**European Court of Justice, 20 May 2003, Österreichischer Rundfunk**


**PERSONA**

**Wide disclosure of income-data permitted if necessary for and appropriate to the objective of proper management of public funds**

- **Provided that the wide disclosure not merely of the amounts of the annual income 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**

Articles 6(1)(c) and 7(c) and (e) of Directive 95/46/EC of the European Parliament and of the Coun-cil 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.

- **Directive 95/46 directly applicable**

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.

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**European Court of Justice, 20 May 2003**
(G.C. Rodríguez Iglesias, J.-P. Puissochet, M. Wathelet and R. Schintgen, 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)
JUDGMENT OF THE COURT
20 May 2003 (1)
*(Protection of individuals with regard to the processing of personal data - Directive 95/46/EC - Protection of private life - Disclosure of data on the income of employees of bodies subject to control by the Rechnungshof)*
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,
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. Okresek, 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).

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 communicating 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 per-

sonal 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.

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OPINION OF ADVOCATE GENERAL
TIZZANO
delivered on 14 November 2002 (1)
Case C-465/00
Rechnungshof
v
Österreichischer Rundfunk and Others
(Reference for a preliminary ruling from the Verfassungsgerichtshof)
and Joined Cases C-138/01 and C-139/01
Neukomm and Lauremann
v
Österreichischer Rundfunk
(Reference for a preliminary ruling from the Oberster Gerichtshof)
(Directive 95/46//EC - Scope)

1. By three separate orders, of 12 December 2000 and 14 and 28 February 2001, the Verfassungsgerichtshof and the Oberster Gerichtshof (the Constitutional Court and the Supreme Court), Austria, have referred to the Court of Justice a number of questions for a preliminary ruling on the interpretation of the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter 'Directive 95/46' or, simply, 'the Directive') (2) and of the general principles of Community law regarding privacy. Briefly, the Austrian courts ask whether those provisions and principles preclude national rules which require the collection of data on the income of certain employees of public entities and companies to be included, naming the individuals concerned, in a report by a State body (Court of Auditors) intended to be published.

**Relevant provisions**

**The European Convention for the Protection of Human Rights and Fundamental Freedoms**

2. In reconstructing the legal context relevant to the present cases, attention should be drawn first of all to Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter, the 'ECHR'), expressly invoked in certain questions, which provides:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as 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'. (3)

**Directive 95/46**

3. Of importance at the Community level is Directive 95/46, adopted on the basis of Article 100a of the EC Treaty (now Article 95 EC) to encourage the free movement of personal data by 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.

4. Underlying the Directive is the idea that 'the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State [and that] this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law (seventh recital). The Community legislature therefore considered that, "in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States'. To do that, it considered that a harmonising measure was necessary at Community level, since the objective of free movement of personal data, "[was] vital to the internal market but [could not] be achieved by the Member States alone, especially in view of the scale of the divergences [existing] between the relevant laws in the Member States and the need to coordinate the laws of the Member States so as to ensure that the cross-border flow of personal data [was] regulated in a consistent manner ... in keeping with the objective of the internal market as provided for in Article 7a of the Treaty" (eighth recital). Following the adoption of a harmonising measure, however, given the equivalent protection resulting from the approximation of national laws, the Member States [would] no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy' (ninth recital).

5. That having been said, the Community legislature considered that, in establishing a level of protection 'equivalent in all Member States', it was not possible to leave out of consideration the requirement that 'the fundamental rights of individuals should be safeguarded' (third recital). To that effect, it considered that

'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'. On that basis, it considered that 'the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community' (10th recital).

6. Article 1 of the Directive should therefore be read in the light of those assumptions and reasons; it defines the object of the Directive as follows:

'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'.

7. As regards the principal definitions given in Article 2 of the Directive, it should be noted for present purposes that:

(a) 'personal data' means 'any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity';

(b) 'processing of personal data' ('processing') means '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';

(c) 'controller' means the 'natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.

