

JUDGMENT OF THE COURT

20 May 2003 *

In Joined Cases C-465/00, C-138/01 and C-139/01,

REFERENCES to the Court under Article 234 EC by the Verfassungsgerichtshof (C-465/00) and the Oberster Gerichtshof (C-138/01 and C-139/01) (Austria) for preliminary rulings in the proceedings pending before those courts between

Rechnungshof (C-465/00)

and

Österreichischer Rundfunk,

Wirtschaftskammer Steiermark,

Marktgemeinde Kaltenleutgeben,

Land Niederösterreich,

Österreichische Nationalbank,

* Language of the case: German.

Stadt Wiener Neustadt,
Austrian Airlines, Österreichische Luftverkehrs-AG,

and between

Christa Neukomm (C-138/01),

Joseph Lauermann (C-139/01)

and

Österreichischer Rundfunk,

on the interpretation of 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 (OJ 1995 L 281, p. 31),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Rechnungshof, by F. Fiedler, acting as Agent (C-465/00),
- Österreichischer Rundfunk, by P. Zöchbauer, Rechtsanwalt (C-465/00),
- Wirtschaftskammer Steiermark, by P. Mühlbacher and B. Rupp, acting as Agents (C-465/00),
- Marktgemeinde Kaltenleutgeben, by F. Nistelberger, Rechtsanwalt (C-465/00),
- Land Niederösterreich, by E. Pröll, C. Kleiser and L. Staudigl, acting as Agents (C-465/00),
- Österreichische Nationalbank, by K. Liebscher and G. Tumpel-Gugerell, acting as Agents (C-465/00),

- Stadt Wiener Neustadt, by H. Linhart, acting as Agent (C-465/00),
- Austrian Airlines, Österreichische Luftverkehrs-AG, by H. Jarolim, Rechtsanwalt (C-465/00),
- the Austrian Government, by H. Dossi, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the Danish Government, by J. Molde, acting as Agent (C-465/00),
- the Italian Government, by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato (C-465/00), and O. Fiumara, avvocato generale dello Stato (C-138/01 and C-139/01),
- the Netherlands Government, by H.G. Sevenster, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the Finnish Government, by E. Bygglin, acting as Agent (C-465/00),
- the Swedish Government, by A. Kruse, acting as Agent (C-465/00, C-138/01 and C-139/01),

- the United Kingdom Government, by R. Magrill, acting as Agent, and J. Coppel, Barrister (C-465/00, C-138/01 and C-139/01),

- the Commission of the European Communities, by U. Wölker and X. Lewis, acting as Agents (C-465/00, C-138/01 and C-139/01),

having regard to the Report for the Hearing,

after hearing the oral observations of Marktgemeinde Kaltenleutgeben, represented by F. Nistelberger; Land Niederösterreich, represented by C. Kleiser; Österreichische Nationalbank, represented by B. Gruber, Rechtsanwalt; Austrian Airlines, Österreichische Luftverkehrs-AG, represented by H. Jarolim; the Austrian Government, represented by W. Okressek, acting as Agent; the Italian Government, represented by M. Fiorilli, avvocato dello Stato; the Netherlands Government, represented by J. van Bakel, acting as Agent; the Finnish Government, represented by T. Pynnä, acting as Agent; the Swedish Government, represented by A. Kruse and B. Hernqvist, acting as Agent; and the Commission, represented by U. Wölker and C. Docksey, acting as Agent, at the hearing on 18 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following

Judgment

- 1 By orders of 12 December 2000 and 28 and 14 February 2001, the first of which was received at the Court on 28 December 2000 and the other two on 27 March 2001, the Verfassungsgerichtshof (Constitutional Court) (C-465/00) and the Oberster Gerichtshof (Supreme Court) (C-138/01 and C-139/01) each referred to the Court under Article 234 EC two questions, formulated in substantially the same way, on the interpretation of 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 (OJ 1995 L 281, p. 31).

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- 2 Those questions were raised in proceedings between, first, the Rechnungshof (Court of Audit) and a large number of bodies subject to its control and, second, Ms Neukomm and Mr Lauermann and their employer Österreichischer Rundfunk ('ÖRF'), a broadcasting organisation governed by public law, concerning the obligation of public bodies subject to control by the Rechnungshof to communicate to it the salaries and pensions exceeding a certain level paid by them to their employees and pensioners together with the names of the recipients, for the purpose of drawing up an annual report to be transmitted to the Nationalrat, the Bundesrat and the Landtage (the lower and upper chambers of the Federal Parliament and the provincial assemblies) and made available to the general public ('the Report').

