

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Section Control – no violation of right to data privacy by automatic speed measuring systems of road traffic

Austrian Constitutional Court
Judgement from June 15th, 2007
(G 147, 148/06-15, G 166/06-18, G 167/06-13, G 168/06-13)

The Circumstances of the case

The claimant appealed against an administrative penalty because of an excess of a regulated speed limit measured by an automatic speed measuring system ("Section Control") on a highway in Vienna. "Section control" means an automatic measuring system that controls and detects the compliance with mandatory speed limits not just at a special measuring point but along a certain stretch of way. Therefore there are checkpoints at the beginning and the end of the supervised distance which are equipped with digital cameras, light sensors, flash guns and laser scanners. When entering the controlled section the vehicle is being registered and the data and exact time are transferred to a computer.

This procedure is repeated when leaving the section and all filed data are verified according to the time of entrance and exit. When the computer calculates a total time exceeding the defined minimum time all data are deleted from the computer. When the calculated time falls below the minimum time – in case of an exceeding of the speed limit – the relevant data (pictures of the vehicle from behind, license plate, calculated time) is transferred to the responsible administrative penalty authority to start an administrative penalty procedure.

The responsible Independent Administrative Tribunal Vienna (Unabhängiger Verwaltungssenat) rejected the appeal and as a consequence the claimant filed a complaint at the Austrian Constitutional Court. Furthermore the Independent Administrative Senate Vienna made a motion itself to repeal the relevant section of the Road Traffic Act.

When handling the complaint there were rising concerns at the Austrian Constitutional Court whether section 100 (5b) of the Road Traffic Act was compatible with the constitution and the Court started a judicial review of its own motion of the constitutionality of the relevant section in June 2006 and combined

all concerned actions of the claimant and the Independent Administrative Senate to one hearing and ruling.

When applying the relevant law (Section 134 (3b) Motor Act 1967 and Section 100 (5b) Road Traffic Act 1960) it seems possible to detect, save and use the data of every vehicle passing the supervised stretch of way without consideration whether the measured vehicle exceeded the speed limit or not. When combining these Sections with other regulations concerning information on the driver of the vehicle (Section 103 (2) Motor Act 1967) it is also possible to determine the driver of a particular vehicle.

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.

Furthermore it seemed not clear how to understand the legal term "certain stretch of way" in Section 100 (5b) Road Traffic Act 1960. As from the existing regulations it can not be concluded which concrete criteria (location, length, ...) have to be fulfilled by such a "certain stretch of way".

The Austrian Constitutional Court had serious doubts whether there was a legal basis regulating in which situations and under what circumstances it is allowed to detect data using an automatic measuring system. The regulation checked on its constitutionality (Section 100 (5b) Road Traffic Act 1960) seemed to allow the detection, storage and processing of all highway users independent from an administrative infringement.

The parties of proceedings concerning judicial review of the Austrian Constitutional Court on its own motion are the Austrian Federal Government or a Land Government (Section 63 Constitutional Court Act). The parties have the right to exhibit a statement in written form declaring their position in the proceedings. Being responsible for the checked Section of the Road Traffic Act the Federal Government made a statement declaring that the detected data was digital, encoded and showed no direct individual-relation because the digital picture of the vehicle was only a shot from behind so that the actual driver was not cognizable. The individual relation is only established by the administrative penalty authority when connecting the transferred data to a vehicle registration database so that this process is not any more part of the automatic speed measuring system "Section Control".

Regarding the legal term "certain stretch of way" it was stated that it was not concretised and not connected to special criteria intentionally because such narrowing would not be reasonable. The word choice means a distance being determined by an initial point and an endpoint to calculate the average speed along this "certain stretch of way".

Relevant Austrian Law

Motor Act 1967 (Kraftfahrgesetz)

Section 134 (3b) allows the usage of automatic speed measuring systems to measure and detect an excess of a regulated limit speed on a certain stretch of way.

Road Traffic Act 1960 (Straßenverkehrsordnung)

The relevant paragraph that was checked on its constitutionality by the Austrian Constitutional Court is Section 100 (5b) and reads as follows: "When the detection of an excess of a regulated limit speed is based on an automatic speed measuring system which measures the average driving speed of a vehicle on a certain stretch of way, this measuring distance is the relevant place of the violation of law."

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.ris.bka.gv.at/auswahl/>, especially the decisions of the Austrian Constitutional Court: <http://www.ris.bka.gv.at/vfgh> (only available in German).

The Court's Assessment

The Court assessed that Section 100 (5b) Road Traffic Act 1960 is the legal basis for the compilation of individual-related data as defined in the Federal Act concerning the Protection of Personal Data 2000 (Section 4) with an automatic speed measuring system. In the opinion of the Court it can be disregarded whether parts of the compiled data are not individual-related data because the used "Section Control" system definitely also detects individual-related data.