8. Article 3 defines the scope of the Directive, stating in paragraph 1 that its provisions 'shall 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'. Under paragraph 2, however, the scope of the Directive does not include 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';

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

9. For present purposes, certain provisions of Chapter II, 'General Rules on the Lawfulness of the Processing of Personal Data' (Articles 5 to 21), should also be noted. It should be pointed out in particular that, according to Article 6(1), 'Member States shall provide that personal data 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. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

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

...'.

10. Article 7 identifies those cases where 'personal data may be processed' and provides, so far as we are concerned here, that processing is permitted where it is necessary 'for compliance with a legal obligation to which the controller is subject' or 'for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'.

11. It should also be noted that Article 13 authorises Member States to derogate from certain provisions of the Directive and, in particular, from Article 6(1), where it is necessary to safeguard, among other things, 'an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters' [subparagraph (e)]; or 'a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority' in specific cases, including one as described in subparagraph (e) [subparagraph (f)].

12. Lastly Article 22 should be noted, according to which 'Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question'.

**The Austrian legislation**

13. Paragraphs 126b, 126c, 127, 127a and 127b of the Bundesverfassungsgesetz (the Austrian Constitution; hereinafter 'B VG') govern the powers of the Rechnungshof (the Austrian Court of Auditors), making the following subject to audit by it: the Federation; the Länder; major communes and - where a reasoned request has been made by a government of a Land - communes with fewer than 20 000 inhabitants; associations of communes; social security institutions; statutory bodies representing professional interests; entities, funds and foundations managed by organs of the Federation or Länder or by persons appointed for that purpose by organs of the Federation or Länder; and undertakings managed by the Federal Government, a Land or commune or (alone or jointly with other legal entities subject to audit by the Rechnungshof) con-

trolled through a shareholding of not less than 50%. Furthermore, Paragraph 31a(1) of the Rundfunkgesetz (Law on broadcasting) (4) provides that Österreichische Rundfunk (Austrian National Radio; hereinafter: 'ÖRF') also is subject to audit by the Rechnungshof.

14. Pursuant to Paragraph 8 of the Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre (Federal constitutional law on the limitation of income of public officials; hereinafter 'BezBegrBVG'): (5)

'1. Entities subject to audit by the Rechnungshof must, within the first three months of each second calendar year, inform the Rechnungshof of the salaries or pensions of persons which in at least one of the two previous calendar years, were greater in that year than 14 times 80% of the monthly reference amount under Section 1 [meaning, for 2000, salaries or pensions 14 times greater than EUR 5 887.87]. The entities must also inform the Rechnungshof of salaries and pensions of persons who receive an additional sum or pension from an entity subject to audit by the Rechnungshof. ... If entities do not comply with that duty of disclosure, the Rechnungshof shall inspect the relevant documents and draw up its report on the basis thereof.

...

3. The Rechnungshof shall summarise that information - for each year - in a report. The report shall include all persons whose total yearly salary and pensions from entities subject to audit by the Rechnungshof exceed the amount referred to in subsection (1) above. The report shall be sent to the Nationalrat, the Bundestrat and the Landtage of the Länder'.

15. From the preparatory documents for the law we see that the above report must show the name of the employee and the amount of salary received; the report must then be made available to the public so as to ensure 'full information for Austrian citizens on salaries received in public entities'. (6)

**Facts and Proceedings**

Facts and questions referred in Case C-465/00

16. The origin of Case C-465/00 lies in a dispute over the interpretation of Paragraph 8 of the BezBegrBVG between the Rechnungshof and a number of bodies subject to its audit: certain regional or local authorities (Land Niederösterreich, the City of Wiener Neustadt and the Commune of Kaltenleutgeben); Österreichische Nationalbank (the Austrian central bank); a statutory body representing its members' interests (Wirtschaftskammer Steiermark); a public undertaking responsible for the performances of tasks relating to the public interest (ÖRF) and a public undertaking managed according to economic criteria 'in competition with other national and foreign undertakings not subject to audit by the Rechnungshof' (Austrian Airlines Österreichische LuftverkehrsAktiengesellschaft; hereinafter simply 'Austrian Airlines').