Legal context

National provisions

- 3 Under Paragraph 8 of the Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre (Federal constitutional law on the limitation of salaries of public officials, BGBl. I 1997/64, as amended, ‘the BezBegrBVG’):

- ‘1. Bodies subject to control by the Rechnungshof must, within the first three months of each second calendar year, inform the Rechnungshof of the salaries or pensions of persons who in at least one of the two previous calendar years drew salaries or pensions greater annually than 14 times 80% of the monthly reference amount under Paragraph 1 [for 2000, 14 times EUR 5 887.87]. The bodies must also state the salaries and pensions of persons who draw an additional salary or pension from a body subject to audit by the Rechnungshof. Persons who draw a salary or pension from two or more bodies subject to control by the Rechnungshof must inform the bodies of this. If this duty of disclosure is not complied with by the body, the Rechnungshof must inspect the relevant documents and draw up its report on the basis thereof.
2. In the application of subparagraph 1, social benefits and benefits in kind are also to be taken into account, unless they are benefits from sickness or accident insurance or on the basis of comparable provisions of *Land* law. Where several salaries or pensions are paid by bodies subject to control by the Rechnungshof, they are to be aggregated.

3. The Rechnungshof shall summarise that information — for each year separately — in a report. The report shall include all persons whose total yearly salaries and pensions from bodies subject to control by the Rechnungshof exceed the amount stated in subparagraph 1. The report shall be transmitted to the Nationalrat, the Bundesrat and the Landtage.’
- 4 It appears from the orders of reference that, in the light of the *travaux préparatoires* of the BezBegrBVG, legal commentators deduce from the latter provision that the Report must give the names of the persons concerned and against each name the amount of annual remuneration received.
- 5 The Verfassungsgerichtshof states that, in accordance with the legislature’s intention, the Report must be made available to the general public, so as to provide them with ‘comprehensive information’. It states that through this information pressure is brought to bear on the bodies concerned to keep salaries at a low level, so that public funds are used thriftily, economically and efficiently.
- 6 The bodies subject to audit by the Rechnungshof are the Federation, the *Länder* (Federal provinces), large municipalities and — where a reasoned request has been made by the government of a *Land* — municipalities with fewer than 20 000 inhabitants, associations of municipalities, social security institutions, statutory professional bodies, Österreichischer Rundfunk, institutions, funds and foundations managed by organs of the Federation or the *Länder* or by persons appointed by them for that purpose, and undertakings managed by the Federation, a *Land* or a municipality or (alone or jointly with other bodies subject to control by the Rechnungshof) controlled through a company-law holding of not less than 50% or otherwise.

Community legislation

7 Recitals 5 to 9 in the preamble to Directive 95/46 show that it was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC) to encourage the free movement of personal data through the harmonisation of the laws, regulations and administrative provisions of the Member States on the protection of individuals with regard to the processing of such data.

8 According to Article 1 of Directive 95/46:

‘1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.’

9 In this connection, recitals 2 and 3 of Directive 95/46 read as follows:

‘(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and

contribute to economic and social progress, trade expansion and the well-being of individuals;

- (3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded’.

10 Recital 10 of Directive 95/46 adds:

- ‘(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law;...’

- 11 Under Article 6(1) of Directive 95/46, personal data (that is, in accordance with Article 2(a), ‘any information relating to an identified or identifiable natural person’) must be:

‘(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes...

- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

...'

- 12 Article 2(b) of Directive 95/46 defines 'processing of personal data' as:

'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

- 13 Under Article 7 of Directive 95/46, personal data may be processed only if one of the six conditions it sets out is satisfied, and in particular if:

'(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

...

- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed’.

14 According to recital 72 of Directive 95/46, the directive allows for the principle of public access to official documents to be taken into account when implementing the principles set out in the directive.

15 As regards the scope of Directive 95/46, Article 3(1) provides that it is to apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. However, under Article 3(2), the directive ‘shall not apply to the processing of personal data:

- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law;

- by a natural person in the course of a purely personal or household activity’.

- 16 In addition, Article 13 of Directive 95/46 authorises Member States to derogate from certain of its provisions, in particular Article 6(1), where this is necessary to safeguard *inter alia* ‘an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters’ (Article 13(1)(e)) or ‘a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority’ in certain cases referred to, including that in subparagraph (e) (Article 13(1)(f)).

