

VERWALTUNGSGERICHTSHOF
PRÄSIDIUM

I.

ANSWERS TO GENERAL QUESTIONS CONCERNING THE INCORPORATION
("TRANSPOSITION") OF EU DIRECTIVES INTO AUSTRIAN LAW WITH
SPECIAL REFERENCE TO THE DIRECTIVES ON THE MUTUAL RECOGNITION
OF DIPLOMAS, EXAMINATION CERTIFICATES AND OTHER CERTIFICATES OF
PROFESSIONAL QUALIFICATION

1. Transposition procedures

- a) Austria is a State governed by the rule of law where any executive act must be based on law. Legislative enactments are therefore the first choice where EU directives have to be incorporated into Austrian law. Transposition by executive regulation (ordinance, decree) is licit where such a regulation has a basis in appropriate legislation. Thus the directive on the recognition of diplomas in the field of agriculture (85/384/EWG) was transposed by a "Regulation concerning Architects in the EEA" which was issued under powers conferred by the Austrian "Civil Engineers Act".

Moreover, Austria is a federal state where legislation is divided between the Federation and the constituent states (Länder) according to the subject matter in question. Hence directives have to be transposed either by federal or by Länder legislation (and the executive regulations based on such laws) depending on which entity is competent to deal with the matter concerned. Where a EU directive affects the spheres of both the Federation and the Länder, it has to be incorporated by appropriate federal as well as Länder legislation. Hence the EU directive on the recognition of professional qualifications (92/51/EWG) was transposed by a

federal law for foresters and by acts of the Länder parliaments for kindergarten teachers and educational supervisors employed by boarding schools and similar institutions.

- (b) The Administrative Court is not involved in the procedure by which directives are incorporated into Austrian law.
- (c) Where national rules already exist in a specific sphere and Where EU directives leave same scope of independent action to national authorities, Austria will try to incorporate the directives in such a way as to ensure that they harmonise as far as possible with the existing set of rules. Thus Austria has attempted to keep the changes to national education programmes required by the EU directives on recognition as far as possible in conformity with the existing system of provisions on curricula, teaching methods and examinations.

Literal reproduction of the text of a directive will chiefly be found in cases where the directive leaves little scope for variation to member countries, such as the rules making it obligatory to recognise foreign diplomas. Thus the enumeration of the diplomas for midwives of various member countries which directive RL 80/154/EWG made it mandatory to recognise was literally written into the Austrian executive regulation on midwives from EEA countries. Sometimes there a simple reference to the relevant provisions of the EU directive is inserted, as in the EEA regulation on architects which requires the beneficiary to "show a diploma, examination certificate or other proof of professional qualification referred to in directive 85/384/EWG".

2. Legal effects of a directive

(a) Before transposition

The Austrian Administrative Court recently made it clear (No. 95/10/0108, 23 Oct. 1995) that the rules laid down in a directive have a significance even before the time allowed for their formal incorporation into Austrian law runs out, in that the national provisions applicable to the case in question should be interpreted in accordance with the spirit of the EU directive. But where the wording and meaning of a national rule is clear, it is not permitted to turn it into its contrary by this kind of interpretation.

(b) After transposition

- According to a recent decision of the Austrian Constitutional Court (V 136/94-10, 12 Dec. 1995), national legal provisions enacted to incorporate a EU directive should be interpreted in conformity with the directive, "making full use of the judicial scope for assessment", even where an historic interpretation of the legal rule concerned clearly argues against doing so. What is not yet clear is how to distinguish between interpretation in conformity with the directive and a case where the EU directives has not been "transposed" as it should have been. The Administrative Court has already recognised the "conforming" interpretation of national law in two of its decisions (No. 95/10/0108, 23 Oct. 1995; No. 95/19/0081, 23 Oct. 1995). According to the Administrative Court, the admissibility of conforming interpretation is only dependent on the scope which national rules on interpretation allow to the national authorities.

- By becoming a member of the EU, Austria has accepted the "acquis communautaire" which includes the case-law of the European Court. According to the Court's case-law, the national courts must examine the national law applicable by them to see whether it conforms to Community rules, and where a conflict arises, they must ignore the national rules - if necessary after asking for a preliminary ruling. It may be noted in this context that Austrian courts have so far instituted two proceedings for preliminary rulings, although neither of them concerns the interpretation or validity of a EU directive.

(c) Failure to incorporate a EU directive or defective incorporation

- According to the case-law of the European Court, persons subject to a State's jurisdiction may rely, vis-à-vis that State, on the direct effect of sufficiently precise and absolute provisions in a EU directive. On the other hand, the European Court believes that a directive cannot establish any claims between persons subject to a State's jurisdiction. As part of the "acquis communautaire", this case-law is binding on Austria, although it is not yet possible to make any statement on how Austrian authorities are applying it in practice.
- It has already been mentioned that the Austrian Constitutional Court in a recent decision has provided a very generous "conforming" interpretation of national law. It remains to be seen whether and how far other courts will follow this example. Should this be the case, then "interpretation in conformity with EU directives" could establish itself as a new and particularly important criterium in construing national law, although the queries mentioned earlier as to the distinction between conforming

interpretation and deficient incorporation or "transposition" into national law still await clarification.

According to the European Court's case-law, a member State is liable to persons subject to its jurisdiction for its failure to incorporate a EU directive into national law. Again this case-law is part of the "acquis communautaire" accepted by Austria. It may be mentioned in this context that several civil actions for damages relying on this case-law have been brought in Austrian courts, under Austrian statutory provisions on the liability of public authorities, on the ground of belated "transposition" of the directive on package tours (90/314/EWG).