17. More specifically, at the time of the audit relating to pensions and salaries paid in the years 1998 to 1999, those entities merely provided the data on the incomes of their employees in anonymous form, with the exception of Wirtschaftskammer Steiermark, which provided no data. When the Rechnungshof subsequently attempted to conduct a direct examination of the accounting documents, those entities did not agree to the audit or made it subject to the condition (which the Rechnungshof considered unacceptable) of rendering the data anonymous.

18. The Rechnungshof then applied to the Verfassungsgerichtshof, seeking confirmation of its power to conduct the examination on the premises of the entities cited, for the purpose of drawing up the report on incomes specified in Paragraph 8 of the BezBegrBVG. The defendant entities opposed the claim of the Rechnungshof, seeking a declaration that it is unlawful for the report to show the names and functions of the persons concerned. Among other points, they claimed that disclosure of the names and functions of the employees concerned was contrary to the provisions of the Directive and to the Community principles on the protection of privacy and would create an unlawful impediment to the free movement of workers.

19. Seised of those applications, the Verfassungsgerichtshof considered it necessary to refer to the Court of Justice, pursuant to Article 234 EC, the following questions:

'1. Are the provisions of Community law, in particular those on data protection, to be interpreted as precluding national rules which require a State body to collect and pass on 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 body representing its members' interests,

(e) a partially State-controlled undertaking?

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

Are the provisions precluding the abovementioned national rules directly applicable, in the sense that persons obliged to disclose data may rely on them in order to prevent the application of conflicting national rules?'

**Facts and questions submitted in Cases C-138/01 and C-139/01**

20. Ms Christa Neukomm and Mr Josef Lauermann are employees of ÖRF, which pays them a salary above the threshold set in Paragraph 8 of the BezBegrBVG. Under that provision, ÖRF is therefore required to give the Rechnungshof the data relating to their pay.

21. Ms Neukomm and Mr Lauermann both applied, separately, to the Arbeits- und Sozialgericht, Vienna, and to the Landesgericht, St Pölten, seeking emergency measures to prevent ÖRF from passing on their data with their names. In support of their applications, so far as concerns this case, the applicants alleged breach of their fundamental rights (in particular the right to respect for private life as laid down in Article 8 of the ECHR) and of the provisions of the Directive. In the course of the two proceedings, the ÖRF - although ask-

ing for the applications to be dismissed, - declared that it took the same standpoint as its own employees.
22. The two courts dismissed the applicants' claims by decisions that were subsequently upheld on appeal by the Oberlandesgericht, Vienna. The applicants then appealed in cassation against the decisions at second instance to the Oberster Gerichtshof which - referring to the questions already put by the Verfassungsgerichtshof - decided to stay proceedings and refer to the Court the following questions for a preliminary ruling:
'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 (ex Article F) of the EU Treaty and with Article 8 of the European Convention for the Protection of Human Rights], to be interpreted as precluding national rules which require a broadcasting organisation governed by public law acting as an entity recognised by law to pass on data concerning the incomes of its employees and a State body to collect and to pass on such data for the purpose of publishing the names and incomes of those employees.
2. If the Court of Justice of the European Communities answers the question put in the affirmative: are the provisions precluding national rules as described above directly applicable, in the sense that the entity obliged to disclose data may rely on them in order to prevent the application of conflicting national rules and therefore may not rely upon an obligation imposed by national law as regards the employees concerned by the disclosure'.

**Proceedings before the Court**

23. In Case C-465/00, observations were submitted by the parties to the main proceedings, the Commission and the Governments of Austria, Denmark, Finland, Italy, the Netherlands, Sweden and the United Kingdom whilst, in Cases C-138/01 and C-139/01, joined by order of 17 May 2001, observations were submitted by the Commission and the Governments of Austria, Italy, the Netherlands, Sweden and the United Kingdom.
24. A joint hearing in the three cases was held on 18 June 2002, in which the Commune of Kaltenleutgeben, the Land Niederösterreich, the Österreichische Nationalbank, Austrian Airlines, ÖRF, the Commission and the Governments of Austria, Finland, Italy, the Netherlands and Sweden participated.