The main proceedings and the questions referred for preliminary rulings

Case C-465/00

- 17 Differences of opinion as to the interpretation of Paragraph 8 of the BezBegrBVG arose between the Rechnungshof and a large number of bodies under its control with respect to salaries and pensions paid in 1998 and 1999.
- 18 The defendants in the main proceedings, which include local and regional authorities (a *Land* and two municipalities), public undertakings, some of which are in competition with other Austrian or foreign undertakings not subject to control by the Rechnungshof, and a statutory professional body (Wirtschaftskammer Steiermark), did not communicate the data on the income of the employees in question, or communicated the data, to a greater or lesser extent, in anonymised form. They refused access to the relevant documents or made access subject to conditions which the Rechnungshof did not accept. The Rechnungshof therefore brought proceedings before the Verfassungsgerichtshof pursuant to Article 126a of the Bundes-Verfassungsgesetz (Federal Constitutional Law), which gives that court jurisdiction to rule on ‘differences of opinion concerning the interpretation of the statutory provisions governing the jurisdiction of the Rechnungshof’.

- 19 The Rechnungshof infers from Paragraph 8 of the BezBegrBVG an obligation to list in the Report the names of the persons concerned and show their annual income. The defendants in the main proceedings take a different view and consider that they are not obliged to communicate personal data relating to that income, such as the names or positions of the persons concerned, with an indication of the emoluments received by them. They rely principally on Directive 95/46, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the Convention'), which guarantees respect for private life, and on the argument that the obligation of publicity creates a barrier to the movement of workers, contrary to Article 39 EC.
- 20 The Verfassungsgerichtshof wishes essentially to know whether Paragraph 8 of the BezBegrBVG, as interpreted by the Rechnungshof, is compatible with Community law, so that it can interpret it consistently with Community law or declare it (partly) inapplicable, as the case may be.
- 21 It points out, in this connection, that the provisions of Directive 95/46, in particular Articles 6(1)(b) and (c) and 7(c) and (e), must be interpreted in the light of Article 8 of the Convention. It considers that comprehensive information for the public, as intended by the national legislature with respect to the income of employees of bodies subject to control by the Rechnungshof whose annual remuneration exceeds a certain threshold (ATS 1 127 486 in 1999 and ATS 1 120 000 in 1998), has to be regarded as an interference with private life, which can be justified under Article 8(2) of the Convention only if that information contributes to the economic well-being of the country. An interference with fundamental rights cannot be justified by the existence of a mere 'public interest in information'. The court doubts that the disclosure, by means of the Report, of data on personal income promotes the 'economic well-being of the country'. In any event, it constitutes a disproportionate interference with private life. The audit carried out by the Rechnungshof is indubitably sufficient to ensure the proper use of public funds.

- 22 The national court is also uncertain as to whether the scope of Community law varies according to the nature of the body which is required to contribute to the disclosure of the individual income of some of its employees.
- 23 In those circumstances, the Verfassungsgerichtshof decided to stay proceedings and refer the following two questions to the Court for a preliminary ruling:
- ‘1. Are the provisions of Community law, in particular those on data protection, to be interpreted as precluding national legislation which requires a State body to collect and transmit data on income for the purpose of publishing the names and income of employees of:
- (a) a regional or local authority,
 - (b) a broadcasting organisation governed by public law,
 - (c) a national central bank,
 - (d) a statutory representative body,
 - (e) a partially State-controlled undertaking which is operated for profit?

2. If the answer to at least part of the above question is in the affirmative:

Are the provisions precluding such national legislation directly applicable, in the sense that the persons obliged to make disclosure may rely on them to prevent the application of contrary national provisions?’

Cases C-138/01 and C-139/01

- ²⁴ Ms Neukomm and Mr Lauermann, who are employees of ÖRF, a body subject to control by the Rechnungshof, brought proceedings in the Austrian courts for interim orders to prevent ÖRF from acceding to the Rechnungshof’s request to communicate data.
- ²⁵ The applications for interim orders were dismissed at first instance. The Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) (Austria) (C-138/01), distinguishing between the transmission of the data to the Rechnungshof and its inclusion in the Report, considered that the Report had to be anonymous, while the mere transmission of the data to the Rechnungshof, even including names, did not infringe Article 8 of the Convention or Directive 95/46. The Landesgericht St Pölten (Regional Court, St Pölten) (Austria) (C-139/01), on the other hand, held that the inclusion of data with names in the Report was lawful, since an anonymised report would not enable the Rechnungshof to exercise adequate control.
- ²⁶ The Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria) upheld on appeal the dismissal of the applications for interim orders by the courts at first instance. While stating, in connection with Case C-138/01, that in communicat-

ing the data in question the employer is merely performing a task imposed on him by law and that the subsequent processing of the data by the Rechnungshof is not carried out under the control of the employer, the Oberlandesgericht held, in the context of Case C-139/01, that Paragraph 8 of the BezBegrBVG was consistent with fundamental rights and with Directive 95/46, even in the case of a list by name of the persons concerned.

