

QUESTIONNAIRE DATA PROTECTION 2023

Austria

1. In your jurisdiction is a court considered to be a data controller for data protection law purposes in all, or any, of the following situations:

The general legal framework on data protection for civil court proceedings in Austria summarizes as follows:

Section 1 of the Austrian Data Protection Act (DSG) enshrines the fundamental right to data protection on a constitutional level. Section 1 (1) DSG grants everyone the right to confidentiality of personal data relating to them, in particular with regard to their private and family life, insofar as there is an interest worthy of protection. The right to secrecy includes protection from the identification, processing and disclosure of one's data, regardless of the (technical) type of data processing. Hence, not only automation-assisted - as within the scope of the GDPR -, but also conventional (manual) data processing is covered. Since May 25, 2018, the European General Data Protection Regulation (GDPR) has also been applicable in Austria to automated processing of personal data as well as data processed in a file system. In addition, data protection provisions exist in various national procedural laws, amongst those also in the Judicial Organisation Act (GOG) or the Civil Procedure Act (CCP).

Interference by state authorities with the fundamental right to data protection is only permissible on the basis of a specific legal provision, whereby these laws must comply with the requirements of Art 8 (2) ECHR. Section 1 (3) of the Data Protection Act (DSG) provides for the rights to information, correction and deletion as so-called "ancillary rights guaranteed by constitutional law", insofar as the personal data are intended for processing by automated means or manually, i.e. without automated support.

Pursuant to Section 83 (1) Judicial Organisation Act (GOG), judicial activity constitutes a justification for data processing in civil proceedings, without further requirements having to be met. The relevant legal bases for data processing can be found in the relevant procedural laws (e.g. CCP [ZPO], Non-Contentious Proceedings Act [AußStrG], Ordinance on Procedure for Civil Courts of First and Second Instance [Geo]) as well as in the GOG itself. These laws conclusively regulate data protection rights and obligations in the area of court proceedings. The use of data in accordance with the procedural laws is therefore also permissible from the perspective of data protection law.

Examples of such procedural rules are: the fundamental obligation of parties and witnesses to provide information on personal data in judicial proceedings (with certain exceptions, cf Sections 321 et seqq, 380 CCP), the right of parties to inspect files, the limited inspection of files by third parties under § 219 CCP or the rules on the destruction of files in Sections 173 et seqq Geo.

a. When performing its judicial functions?

In Austria, the core competence for monitoring and enforcing the application of the GDPR and the national Data Protection Act (DSG) lies with an independent data protection authority („Datenschutzbehörde“), which is not subject to any directives. The data protection authority is an administrative body. Hence, data protection issues do generally not fall in the responsibility of the (civil) courts. The data protection authority may also impose sanctions in the event of data protection violations.

The award of damages by the data protection authority is expressly excluded by Section 29 (1) DSG. For actions claiming material and immaterial damages in the event of data protection violations, the regional court in civil law matters, in whose district the plaintiff has his habitual residence or registered office, shall have jurisdiction in the first instance. Alternatively, actions may be brought before the regional court, in whose district the defendant has their habitual residence or registered office or a branch (Section 29 (2) DSG). Pursuant to the recent case law of the Austrian Supreme Court,¹ claims for injunctive relief or cancellation can also be asserted in (civil) court proceedings - contrary to the originally expressed intention of the legislator.²

Pursuant to Section 31 (1) of the DSG, the data protection authority has no power or jurisdiction to supervise data processing carried out by courts in the course of their judicial activities (see Question 3 below).

b. For purposes connected with the administration of justice, including the publication of a judgment or court decision, or a list or schedule of proceedings or of hearings in proceedings?

Data protection considerations also impact the activities of the administration of justice. On questions regarding the publication of judgments or hearing schedules, see below Question 4.

Monocratic administration of justice follows the rules of administrative law and therefore falls under the „general“ data protection regime, supervised by the data protection authority. In matters of judicial administration to be handled in senates, in which judges act independently, specific procedural purposes must be safeguarded and a deviating data protection regulation is therefore necessary (e.g. in the allocation of cases or in appointment proposals for judges).

c. For purposes connected with the efficient management and operation of the courts and for statistical purposes?

Most of these areas of administration (statistics, etc) are handled by the Federal Ministry of Justice, hence an administrative body falling under the general data protection rules and procedures. The Federal Ministry of Justice has appointed a data protection officer for data protection complaints, which can be reached by mail via the address of the Federal Ministry of Justice or by email (datenschutzbeauftragter@bmj.gv.at).