**Legal analysis**

25. As has been seen, essentially the same questions are put to the Court in all three cases: a question on the compatibility of rules such as those of Austria with the provisions of the Directive and with the general principles of Community law regarding privacy; and a second, alternative, question on the direct effect of the Community provisions with which, in the analysis of the first question, those rules may be found to be incompatible.
26. In answering the questions set out in the three orders for reference (which I shall of course discuss together), it is therefore necessary to consider, first, whether national rules such as those at issue are compatible with the provisions of the Directive and, second, whether such rules infringe the general principles of Community law regarding privacy. Then, if it is found that those rules do infringe the provisions of the Directive or the principles concerning privacy, it will then be necessary to consider also whether those provisions and principles are directly applicable.

**Compatibility of national rules such as those at issue with the provisions of the Directive**

**Introduction**

27. As I have said, the national courts ask, first, whether rules such as those at issue require personal-data processing in breach of the requirements of the Directive. Of course, the answer to that question assumes that the Directive applies to the case in point, and this is by no means to be taken for granted and indeed has been openly disputed by several parties.
28. I note here that, under Article 3, the provisions of the Directive do not apply to all 'processing of personal data'; for present purposes, in particular, they do not apply to processing 'in the course of an activity which falls outside the scope of Community law' (first indent of Article 3(2)). Assuming that the various operations prescribed in Paragraph 8 of the BezBegrBVG (collection of data on salaries and pensions, provision of data to the Rechnungshof, inclusion in the report, submission of the report to the competent bodies and publication of the report) entail 'processing of personal data', almost all of the participants in the proceedings before the Court, and the referring courts themselves, have therefore dwelt at length on the question whether or not the activities for which that processing has been effected do fall 'outside the scope of Community law', within the meaning of the first indent of Article 3(2). Only if they do fall within its scope can it be held that such processing is covered by the provisions of the Directive.
29. It therefore seems clear to me that for present purposes the question whether the Directive is applicable must be considered as an inescapable preliminary point, since, if it were not, there would clearly be no reason to consider the compatibility of rules such as those at issue. First of all, therefore, I shall examine that point.

**Considerations put forward by the national courts and the arguments of the parties**

30. Although they recognise that the point is disputed, the national courts appear inclined to hold that the Directive also covers processing of the type in point, since it effected full harmonisation in this area in order to ensure full 'protect[ion of] the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data' (Article 1(1)). They further observe that the Rechnungshof's audit activities, for which the processing now under consideration is effected, may fall within the scope of Community law because it may have an effect on freedom of movement for workers (Article 39 EC), particularly since such an audit is required even of a public company which is in competition with (national and foreign) operators which are not required to make public the data on their employees' salaries.