27 Ms Neukomm and Mr Lauermann appealed on a point of law (*Revision*) to the Oberster Gerichtshof.

28 The Oberster Gerichtshof, referring to the reference for a preliminary ruling in Case C-465/00 and adopting the points of law raised by the Verfassungsgerichtshof, decided to stay proceedings and refer the following two questions to the Court, using the same wording in Cases C-138/01 and C-139/01:

- ‘1. Are the provisions of Community law, in particular those on data protection (Articles 1, 2, 6, 7 and 22 of Directive 95/46/EC in conjunction with Article 6 (formerly Article F) of the Treaty on European Union and Article 8 of the Convention), to be interpreted as precluding national legislation which requires a public broadcasting organisation, as a legal body, to communicate, and a State body to collect and transmit, data on income for the purpose of publishing the names and income of employees of a broadcasting organisation governed by public law?

2. If the Court of Justice of the European Communities answers the above question in the affirmative:

Are the provisions precluding national legislation of the kind described above directly applicable, in the sense that an organisation obliged to make disclosure may rely on them to prevent the application of contrary national legislation, and may not therefore rely on an obligation under national law against the employees concerned by the disclosure?’

- 29 By order of the President of the Court of 17 May 2001, Cases C-138/01 and C-139/01 were joined for the purposes of the written procedure, the oral procedure and judgment. Case C-465/00 and Cases C-138/01 and C-139/01 should also be joined for the purposes of judgment.
- 30 The questions put by the Verfassungsgerichtshof and the Oberster Gerichtshof are essentially the same, and should therefore be examined together.

Applicability of Directive 95/46

- 31 To answer the questions as put would presuppose that Directive 95/46 is applicable in the main proceedings. That applicability is, however, disputed before the Court. This point must be decided as a preliminary issue.

Observations submitted to the Court

- 32 The defendants in the main proceedings in Case C-465/00 consider essentially that the control activity exercised by the Rechnungshof falls within the scope of Community law and hence of Directive 95/46. In particular, in that it relates to

the remuneration received by the employees of the bodies concerned, that activity touches aspects covered by Community provisions in social matters, such as Articles 136 EC, 137 EC and 141 EC, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), and Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

- 33 They further submit that the control exercised by the Rechnungshof, first, affects the possibility for employees of the bodies concerned to seek employment in another Member State, because of the publicity attaching to their salaries which limits their power of negotiation with foreign companies, and, second, deters nationals of other Member States from seeking employment with the bodies subject to that control.
- 34 Austrian Airlines, Österreichische Luftverkehrs-AG states that the interference with the freedom of movement of workers is particularly serious in its case because it competes with companies of other Member States which are not subject to such control.
- 35 The Rechnungshof and the Austrian and Italian Governments, and to a certain extent the Commission, on the other hand, consider that Directive 95/46 is not applicable in the main proceedings.
- 36 According to the Rechnungshof and the Austrian and Italian Governments, the control activity referred to in Paragraph 8 of the BezBegrBVG, which pursues objectives in the public interest in the field of public accounts, does not fall within the scope of Community law.

- 37 After observing that the directive, which was adopted on the basis of Article 100a of the Treaty, has the objective of establishing the internal market, an aspect of which is the protection of the right to privacy, the Rechnungshof and the Austrian and Italian Governments submit that the control in question is not such as to obstruct the freedom of movement of workers, since it does not in any way prevent the employees of the bodies concerned from going to work in another Member State or those of other Member States from working for those bodies. In any event, the link between the control activity and the freedom of movement of workers, even supposing that workers do seek to avoid working for a body subject to control by the Rechnungshof because of the publicity attaching to the salaries received, is too uncertain and indirect to constitute an infringement of freedom of movement and thereby to allow a link to be made with Community law.
- 38 The Commission adopts a similar position. At the hearing, it nevertheless submitted that the collection of data by the bodies subject to control by the Rechnungshof with a view to communication to the latter and inclusion in the report is itself within the scope of Directive 95/46. Collection serves not only the function of auditing but also, primarily, the payment of remuneration, which constitutes an activity covered by Community law, having regard to the existence of various relevant social provisions in the Treaty, such as Article 141 EC, and to the possible effect of that activity on the freedom of movement of workers.

Findings of the Court

- 39 Directive 95/46, adopted on the basis of Article 100a of the Treaty, is intended to ensure the free movement of personal data between Member States through the harmonisation of national provisions on the protection of individuals with regard to the processing of such data. Article 1, which defines the object of the directive, provides in paragraph 2 that Member States may neither restrict nor prohibit the

free flow of personal data between Member States for reasons connected with the protection of the fundamental rights and freedoms of natural persons, in particular their private life, with respect to the processing of that data.

