

The following four examples of recent decisions of the Constitutional Court provide a deeper insight into the Court's application of the guarantees and principles outlined in this brief introduction.

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11 *Bauer*, Section Control, ICL-J 2007, 57 (62).