31. Naturally, the entities which are defendants before the Verfassunggerichtshof think likewise. Essentially, albeit with minor variations, they consider that the Rechnungshof's audit activities fall within the scope of Community law because, as they affect the working conditions of the employees of the entities concerned, they touch on aspects governed in part by Community provisions on social matters (7) and also, primarily, because they may impair the free movement of workers, in breach of Article 39 EC.
32. With particular reference to the latter aspect, it is maintained that, on the one hand, audit by the Rechnungshof adversely affects the possibility for the employees of the entities concerned to seek work in another Member State (presumably because publication of their salaries would restrict their negotiating power vis-à-vis foreign companies) and, on the other hand, it discourages citizens of other Member States wishing to move to Austria to work for the entities subject to audit by the Rechnungshof.
33. More specifically, then, the Austrian Central Bank claims that the impairment of free movement of workers is aggravated by the fact that the audit also relates to the branches of the entities concerned located in other Member States, whilst Austrian Airlines claims that that impairment is of particular importance to it, since it is in competition with airlines of other Member States that are not subject to any similar audit.
34. Lastly, ÖRF contends that the Rechnungshof's activities fall within the scope of Community law (and hence that the processing concerned is subject to the provisions of the Directive) because Paragraph 8 of the BezBegrBVG must be regarded as a provision implementing the Directive.
35. On the other hand, the observations submitted by the Rechnungshof and by Austria and Italy are to the opposite effect. For them, the audit activity prescribed by Paragraph 8 of the BezBegrBVG is the expression of an autonomous power of the State, clearly intended for the pursuit of objectives of general interest in the field of public accounts and thus does not fall within any aspect of Community law. These parties add that the Directive, adopted under Article 100a of the EC Treaty, essentially pursues the objective of realisation of the internal market, in relation to which protection of the right to privacy is merely incidental. They further contend that that audit is not such as to hinder the free movement of workers, because it does not prevent the employees of the entities concerned from moving to work in another Member State, or workers from other Member States from becoming employees of those entities.
36. For its part, the Commission has not taken a clear and unambiguous position on this point, for the written observations which it has submitted in the three cases are not entirely the same and subsequently, at the hearing, it modified the conclusions reached previously.
37. In its written observations submitted in Case C-465/00, the Commission maintained that the Directive does not apply to processing such as that at issue, because it is effected in the course of an audit of accounts which falls outside the scope of Community law. That audit activity is concerned with national budgetary policy which, apart from certain restrictions laid down in the context of the economic and monetary union, is not regulated at Community level and therefore remains essentially within the competence of the Member States. Furthermore, the Commission continues, there is no question either of the activity concerned falling within the scope of Community law as a result of its possible effect on the functioning of the internal market. This is so, in particular, because (i) the report on incomes and publication thereof involves no cross-frontier processing of data; (ii) the assumed competitive disadvantage for undertakings subject to audit by the Rechnungshof is in any case negligible; and (iii) the influence of the legislation at issue on the choices made by workers is too indirect and uncertain for it actually to represent a barrier to their movement within the Community.
38. In its written observations submitted later in Joined Cases C-138/01 and C-139/01, the Commission essentially repeats the view that the Rechnungshof's activities fall outside the scope of Community law. However, it added that the processing effected by the entities subject to audit by the Rechnungshof by means of collecting the data on their employees' salaries is actually carried out in the course of two separate activities: the first is the payment of those salaries and falls within the scope of Community law because it may have an effect on free movement of workers and on the principle of equal pay for male and female workers (Article 141 EC); the other is the passing on of the data concerned to the Rechnungshof for writing of the report referred to in Paragraph 8 of the BezBegrBVG - and that activity, as maintained earlier, falls outside the scope of Community law. Since the former activity is ‘obscured’ by the accounts-audit activity (for which subsequent processing is effected by the Rechnungshof), the Commission submitted that the collection of data on incomes likewise is not processing covered by the provisions of the Directive.
39. However, at the hearing, the Commission modified that submission and took the view that the Directive is applicable. In particular, it began by noting that Paragraph 8 of the BezBegrBVG essentially prescribes five processes: collection of data by the entities subject to audit; passing those data to the Rechnungshof; the Rechnungshof's inclusion of them in its report; the sending of the report to the Parliament and publication of the report. The four latter processes are not covered by the provisions of the Directive, in the sense contemplated in Article 3(2), as they are carried out in the course of an accounting-audit activity outside the scope of Community law. However, departing from what it had maintained earlier, at the hearing the Commission observed that the first of the processes, where the entities subject to audit collect the data, does fall under the provisions of the Directive. The reason for that is that it is carried out (only) for the payment of salaries and, thus, for an activity which falls within the scope of Community law, firstly because it may have an effect

on the free movement of workers and, secondly, because it is relevant to the implementation of various Community provisions on social matters (in particular Article 141 EC). But if such data are re-used also for the accounting-audit activity, they would then be 'further processed' within the meaning of Article 6(1)(b) of the Directive and the lawfulness of that processing must be considered in the light of the derogations set out in Article 13.

**Assessment**

40. Turning now to an assessment of the various submissions, I would first of all agree with the Commission that Paragraph 8 of the BezBegrBVG essentially prescribes five forms of processing: collection of data on salaries and pensions by the entities concerned; passing those data to the Rechnungshof; the Rechnungshof's inclusion of these in its report; the sending of the report to the Parliament and the other competent bodies and publication of the report. However, I do not agree with the Commission's contention in its second set of written observations, and at the hearing, as regards the first of those forms of processing (collection of data by the entities subject to audit by the Rechnungshof); that is to say, I do not believe that the entities concerned effect this form of processing for the payment of salaries to their employees or, as a result, for an activity which, in the Commission's view, falls within 'the scope of Community law' for the purposes of Article 3(2) of the Directive - unlike the activity for which the four other processes are intended.