- 40 Since any personal data can move between Member States, Directive 95/46 requires in principle compliance with the rules for protection of such data with respect to any processing of data as defined by Article 3.
- 41 It may be added that recourse to Article 100a of the Treaty as legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis. As the Court has previously held (see Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paragraph 85, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60), to justify recourse to Article 100a of the Treaty as the legal basis, what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market. In the present case, that fundamental attribute was never in dispute before the Court with respect to the provisions of Directive 95/46, in particular those in the light of which the national court raises the question of the compatibility of the national legislation in question with Community law.
- 42 In those circumstances, the applicability of Directive 95/46 cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular, in those cases, the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of

the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations.

- 43 Moreover, the applicability of Directive 95/46 to situations where there is no direct link with the exercise of the fundamental freedoms of movement guaranteed by the Treaty is confirmed by the wording of Article 3(1) of the directive, which defines its scope in very broad terms, not making the application of the rules on protection depend on whether the processing has an actual connection with freedom of movement between Member States. That is also confirmed by the exceptions in Article 3(2), in particular those concerning the processing of personal data 'in the course of an activity... provided for by Titles V and VI of the Treaty on European Union' or 'in the course of a purely personal or household activity'. Those exceptions would not, at the very least, be worded in that way if the directive were applicable exclusively to situations where there is a sufficient link with the exercise of freedoms of movement.
- 44 The same observation may be made with regard to the exceptions in Article 8(2) of Directive 95/46, which concern the processing of specific categories of data, in particular those in Article 8(2)(d), which refers to processing carried out 'by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim'.
- 45 Finally, the processing of personal data at issue in the main proceedings does not fall within the exception in the first indent of Article 3(2) of Directive 95/46. That processing does not concern the exercise of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union. Nor is it a processing operation concerning public security, defence, State security or the activities of the State in areas of criminal law.

- 46 The purposes set out in Articles 7(c) and (e) and 13(e) and (f) of Directive 95/46 show, moreover, that it is intended to cover instances of data processing such as those at issue in the main proceedings.
- 47 It must therefore be considered that Directive 95/46 is applicable to the processing of personal data provided for by legislation such as that at issue in the main proceedings.

The first question

- 48 By their first question, the national courts essentially ask whether Directive 95/46 is to be interpreted as precluding national legislation such as that at issue in the main proceedings which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold.

Observations submitted to the Court

- 49 The Danish Government considers that Directive 95/46 does not, strictly speaking, govern the right of third parties to obtain access to documents on request. In particular, Article 12 of the directive refers only to the right of any person to obtain data concerning him. According to the Government, the protection of personal data which appear not to be sensitive must give way to the principle of transparency, which holds an essential place in the Community legal order. The Danish Government, with the Swedish Government, observes in this

respect that, according to recital 72 of the directive, the principle of public access to official documents may be taken into account when implementing the directive.

- 50 The Rechnungshof, the Austrian, Italian, Netherlands, Finnish and Swedish Governments and the Commission consider that the national provisions at issue in the main proceedings are compatible with Directive 95/46, by reason, generally, of the wide discretion the Member States have in implementing it, in particular where a task in the public interest provided for by law is to be carried out, under Articles 6(b) and (c) and 7(c) or (e) of the directive. Both the principles of transparency and of the proper management of public funds and the prevention of abuses are relied on in this respect.
- 51 Those objectives in the public interest can justify an interference with private life, protected by Article 8(2) of the Convention, if it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued.
- 52 The Austrian Government notes in particular that, when reviewing proportionality, the extent to which the data affect private life must be taken into account. Data relating to personal intimacy, health, family life or sexuality must therefore be protected more strongly than data relating to income and taxes, which, while also personal, concern personal identity to a lesser extent and are thereby less sensitive (see, to that effect, *Fressoz and Roire v. France* [GC], no. 29183/95, § 65, ECHR 1999-I).

- 53 The Finnish Government likewise considers that protection of private life is not absolute. Data relating to a person acting in the course of a public office or public functions relating thereto do not fall within the protection of private life.
- 54 The Italian Government submits that data such as that at issue in the main proceedings are already by their nature public in most Member States, since they are visible from salary scales or remuneration brackets laid down by statute, regulation or collective agreements. In those circumstances, it is not contrary to the principle of proportionality to provide for diffusion of that data with the identities of the various people in receipt of the salaries in question. That diffusion, being thus intended to clarify a situation that is already apparent from data available to the public, constitutes the minimum measure which would ensure realisation of the objectives of transparency and sound administration.
- 55 The Netherlands Government adds, however, that the national courts must ascertain, for each public body concerned, whether the objective of public interest can be attained by processing the personal data in a way that interferes less with the private lives of the persons concerned.
- 56 The United Kingdom Government submits that, in answering the first question, the provisions of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 18 December 2000 (OJ 2000 C 364, p. 1), to which the Verfassungsgericht briefly refers, are of no relevance.
- 57 In Cases C-138/01 and C-139/01, the Commission questions whether, in the context of examining proportionality under Article 6(1)(b) of Directive 95/46, it might not suffice for attaining the objective pursued by the BezBegrBVG to

transmit the data in an anonymised form, for example by indicating the function of the person concerned rather than his name. Even if it is admitted that the Rechnungshof needs details of names in order to carry out a more exact check, it is questionable whether the inclusion of that data in the Report, giving the name of the person concerned, is really necessary for performing that check, especially as the Report is not only submitted to the parliamentary assemblies but must also be widely published.