1 Austrian Supreme Court 6 Ob 131/18k; 6 Ob 35/21x.

2 AB 1761 25. GP 30; Moser, RZ 2021, 268.

2. In your jurisdiction does a data subject (e.g. a party to litigation, a witness, or a party whose interests may be affected by the litigation) have a right to information regarding the processing of their personal data by or on behalf of the courts?

In principle, everybody has the right of access, rectification, erasure, restriction and objection concerning the data processed about them. In matters covered by the judicial activity of the civil courts (and judicial administrative cases to be settled in senates), an individual may, however, only invoke these rights if and to the extent that the procedural laws, ordinances or the Judicial Organisation Act (GOG) reflect these rights and obligations.

Pursuant to section 83 (1) Judicial Organisation Act (GOG), courts may process the personal data required for this purpose in the course of their judicial activities, whereby according to para 2 leg cit all activities necessary for the performance of tasks in matters of ordinary jurisdiction are included.

The right of access and information is to exist, for example, in the form of the right to the inspection of files and the obligation to produce documents. The right of rectification and deletion is granted by provisions on the rectification of decisions, the rules on the rectification of party names and minutes, and the rules on the destruction of files (Sections 173 et seqq. Geo).³

3. In your jurisdiction does a data subject whose personal data is published in a court document such as a judgment, have the right to seek rectification of allegedly inaccurate or inappropriately disclosed personal data?

Pursuant to Section 85 GOG, a person, whose fundamental right to data protection has been violated by an institution in exercise of their judicial activities in civil law cases, has the right to request a declaratory judgment on this violation. The competent court for this declaratory relief is the respective superior court (e.g. the regional court for alleged violations occurred before district courts). If the complaint concerns a violation by an organ of the Supreme Court, the latter itself shall have jurisdiction to decide on the matter. The proceedings are governed by the Non-Contentious-Proceedings Act (AußStrG), opposing party is the Federal Republic of Austria.

The request for declaratory relief shall be filed within one year from the day the applicant has become aware of the alleged violation (Section 85 (4) GOG). After a total duration of three years after the alleged infringement has taken place no relief can be sought anymore (Section 85 (5) GOG).

The request shall state the grounds on which the complainant considers that their right to data protection has been infringed. The decision or the allegedly violating procedure shall be described in detail. To assess the timeliness of the request, the date on which the applicant became aware of the decision or the event shall be stated in the request (Section 85 (3) GOG).

Pursuant to Section 85 (5) GOG, the court shall rule on the alleged violation of data protection and may also issue any necessary orders to the competent court (cf Section 85(1), (2) and (5) GOG).

³ ErläutRV 65 BlgNR 26. GP 151 et seq; *Lutschounig*, 181.

An appeal against such a decision shall be admissible to the Supreme Court (unless the decision has already been rendered by the Supreme Court, see above), provided that the decision depends on the resolution of a question of law which is of considerable importance for the preservation of legal unity, legal certainty or the development of the law (Section 85 (5) GOG). In such appeal proceedings, unlike in those of first instance, parties have to be represented by legal counsel (Section 85 (4) et seq GOG).

In case of a successful request for declaratory relief, the applicant shall be reimbursed with their costs (Section 85 (5) GOG).

It is important to note, however, that Sections 84, 85 GOG are not intended to influence, correct or subsequently control judicial proceedings in those areas where the procedural laws (conclusively) regulate the use of data. Rather, the remedies provided by the respective procedural code (Code of Civil Procedure) are to be used primarily. Accordingly, it is not admissible to take action by means of an application under Section 85 GOG against the use of data insofar as it is regulated by the procedural laws. Sections 84, 85 GOG only provide subsidiary legal protection in areas where there is no possibility of taking up a data protection violation within the framework of the Code of Civil Procedure.⁴ Such legal remedies are, for example, an appeal against a decision in which a third party is granted access to the file or an application for correction of a judgment pursuant to Section 419 CCP.

4. In your jurisdiction is personal data contained in a judgment or decision of a court, or in a list or schedule of proceedings or hearings, generally made accessible to the public? If so, are there exceptions and what are they? If not, is there a redaction requirement, or alternative requirement, to be implemented before a judgment / list /schedule can be published so as to safeguard the rights of data subjects?