41. It seems to me that Paragraph 8 of the BezBegrBVG does impose on the entities subject to Rechnungshof audit a processing which is different and additional to that which they normally carry out in the management of their accounts, for the purpose of paying salaries to their employees: the first of the forms of processing required in that provision in effect involves the selection and extrapolation, from all the data to be found in those entities' accounts, of the data relating to the salaries and pensions 'of persons which in at least one of the two previous calendar years were greater in that year than 14 times 80% of the monthly reference amount', taking account also of any other salaries and pensions received from other entities subject to audit by the Rechnungshof. This is therefore a special processing of the data held by those entities and assuredly it must not be confused with other forms of processing which those entities must normally carry out in managing their accounts and in paying salaries to all employees. And that is because, unlike those forms of processing, this is a form of processing for a particular purpose, specifically and exclusively intended to permit the accounting-audit activity prescribed in Paragraph 8.

42. That having been made clear, in order to establish whether the five forms of processing required by Paragraph 8 of the BezBegrBVG are covered by the provisions of the Directive, it is now necessary to inquire whether the Rechnungshof's audit activity for which they are intended falls within 'the scope of Community law' within the meaning of Article 3(2) of the Directive.

43. I believe that that question must be answered in the negative. The Rechnungshof undertakes this activity for the purpose of ensuring 'full information for Austrian citizens on salaries received in public entities' and so to encourage proper management of public resources. It is therefore, as the Rechnungshof itself, the Commission and the Austrian and Italian Governments have observed, a public-audit activity prescribed and regulated by the Austrian authorities (and in fact in a constitutional law) on the basis of a choice of a policy and institutional nature made by them autonomously and not intended to give effect to a Community obligation. Since it is not the subject of any specific Community legislation, that activity can only fall within the competence of the Member States.

44. Nor do I think that this conclusion is affected by the opposing arguments raised in an attempt to bring the activity of the Rechnungshof within the scope of Community law. To that end, as we have seen, particular emphasis has been placed on the alleged relevance of that activity for certain provisions of the Treaty and of secondary law, but I do not think that any of the hypotheses invoked are well founded.

45. First of all, apart from making a general reference, no-one has really been able to explain what relevance that activity can have from the standpoint of Article 141 EC. Given that the activity relates without distinction to the data on workers of either sex, it is, specifically, not possible to see in what way the audit by the Rechnungshof might affect application of the principle of equal pay enshrined in that provision. Nor can I understand what relationship there can be between the audit and the other Community provisions in the social field referred to by some of the participants in these proceedings, that is to say, with Articles 136 EC and 137 EC on social policy, Directive 76/207 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, (8) and with Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. (9) Furthermore, those reference are made without any explanation and, in any event, try as I may, I am unable to perceive the link with the Rechnungshof's audit activity.

46. Next, I find that the attempt to bring that activity within the scope of Community law by invoking its possible effect on the freedom of movement for workers, guaranteed by Article 39 EC, is strained and in any event not convincing. I would observe, as a preliminary point, that the orders for reference reveal no cross-border elements which might justify applying that article to the cases in the main proceedings except, at most, on a hypothetical basis: but that is in conflict with the case-law of the Court according to which '[a] purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with Community law to justify the application of Article 48 of the Treaty [now Article 39 EC]'. (10)

47. But even leaving that point aside, I believe that the rules at issue here also cannot properly be described as an obstacle to freedom of movement for workers. Given that they relate equally to national and to foreign workers, it seems to me that any possible influence on workers' decisions that they may have is too uncertain and indirect for it really to constitute an obstacle to workers' movement for the purposes of Article 39 EC. In that connection, I would recall that the case-law of the Court, while accepting that '[p]rovisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement ... constitute an obstacle to that freedom', has made it clear, however, that, 'in order to be capable of constituting such an obstacle, [such provisions] must affect access of workers to the labour market'. (11) Accordingly, as observed in particular by the Austrian Government, even if audit by the Rechnungshof may perhaps rank among the factors taken into consideration by some workers in making their professional decisions, it clearly does not affect either access by workers from other Member States in Austria to employment with the entities concerned nor access by the employees of those entities to the employment market in the other Member States.