- 58 Moreover, the Commission observes that under Article 13 of Directive 95/46 the Member States may *inter alia* derogate from Article 6(1)(b) of the directive in order to safeguard a number of objectives in the public interest, in particular 'an important economic or financial interest of a Member State' (Article 13(1)(e)). However, in the Commission's view, the derogating measures must also comply with the principle of proportionality, which calls for the same considerations as those stated in the preceding paragraph with reference to Article 6(1)(b) of the directive.
- 59 The defendants in the main proceedings in Case C-465/00 consider that the national legislation at issue is incompatible with Article 6(1)(b) and (c) of Directive 95/46 and cannot be justified under Article 7(c) or (e) of the directive, since it constitutes an interference which is not justified under Article 8(2) of the Convention, and is in any event disproportionate. The audit performed by the Rechnungshof is sufficient to guarantee the thrifty use of public funds.
- 60 More particularly, it has not been shown that publication of the names and the amount of the income of all persons employed by public bodies where that amount exceeds a certain level constitutes a measure aimed at the economic well-being of the country. The aim of the legislature was to exert pressure on the bodies in question to maintain salaries at a low level. The defendants also submit that that measure is aimed, in the present case, at persons who for the most part are not public figures.

- 61 Moreover, even if the drawing up by the Rechnungshof of a report containing personal data on income intended for public debate were to be regarded as an interference with private life justified under Article 8(2) of the Convention, Land Niederösterreich and ÖRF consider that that measure also violates Article 14 of the Convention. Persons receiving the same income are treated unequally, depending on whether or not they are employed by a body subject to control by the Rechnungshof.
- 62 ÖRF points out a further example of unequal treatment that cannot be justified under Article 14 of the Convention. Among the employees of bodies subject to control by the Rechnungshof, only those whose income exceeds the threshold fixed in Paragraph 8 of the BezBegrBVG have to suffer an interference with their private life. If the legislature attaches real importance to the reasonableness of the remuneration received by the employees of certain bodies, it is then necessary to publish the income of all employees, regardless of its amount.
- 63 Finally, ÖRF, Marktgemeinde Kaltenleutgeben and Austrian Airlines, Österreichische Luftverkehrs-AG submit that the wording of Paragraph 8 of the BezBegrBVG lends itself to an interpretation consistent with Community law, under which the salaries in question are required to be communicated to the Rechnungshof and included in the Report only in anonymised form. That interpretation should prevail, as it resolves the contradiction between that provision and Directive 95/46.

Findings of the Court

- 64 It should be noted, to begin with, that the data at issue in the main proceedings, which relate both to the monies paid by certain bodies and the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46,

being 'information relating to an identified or identifiable natural person'. Their recording and use by the body concerned, and their transmission to the Rechnungshof and inclusion by the latter in a report intended to be communicated to various political institutions and widely diffused, constitute processing of personal data within the meaning of Article 2(b) of the directive.

⁶⁵ Under Directive 95/46, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the 'principles relating to data quality' set out in Article 6 of the directive and, second, with one of the 'criteria for making data processing legitimate' listed in Article 7.

⁶⁶ More specifically, the data must be 'collected for specified, explicit and legitimate purposes' (Article 6(1)(b) of Directive 95/46) and must be 'adequate, relevant and not excessive' in relation to those purposes (Article 6(1)(c)). In addition, under Article 7(c) and (e) of the directive respectively, the processing of personal data is permissible only if it 'is necessary for compliance with a legal obligation to which the controller is subject' or 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed'.

⁶⁷ However, under Article 13(e) and (f) of the directive, the Member States may derogate *inter alia* from Article 6(1) where this is necessary to safeguard respectively 'an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters' or 'a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority' in particular cases including that referred to in subparagraph (e).

- 68 It should also be noted that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures (see, *inter alia*, Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37).
- 69 Those principles have been expressly restated in Article 6(2) EU, which states that ‘[t]he Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’
- 70 Directive 95/46 itself, while having as its principal aim to ensure the free movement of personal data, provides in Article 1(1) that ‘Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data’. Several recitals in its preamble, in particular recitals 10 and 11, also express that requirement.
- 71 In this respect, it is to be noted that Article 8 of the Convention, while stating in paragraph 1 the principle that the public authorities must not interfere with the right to respect for private life, accepts in paragraph 2 that such an interference is possible where it 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’.