VERWALTUNGSGERICHTSHOF
PRÄSIDIUM

II

ANSWERS TO THE QUESTIONS CONCERNING EU DIRECTIVE 95/46/EG FOR
THE PROTECTION OF NATURAL PERSONS IN THE PROCESSING OF PERSONAL
DATA AND FOR FREE DATA EXCHANGES

Before we go into the specific questions, we have to mention that a debate is currently in progress on how and to what extent of the incorporation or "transposition" of this EU directive into Austrian law should be effected. The answers below are therefore of a provisional nature.

1. Procedure of transposition

- The confidentiality of personal data is protected by a fundamental human right of constitutional status in Austria. This provision does not have to be amended to adopt the EU directive. The protection of data processed by automatic methods is specifically regulated, in addition to the fundamental right, by the provisions of the Data Protection Act, a "simple" law which does not have constitutional status and whose provisions will have to be amended to some extent to "transpose" the EU directive.
- The Constitutional Court and Administrative Court are not involved in the procedures to incorporate the directive into Austrian law.

2. Substance of the measures that have to be taken to "transpose" the directive

- The Data Protection Act provides that a special permit must be obtained for the international exchange of data. In respect of data concerning natural persons, this requirement has to be abolished for exchanges of data within the EU.
- Austria assumes that the definitions in the Data Protection Act are identical, at least in substance, with those in the EU directive. Currently there are discussions in progress with the Commission on the extent to which the directive's terminology has to be taken over literally into Austrian law.
- In Austria, only the fundamental right to data protection applies to data transactions not supported by automation, whereas the other "simple" statutory provisions of the Act do not apply. But the types of processing mentioned in Art. 3 para. 2 of the directive are exempt from the scope of application of the Data Protection Act only in regard to very specific issues, such as registration. There are also some special provisions on data protection in the sphere of police activities.
- The principles enunciated in Art. 6 of the directive are already mandatory in Austria under several provisions of the Data Protection Act.
- The Data Protection Act permits no processing in cases other than those mentioned in Art. 7 of the directive. How far the incorporation of Art. 7 of the directive will require linguistic adaptations is still under discussion.
- The Data Protection Act contains no explicit enumeration of types of sensitive data, but the whole Act is based on the concept of the "worthiness of protection" of personal data,

which implies that data of a sensitive nature must be specially protected. Whether proper incorporation of the EU directive will require that the enumeration of sensitive data contained in the directive be written into Austrian law is a question not yet finally clarified at present.

- Austrian law does not provide for national identification numbers.
- The Data Protection Act contains a "media privilege" under which media, as far as their journalistic activities are concerned, are largely exempt from the Act's provisions.
- The Data Protection Act does not stipulate an obligation of the person who commissions the collection of personal data to inform the person concerned.
- Neither does the Data Protection Act stipulate an obligation to inform the person concerned where the data have not been obtained from him or her.
- An exemption of data processing for statistical purposes exists under the Data Protection Act only inasmuch as the transmission of data from the "public sector" (institutions established by law) to the Central Statistical Office is always permitted.
- Fundamentally the right to get an answer to enquiries stipulated by the Data Protection Act is the same as that stipulated by the directive. Only access to information about the "logical structure of automated processing" as required by Art. 12 (a) of the directive is not stipulated by the Act.
- Not all exceptions allowed by Art. 13 of the directive are contained in the Data Protection Act. Thus, Austria being a new member of the EU, the exception protecting important economic

or financial interests of a member country or of the European Union as a whole is not explicitly provided for by the Austrian Act.

- There is no general right to lodge objections in Austria as available under Art. 14 of the directive, but there is a right to forbid the commercial transmission of certain data (direct marketing).
- The Data Protection Act does not contain an explicit provision on automated individual decisions as does Art. 15 of the directive.
- The Data Protection Act contains rules on data security and confidentiality which roughly correspond to those set out in the directive.
- The Data Protection Act stipulates a general obligation to report automated data processing activities, unless they serve purely private purposes, to the central Data Processing Register. Like the directive, the Act makes provision for appropriate simplifications (standard data processing operations to be defined by executive regulation).
- The Data Protection Act does not provide for preliminary controls on the lines of Art. 20 of the directive.
- The Data Processing Act contains a provision to the effect that anybody may see the Data Processing Register.
- Where the provisions of the Data Protection Act are violated, there lies a complaint to the Data Protection Commission (an autonomous administrative authority) in the public sector; in

the private sector, a civil action can be instituted in the appropriate courts.

- Under Austrian law, claims for material damage caused by violations of data protection provisions can be prosecuted by a civil action in the appropriate courts.
- violations of the Data Protection Act may carry administrative fines of up to 150,000 Austrian schillings or criminal sentences of up to one year in prison.
- There is no statutory obligation in Austria to elaborate codes of conduct in the field of data protection.
- The Data Protection Commission is a tribunal within the meaning of Art.6 of the European Convention of Human Rights. The Commission hears complaints of persons about violations of the Data Protection Act in the public sector. In the private sector, breaches of the Act may be prosecuted in the country's independent court system. However, for legal protection in this field to conform in every respect to the directive, it would be advisable to add more powers to inspect and review data files, especially in the private sector.

Generally speaking, Austria has traditionally had a relatively high level of data protection. Hence the adaptations necessary to embody the EU directive in Austrian law will not be too extensive.