48. Lastly, equally unfounded, it seems to me, and not very clear either, is the argument of the ÖRF to the effect that the Rechnungshof's audit activity falls within the scope of Community law because Paragraph 8 of the BezBegrBVG must be characterised as a provision implementing the Directive. In reality, that provision does not lay down rules of a general nature on processing of personal data, for the purpose of transposing the provisions of the Directive; it only requires specific forms of processing which are strictly necessary for the carrying out of the audit activity of the Rechnungshof. If one is not to engage in a circular argument and in any case contradict the underlying objective of Article 3(2), one cannot regard as a provision transposing the Directive any national provision whatever which requires the processing of personal data and then, from that premiss, infer that every form of processing prescribed by a national provision is covered by the provisions of the Directive because, by definition, it is carried out in the course of an activity that falls within 'the scope of Community law'.

49. All of the considerations set out above lead me therefore to consider that the forms of data processing of the type prescribed in Paragraph 8 of the BezBegrBVG are not covered by the provisions of the Directive, because they are effected in the course of a public activity of audit of accounts which falls outside the scope of Community law within the meaning of Article 3(2) of the Directive.

50. Nor, moreover, do I believe that it can be objected here, as the national courts appear to do, that the Directive must also be applied in similar cases because it is intended to guarantee '[protection of] the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data' (Article 1(1)).

51. As I have observed before, in my Opinion in Case C-101/01, Lindqvist, the Directive was adopted on the basis of Article 100a of the Treaty in order to encourage the free movement of personal data by the harmonisation of the laws, regulations and administrative provisions of the Member States on the protection of natural persons with regard to the processing of such data. In particular, the Community legislature sought to establish a level of protection 'equivalent in all Member States', in order to remove the obstacles to flows of personal data deriving from the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, ... afforded in the Member States (seventh and eighth recitals). The intention here was that, following adoption of the harmonisation directive, 'given the equivalent protection resulting from the approximation of national laws, the Member States [would] no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy' (ninth recital).

52. It is indeed true that, in determining that level of protection 'equivalent in all Member States', the legislature took account of the need to safeguard 'the fundamental rights of individuals' (second and third recitals), with the aim of ensuring a 'high level' of protection (tenth recital). But the context and the purpose of all this was still the attainment of the principal objective of the Directive, that is the intention of encouraging the free movement of personal data, since that was considered to be 'vital to the internal market' (eighth recital).

53. The safeguarding of fundamental rights constitutes therefore an important value and a requirement taken into account by the Community legislature in delineating the harmonised system needed for the establishment and functioning of the internal market, but it is not an independent objective of the Directive. If it were, it would have to be accepted that the Directive is intended to protect individuals with respect to the processing of personal data even quite apart from the objective of encouraging the free movement of such data, with the incongruous result that even forms of processing carried out in the course of activities entirely unrelated to the establishment and functioning of the internal market would also be brought within its scope.

54. If, furthermore, over and above the purpose of encouraging the free movement of personal data within the internal market, one also attached to the Directive the additional, independent objective of guaranteeing the protection of fundamental rights (in particular the right to privacy), there would be a danger of compromising the validity of the Directive itself, because, in such a case, its legal basis would clearly be inappropriate. Article 100a could not be invoked as a basis for measures going beyond the specific purposes stated in that provision, that is to say, for measures not justified

by the objective of encouraging 'the establishment and functioning of the internal market'.