- 72 So, for the purpose of applying Directive 95/46, in particular Articles 6(1)(c), 7(c) and (e) and 13, it must be ascertained, first, whether legislation such as that at issue in the main proceedings provides for an interference with private life, and if so, whether that interference is justified from the point of view of Article 8 of the Convention.

Existence of an interference with private life

- 73 First of all, the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 of the Convention. The European Court of Human Rights has held in this respect that the expression 'private life' must not be interpreted restrictively and that 'there is no reason of principle to justify excluding activities of a professional ... nature from the notion of "private life"' (see, *inter alia*, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000-V).
- 74 It necessarily follows that, while the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the Convention.
- 75 To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way (see, to that effect, *Amann v. Switzerland*, § 70). It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party.

Justification of the interference

- 76 An interference such as that mentioned in paragraph 74 above violates Article 8 of the Convention unless it is ‘in accordance with the law’, pursues one or more of the legitimate aims specified in Article 8(2), and is ‘necessary in a democratic society’ for achieving that aim or aims.
- 77 It is common ground that the interference at issue in the main proceedings is in accordance with Paragraph 8 of the BezBegrBVG. However, the question arises whether that paragraph is formulated with sufficient precision to enable the citizen to adjust his conduct accordingly, and so complies with the requirement of foreseeability laid down in the case-law of the European Court of Human Rights (see, *inter alia*, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).
- 78 In this respect, Paragraph 8(3) of the BezBegrBVG states that the report drawn up by the Rechnungshof is to ‘include all persons whose total yearly salaries and pensions from bodies... exceed the amount stated in subparagraph 1’, without expressly requiring the names of the persons concerned to be disclosed in relation to the income they receive. According to the orders for reference, it is legal commentators who, on the basis of the *travaux préparatoires*, interpret the constitutional law in that way.
- 79 It is for the national courts to ascertain whether the interpretation to the effect that Paragraph 8(3) of the BezBegrBVG requires disclosure of the names of the persons concerned in relation to the income received complies with the requirement of foreseeability referred to in paragraph 77 above.

- 80 However, that question need not arise until it has been determined whether such an interpretation of the national provision at issue is consistent with Article 8 of the Convention, as regards its required proportionality to the aims pursued. That question will be examined below.
- 81 It appears from the order for reference in Case C-465/00 that the objective of Paragraph 8 of the BezBegrBVG is to exert pressure on the public bodies concerned to keep salaries within reasonable limits. The Austrian Government observes, more generally, that the interference provided for by that provision is intended to guarantee the thrifty and appropriate use of public funds by the administration. Such an objective constitutes a legitimate aim within the meaning both of Article 8(2) of the Convention, which mentions the 'economic well-being of the country', and Article 6(1)(b) of Directive 95/46, which refers to 'specified, explicit and legitimate purposes'.
- 82 It must next be ascertained whether the interference in question is necessary in a democratic society to achieve the legitimate aim pursued.
- 83 According to the European Court of Human Rights, the adjective 'necessary' in Article 8(2) of the Convention implies that a 'pressing social need' is involved and that the measure employed is 'proportionate to the legitimate aim pursued' (see, *inter alia*, the *Gillow v. the United Kingdom* judgment of 24 November 1986, Series A no. 109, § 55). The national authorities also enjoy a margin of appreciation, 'the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved' (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, § 59).

- 84 The interest of the Republic of Austria in ensuring the best use of public funds, and in particular keeping salaries within reasonable limits, must be balanced against the seriousness of the interference with the right of the persons concerned to respect for their private life.
- 85 On the one hand, in order to monitor the proper use of public funds, the Rechnungshof and the various parliamentary bodies undoubtedly need to know the amount of expenditure on human resources in the various public bodies. In addition, in a democratic society, taxpayers and public opinion generally have the right to be kept informed of the use of public revenues, in particular as regards expenditure on staff. Such information, put together in the Report, may make a contribution to the public debate on a question of general interest, and thus serves the public interest.
- 86 The question nevertheless arises whether stating the names of the persons concerned in relation to the income received is proportionate to the legitimate aim pursued and whether the reasons relied on before the Court to justify such disclosure appear relevant and sufficient.
- 87 It is plain that, according to the interpretation adopted by the national courts, Paragraph 8 of the BezBegrBVG requires disclosure of the names of the persons concerned, in relation to income above a certain level, with respect not only to persons filling posts remunerated by salaries on a published scale, but to all persons remunerated by bodies subject to control by the Rechnungshof. Moreover, such information is not only communicated to the Rechnungshof and via the latter to the various parliamentary bodies, but is also made widely available to the public.

