

Austria

Constitutional Court

Important decisions

Identification: AUT-2015-3-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.10.2015 / **e)** G 264/2015 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

3.16 General Principles – **Proportionality.**

3.17 General Principles – **Weighing of interests.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

Keywords of the alphabetical index:

Internet, evaluation, opinion, publish experience / Request, delete, erase / Balance, public interest, data subject, controller.

Headnotes:

In case of a request to erase personal data used in a public data application, the interests of the data subject, the controller of the data application and the general public must be weighed into the decision.

Summary:

I. According to Article 28.2 of the Data Protection Act (*Datenschutzgesetz*), if personal data are used in a public data application, the data subject has the right to object to this use at any time without the need to give reasons. If such an objection is raised, the controller of the application must erase the data within eight weeks.

The applicant before the Constitutional Court runs an Internet portal listing practising doctors in Austria. Each doctor has a site that covers the name, practice address and telephone number, contractual

relationship with health insurance funds, office hours, and certificates of the Austrian General Medical Council (*Ärztelkammer*). Users can search for these data and can publish evaluations and reports of their experiences with the individual doctor.

In a proceeding before the civil courts, a medical doctor had brought an action against the applicant, seeking the omission of the publication on the applicant's website or any other processing of further specified data as well as the erasure of these data from the applicant's website.

The applicant (as defendant in this proceeding) filed a complaint with the Constitutional Court. He claimed that Article 28.2 of the Data Protection Act contradicted Article 10 ECHR.

II. The Constitutional Court held that Article 28.2 of the Data Protection Act interfered with the right to freedom of expression and information as laid down in Article 10 ECHR.

The obligation to erase personal data upon objection aimed at protecting the rights of the person concerned; thus, it served a legitimate aim under Article 10 ECHR. However, Article 28.2 of the Data Protection Act granted the person concerned the absolute right to object to a data application without allowing the courts to strike a fair balance between the rights of the person and the interests of the controller of the application or those of the recipients. In particular, the provision at issue did not permit the consideration of the individual circumstances of the case (e.g., whether the information to be erased concerned the role of the data subject in public life). However, Article 10.2 ECHR requires the weighing of conflicting interests.

As a result, the Constitutional Court repealed Article 28.2 of the Data Protection Act as being contrary to Article 10 ECHR and, therefore, unconstitutional.

Cross-references:

European Court of Human Rights:

- *Sunday Times v. United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30; *Special Bulletin – Leading Cases* [ECH-1979-S-001];
- *Leander v. Sweden*, no. 9248/81, 26.03.1987, Series A, no. 116; *Special Bulletin – Leading Cases* ECH-1987-S-002].

Court of Justice the European Union:

- C-131/12, *Google Spain SL et al. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13.05.2014.

Languages:

German.