55. On that point, I would note that recently, in its judgment annulling Directive 98/43/EC (12) as having no legal basis, the Court had occasion to explain that 'the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it'. (13) And, with specific reference to the protection of fundamental rights, I would note that, in Opinion 2/94, which followed the adoption of the Directive, the Court expressly stated that 'no provision of the Treaty [gave] the Community institutions, in general terms, the power of legislating on human rights'. (14)

56. In the light of all the foregoing considerations, I therefore consider that forms of processing of personal data prescribed in legislation such as that at issue are not covered by the provisions of the Directive, since they are carried out 'in the course of an activity which falls outside the scope of Community law' within the meaning of Article 3(2) of the Directive. Consequently, such legislation cannot be held to be incompatible with the provisions of the Directive.

**Compatibility of national legislation such as that at issue with the general principles of Community law regarding privacy**

57. Now that it has been shown that the Directive is not applicable in the present cases, it still remains to be considered whether legislation such as that at issue is compatible with the general principles of Community law regarding privacy, among which should be mentioned specifically the right to respect for private life as laid down in Article 8 of the ECHR, (15) expressly referred to in the orders for reference.

58. On this point, I must observe that where 'national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights ... whose observance the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law'. (16)

59. Since, as I have said, I consider that the audit activity prescribed by the national legislation at issue falls outside the scope of Community law, I therefore believe that the Court does not have jurisdiction to rule whether that legislation is compatible with the general principles of Community law on privacy.

**The questions on the direct applicability of the provisions of the Directive and of the general principles of Community law on privacy**

60. Having regard to the conclusions which I have reached in the foregoing paragraphs, I consider that there is no need to discuss the questions on direct applicability of the provisions of the Directive and of the general principles of Community law on privacy.

**Conclusion**

In the light of the considerations set out above, I therefore propose that the answer to the questions referred by the Verfassungsgerichtshof and the Oberster Gerichtshof should be that forms of processing of personal data prescribed by legislation such as that at issue are not covered by the provisions of the Directive, since they are carried out 'in the course of an activity which falls outside the scope of Community law' within the meaning of Article 3(2) of the Directive. The Court does not have jurisdiction to rule on whether that legislation is compatible with the general principles of Community law on privacy.

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1: - Original language: Italian.

2: - Directive of the European Parliament and of the Council of 24 October 1995 (OJ 1995 L 281, p. 31).

3: - This provision is repeated by Article 7 of the Charter of Fundamental Rights of the European Union, which provides that '[e]veryone has the right to respect for his or her private and family life, home and communications'. Referring specifically to the protection of personal data, Article 8 of the Charter then states:

'1. Everyone has the right to the protection of personal data concerning him or her.

Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Compliance with these rules shall be subject to control by an independent authority'.

4: - BGBl. 379/1984 (Wv) idF BGBl. I 49/2000.

5: - BGBl. I 64/1997.

6: - Draft Law and Report from Parliamentary Commission, 453/A and 687 BlgNR, 20. GP.

7: - In this connection, reference was made in particular to Articles 136 EC, 137 EC and 141 EC, to 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 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416 ).

8: - Council Directive 76/207, cited in footnote 7.

9: - Council Regulation No 1408/71, cited at footnote 7.

10: - Judgment in Case 180/83 Moser [1984] ECR 2539, paragraph 18. On this, see also the judgments in Case 175/78 Saunders [1979] ECR 1129; in Case C-332/90 Steen [1992] ECR I-341; and in Joined Cases

C-64/96 and C-65/96 Uecker and Jacquet [1997] ECR I-3171.

11: - Judgment in Case C-190/98 Graf [2000] ECR I-493, paragraph 23.

12: - Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998 L 213, p. 9).

13: - Judgment in Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419, paragraph 83.

14: - Opinion 2/94 [1996] ECR I-1759, paragraph 27.

15: - As we know, 'according to settled case-law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect' (judgment of the Court in Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37). To the same effect, see also Article 6(2) EU, according to which '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

16: - Judgment in Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 15. To the same effect see also the judgment in Case C-159/90 Society for the Protection of Unborn Children Ireland v Grogan and Others [1991] ECR I-4685, paragraph 31, that in Case C-309/96 Annibaldi [1997] ECR I-7493, paragraph 13, and the order in Case C-361/97 Nour [1998] ECR I-3101, paragraph 19.