- 88 It is for the national courts to ascertain whether such publicity is both necessary and proportionate to the aim of keeping salaries within reasonable limits, and in particular to examine whether such an objective could not have been attained equally effectively by transmitting the information as to names to the monitoring bodies alone. Similarly, the question arises whether it would not have been sufficient to inform the general public only of the remuneration and other financial benefits to which persons employed by the public bodies concerned have a contractual or statutory right, but not of the sums which each of them actually received during the year in question, which may depend to a varying extent on their personal and family situation.
- 89 With respect, on the other hand, to the seriousness of the interference with the right of the persons concerned to respect for their private life, it is not impossible that they may suffer harm as a result of the negative effects of the publicity attached to their income from employment, in particular on their prospects of being given employment by other undertakings, whether in Austria or elsewhere, which are not subject to control by the Rechnungshof.
- 90 It must be concluded that the interference resulting from the application of national legislation such as that at issue in the main proceedings may be justified under Article 8(2) of the Convention only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

Consequences with respect to the provisions of Directive 95/46

- 91 If the national courts conclude that the national legislation at issue is incompatible with Article 8 of the Convention, that legislation is also incapable of

satisfying the requirement of proportionality in Articles 6(1)(c) and 7(c) or (e) of Directive 95/46. Nor could it be covered by any of the exceptions referred to in Article 13 of that directive, which likewise requires compliance with the requirement of proportionality with respect to the public interest objective being pursued. In any event, that provision cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life contrary to Article 8 of the Convention.

- 92 If, on the other hand, the national courts were to consider that Paragraph 8 of the BezBegrBVG is both necessary for and appropriate to the public interest objective being pursued, they would then, as appears from paragraphs 77 to 79 above, still have to ascertain whether, by not expressly providing for disclosure of the names of the persons concerned in relation to the income received, Paragraph 8 of the BezBegrBVG complies with the requirement of foreseeability.
- 93 Finally, it should be noted, in the light of the above considerations, that the national court must also interpret any provision of national law, as far as possible, in the light of the wording and the purpose of the applicable directive, in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).
- 94 In the light of all the above considerations, the answer to the first question must be that Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 do not preclude national legislation such as that at issue in the main proceedings, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

The second question

- 95 By their second question, the national courts ask whether the provisions of Directive 95/46 which preclude national legislation such as that at issue in the main proceedings are directly applicable, in that they may be relied on by individuals before the national courts to oust the application of that legislation.
- 96 The defendants in the main proceedings in Case C-465/00 and the Netherlands Government consider that Articles 6(1) and 7 of Directive 95/46 fulfil the criteria stated in the Court's case-law for having such direct effect. They are sufficiently precise and unconditional for the bodies required to disclose the data relating to the income of the persons concerned to be able to rely on them to prevent application of the national provisions contrary to those provisions.
- 97 The Austrian Government submits, on the other hand, that the relevant provisions of Directive 95/46 are not directly applicable. In particular, Articles 6(1) and 7 are not unconditional, since their implementation requires the Member States, which have a wide discretion, to adopt special measures to that effect.
- 98 On this point, it should be noted that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals

are able to assert against the State (see, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51).

99 In the light of the answer to the first question, the second question seeks to know whether such a character may be attributed to Article 6(1)(c) of Directive 95/46, under which ‘personal data must be... adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed’, and to Article 7(c) or (e), under which personal data may be processed only if *inter alia* ‘processing is necessary for compliance with a legal obligation to which the controller is subject’ or ‘is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller... to whom the data are disclosed’.

100 Those provisions are sufficiently precise to be relied on by individuals and applied by the national courts. Moreover, while Directive 95/46 undoubtedly confers on the Member States a greater or lesser discretion in the implementation of some of its provisions, Articles 6(1)(c) and 7(c) or (e) for their part state unconditional obligations.

101 The answer to the second question must therefore be that Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.

Costs

- ¹⁰² The costs incurred by the Austrian, Danish, Italian, Netherlands, Finnish, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decisions on costs are a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Verfassungsgerichtshof by order of 12 December 2000 and by the Oberster Gerichtshof by orders of 14 and 28 February 2001, hereby rules:

1. Articles 6(1)(c) and 7(c) and (e) of 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 do not preclude national legislation such as that at issue in the main proceedings, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain

threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

2. Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.

Rodríguez Iglesias

Puissochet

Wathelet

Schintgen

Gulmann

Edward

La Pergola

Jann

Skouris

Macken

Colneric

von Bahr

Cunha Rodrigues

Delivered in open court in Luxembourg on 20 May 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President