According to continuous holdings of the Austrian Constitutional Court (e.g. VfSlg. 16.369/2001) the detection, compilation and usage of individual-related data by state authorities is only permitted when there is a legal basis being adequately precise and concrete as of the criteria of individual-related data detection. Unlike the Court's opinion before the hearing whereby the existing legal basis for the data compilation was not sufficient, a detailed constitutional check-up shows that the synopsis of road traffic acts and general principles of the usage of data allow an interpretation compatible with the Austrian Constitution (Bundes-Verfassungsgesetz, B-VG) resulting in a regulation being accurately precise and concrete.

The automatic speed measuring system as provided by Section 100 (5b) Road Traffic Act 1960 serves as an instrument to detect the exceeding of a defined speed limit by measuring the average speed on a certain stretch of way.

This action is part of the supervision of compliance with road traffic acts. Thereby it is a method of "road traffic police" on highways according to Section 94b (1) Road Traffic Act 1960 and results into a special competence of the Federal Minister for Traffic (www.bmvit.gv.at) who has to approve every automatic speed measuring system by enacting an ordinance/regulation. Such ordinances do not yet exist for any of the several "Section Control" systems on Austrian highways. Without these special regulations of the Federal Ministry for Traffic an automatic speed measuring system on highways is unlawful.

In the opinion of the Court it can be concluded from the regulations of the Federal Act concerning the Protection of Personal Data 2000 (Section 7) that individual-related data detected by an automatic speed measuring system are only allowed to be stored and used in case of an excess of the speed limit – i.e. all data that do not lead to the proof of a violation of the law (speed limit) have to be deleted immediately. The legal problem posed by the allowed space of time to save and store data detected by a "Section Control" system can be solved by applying the basic principle of proportionality: The responsible authority is allowed to save the detected individual-related data for the period of time needed to determine an excess of the speed limit and to enforce an administrative penalty procedure.

Unlike an earlier presumption the Court is of the opinion that the term "certain stretch of way" can be interpreted in a way compatible with the constitution. Section 100 (5b) Road Traffic Act 1960 definitely does not allow the supervision of highways all over the country. The basis for a "Section Control" system on a certain stretch of way has to be a formal declaration that the supervision and control of the speed limit is especially necessary to face particular dangerous situations such as tunnels or construction sites. To cope with the principles of the Federal Act concerning the Protection of Personal Data 2000 this formal declaration has to contain regional (and possibly temporal) limits and has to be announced in form of an ordinance by the responsible authority – i.e. the Minister for Traffic.

Furthermore the Court ruled that – facing the affected fundamental right to data privacy – an appropriate system of legal protection can only be guaranteed if the ruling of individual-related data detection by an automatic speed measuring system for a certain stretch of way is carried out by an ordinance of the responsible Minister for Traffic.

Opinion

The argument of the Austrian Constitutional Court that the particular automatic speed measuring system ("Section Control") can be and has to be interpreted in a way compatible with federal constitutional law on the legal basis of the implementation of an ordinance by the responsible Minister for Traffic gives a coherent but rather formalistic and "technical" answer to the substantial legal question concerning data privacy and road traffic supervision. When taking a general view at the decision it seems almost like the Court tries to get around this particular issue of data detection by automatic systems. There is only little

detailed reconditioning under constitutional law of the problems concerning the interference and restriction of the fundamental right to data privacy especially relating to the necessity of a concrete and precise legal basis for the detection of individual-related data. The relevant reasons in the ruling of the Court are phrased rather general (e.g. "[...] the synopsis of the road traffic acts in combination with the principles of the usage of data shows a sufficiently precise regulation [...]"). The tensed relation between the fundamental right to data privacy and data detection by automatic systems is a thrilling legal question not just concerning road traffic supervision but having an enormous impact legally as well as pertaining to legal policy.

Some might have expected a more detailed analysis of the required specifications to a legal authorisation to restrict the fundamental right to data privacy. Is it really sufficiently precise to gain the relevant criteria for such a legal basis out of a synopsis of road traffic acts and the principles of data protection? Shouldn't there exist one specific legal Act containing all requirements to enact a "Section Control" system touching and restricting individual-related data? As of my opinion it would be a legally more satisfying solution to have an explicit legal basis regulating the supervision of road traffic with automatic systems precisely stating the criteria for individual-related data detection and not having to gain these requirements out of general road traffic regulations and principles of data usage.

Furthermore it could be discussed whether the constitutional interpretation is as clear and without ambiguity as stated by the Court. Is it really possible to interpret the restriction of individual-related data according to the principle of proportionality and the phrase "certain stretch of way" as constitutional? Shouldn't there be further discussion whether there could be constitutional problems concerning the principle of proportionality as well as the rather ambiguous and undetermined wording of "certain stretch of way"? Referring to the essay of *Kunnert* ("Die abschnittsbezogene Geschwindigkeitsüberwachung (Section Control) aus datenschutzrechtlicher Sicht, Zeitschrift für Verkehrsrecht (Austrian Journal on Traffic Law) 2006, 78 (84ff)") the detection of individual-related data is not essential for an automatic speed measuring system (cp. radar control) so that it seems not that understood that the constitutionally relevant principle of proportionality is kept in the case of "Section Control" systems.

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