According to § 15 OGHG (Act on the Organisation and Procedure before the Austrian Supreme Court), decisions of the Supreme Court of general importance are to be published. Based on the substantive principle of the rule of law, the Austrian Constitutional Court has expressly established the constitutional requirement of accessibility of decisions of the Supreme Court.⁵ Therefore, decisions of the Supreme Court, in part also decisions of the courts of second instance, are published on the website www.ris.bka.gv.at, also serving the purpose of maintaining legal uniformity. The decisions are accessible in full text form and free of charge for anyone.

To safeguard the rights of data subjects, however, the names of the parties and their addresses are anonymized in the published decisions. Further redactions are made when needed.

Starting from 2022, a second platform was created, primarily for the publication of second-instance decisions in civil and criminal cases. So far, however, this second platform („anonymisierte

⁴ Moser, RZ 2021, 269 et seq.

⁵ Austrian Constitutional Court 28.6.1990 G 315/89, G 67/90 VfSlg 12.409; cf also Thiele, RZ 1999, 215 (215).

Entscheidungssuche“), can only be accessed by judges and people working within the judiciary, but not by the general public. The search results are also anonymized - with the help of artificial intelligence - in order to maintain data protection.

Hearing schedules are not published in Austria. Anyone wishing to attend a public hearing must inquire directly at the court.

5. How are complaints addressed in your jurisdiction concerning alleged breaches by the courts of the rights of data subjects? Does your jurisdiction have a person or body with special responsibility for the supervision of data processing operations of courts when acting in their judicial capacity?

Every person has the right to lodge a complaint with the Austrian data protection authority (Datenschutzbehoerde) following a breach in the processing of their personal data.

In order to ensure the independence of the judiciary in the exercise of its judicial functions, the supervisory function is to be exercised not by the data protection authority which is competent in principle, but by "special bodies within the judicial system of the Member State" (Recital 20 to the GDPR). Accordingly, Art 55(3) of the GDPR and Section 31(1) 2nd sentence of the GDPR also exclude the competence of the data protection authority for processing carried out by courts in the course of their judicial activities (see already question 1.a). Pursuant to Art 37(1)(a) GDPR, there is also no requirement to appoint a data protection officer, if the data processing is carried out by courts acting in the course of their judicial activities.⁶

In this respect, it is incumbent on the judiciary to ensure compliance with the provisions of data protection law. In such cases, a data protection violation can be asserted before the ordinary courts within the framework of the remedies available under procedural law. In addition, anyone whose fundamental right to data protection has been violated by a body acting in the course of its judicial activities may seek a declaration of such violation before the ordinary courts (cf. Sections 85, 85a (2) GOG; see also Question 3).

6. In your experience have data protection rules impacted adversely on your judicial independence? If so, how have they done so?

The increasing prominence of data protection rules has certainly increased the sensitivity towards this subject. I have personally not noticed or heard of instances where an adverse impact on judicial independence as such was at stake. However, there are indeed some uncertainties when it comes to the task of balancing rights to information (e.g. the right to access file records or the legitimate extent of media requests) on the one hand and safeguarding data protection rights on the other hand. The increasing number and complexity of the provisions on data protection can make it difficult to assess a specific situation (what is [still] right? What ist [already] wrong?).

6 Moser, RZ 2021, 269.

Further information on the subject can be found (in German):

Lutschounig, Entscheidungsveröffentlichung im Zivilprozess - Die Zugänglichkeit richterlicher Entscheidungen im datenschutzrechtlichen Kontext (2021)

Moser, Ausgewählte Fragen des Datenschutzes in der Justiz und die Berücksichtigung von Geheimhaltungsinteressen bei Übermittlung von strafrechtlichen Ermittlungsakten an einen parlamentarischen Untersuchungsausschuss, RZ 2021, 267

Rassi, Fragen zum Datenschutz im Zivilverfahren, in FS Schneider (2013) 403

Schwamberger, Die Bindungswirkung zwischen Zivil- und Verwaltungsverfahren nach der DSGVO, VbR 2018/117

Thiele, Die Publikation von Gerichtsentscheidungen im Internet, RZ 1999, 215

[https://www.justiz.gv.at/datenschutz/datenschutzinformation-\(justizverwaltung-ermittlungs-und-gerichtsverfahren\).67.de.html;jsessionid=3ECE6FAF7D26D5FD2A7D37025F7C23A8.s2](https://www.justiz.gv.at/datenschutz/datenschutzinformation-(justizverwaltung-ermittlungs-und-gerichtsverfahren).67.de.html;jsessionid=3ECE6FAF7D26D5FD2A7D37025F7C23A8.s2) (last accessed on July 7th, 2023)

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