

Case C-638/23**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 October 2023

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

23 August 2023

Appellant on a point of law:

Amt der Tiroler Landesregierung

Subject matter of the main proceedings

Appeal on a point of law against a ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Austria) concerning a data protection matter

Subject matter and legal basis of the request

Interpretation of Regulation (EU) 2016/679, Article 267 TFEU

Question referred for a preliminary ruling

Is Article 4(7) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; GDPR), to be interpreted as precluding application of a provision of national law (such as, in the present case, Paragraph 2(1) of the Tiroler Datenverarbeitungsgesetz (Tyrol Law on data processing)) in which a particular controller is provided for within the meaning of the second part of Article 4(7) of the GDPR but

– this is merely a service (such as, in the present case, the Amt der Tiroler Landesregierung (Office of the Provincial Government of Tyrol)) which, although

established by law, is not a natural or legal person nor, in the present case, an authority, but functions merely as an auxiliary apparatus for such an authority and has no full or partial legal capacity of its own;

– is nominated without reference to specific processing of personal data, with the result that the purposes and means of specific processing of personal data are not determined by Member State law either;

– neither alone nor jointly with others determined the purposes and means of the processing of personal data at issue in the present case?

Provisions of EU law cited

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; GDPR) – Article 4(7), Article 5, Article 9, Article 26

Provisions of national legislation cited

Bundesverfassungsgesetz betreffend Grundsätze für die Einrichtung und Geschäftsführung der Ämter der Landesregierungen außer Wien (Federal Constitutional Law on the principles governing the establishment and management of the Offices of the Provincial Governments other than Vienna; ‘the BVG ÄmterLReg’) – Paragraphs 1 to 3

Datenschutzgesetz (Law on data protection; ‘the DSG’) – Paragraph 1(1)

Gesundheitstelematikgesetz 2012 (Law on health telematics 2012; ‘the GTelG 2012’) – Paragraphs 18, 24d(2)(3)

Tiroler Landesordnung 1989 (Tyrolean Provincial Code 1989), LGBl. No 61/1988, as amended in LGBl. No 71/2019 – Articles 56 and 58

Geschäftsordnung des Amtes der Tiroler Landesregierung (Rules of procedure of the Office of the Provincial Government of Tyrol) – Paragraphs 4(1), 10, 18

Tiroler Datenverarbeitungsgesetz (Tyrolean Law on data processing; ‘the TDVG’) – Paragraphs 1, 2(1)(a) and 2(3)

Succinct presentation of the facts and procedure

- 1 On 21 December 2021, the interested party lodged a data protection complaint with the Datenschutzbehörde (Data Protection Authority; ‘the DSB’) against the Office of the Provincial Government of Tyrol, the respondent, for breach of the

right to confidentiality under Paragraph 1(1) of the DSG in connection with a letter addressed to him in which he was informed of appointments reserved for him at a specified location for a COVID vaccination and was invited to take advantage of the offer. In that context, the interested party suspects that this letter was based on an unauthorised disclosure and processing of data relating to his health.

- 2 In its observations of 31 January 2022, the Office of the Provincial Government of Tyrol declared to the DSB, inter alia, that it, the Office of the Provincial Government, was the controller in terms of data protection law responsible for the sending of that letter and that there was no joint controller within the meaning of Article 26 of the GDPR.
- 3 By decision of 22 August 2022, the DSB – in so far as is here relevant – upheld the data protection complaint and found that the Office of the Provincial Government of Tyrol had breached the interested party’s right to confidentiality. It found that the Office of the Provincial Government of Tyrol had no specific access authorisation for the central vaccination register under Paragraph 24f(4) of the GTelG 2012, for which reason the subsequent processing of data had been unlawful.
- 4 The action brought against that decision by the Office of the Provincial Government of Tyrol was dismissed as unfounded by the Federal Administrative Court in the ruling under appeal.
- 5 The Federal Administrative Court found, in essence, that a ‘proposal’ had been drawn up by the Office of the Provincial Government of Tyrol for determining the purpose and means of the data processing at issue and was subsequently ‘released’ by the Landeshauptmann (Head of Government), with summary instructions. The procedure for sending a letter to citizens of the Province of Tyrol, in particular the proposal to send a ‘vaccination reminder’ to all individuals in Tyrol aged 18 years or older (and not yet vaccinated against Covid-19), had been drawn up, and the letter drafted, by the Office of the Provincial Government of Tyrol. The linking of the interested party’s place of residence with the place of vaccination was based on a proposal from the Office of the Provincial Government of Tyrol, and the Office of the Provincial Government had undertaken its technical implementation. The Office of the Provincial Government of Tyrol had repeatedly declared itself to be the controller of the processing of personal data – for example, in its privacy statement. On 19 November 2021, the Province of Tyrol, represented by the Office of the Provincial Government of Tyrol, had commissioned E GmbH to identify the addressees of the ‘vaccination reminder’. E GmbH had passed on the commission to I GmbH. In performance of the commission, I GmbH had first identified all individuals from the patient index (list of patients maintained pursuant to Paragraph 18 of the GTelG 2012) who were over 18 years of age and had declared an address in Tyrol. Subsequently, I GmbH had filtered out those who had an entry in the central vaccination register recording that they had been vaccinated with a COVID-19 vaccine authorised in the European Union. I GmbH

had submitted the names and addresses of the remaining individuals to the Office of the Provincial Government of Tyrol on 25 November 2021. The interested party had neither participated in the processing of his personal data nor given his consent.

- 6 The Federal Administrative Court further found that, from a legal point of view, it followed from Paragraph 2(1)(a) and (3) of the TDVG alone that the Office of the Provincial Government of Tyrol was to be classified as the controller in respect of the processing of personal data at issue in the present case. The consultation of data from the patient index and from the central vaccination register and the pooling of those data, both done on a commission from the Office of the Provincial Government of Tyrol, were attributable for the purposes of data protection law to the Office of the Provincial Government of Tyrol. Under Paragraph 18 of the GTelG 2012, the Office of the Provincial Government of Tyrol had no grounds by which to justify lawful access to the patient index within the meaning of Article 5(1)(a) of the GDPR. In connection with access to the central vaccination register, that court held that the interested party's vaccination status was a special category of personal data within the meaning of Article 9(1) of the GDPR because information about the data subject's state of health could be derived from his vaccination status. The processing of vaccination status data would be authorised only if one of the exceptions to the processing prohibition of Article 9(1) of the GDPR which are set out in Article 9(2) of the GDPR applied. In the view of the court, no such exception obtained. The Office of the Provincial Government of Tyrol had no access authorisation for the central vaccination register for the purpose of issuing 'reminders of vaccinations' under Paragraph 24d(2)(3) of the GTelG 2012. Since the identification of address data by accessing the patient index and the central vaccination register was shown to be unlawful, their further use to address and send the 'vaccination reminders' was also unlawful.
- 7 The present extraordinary appeal on a point of law by the Office of the Provincial Government of Tyrol has been brought against that ruling. In the pre-litigation procedure initiated by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the DSB submitted a response to the appeal on a point of law, claiming that the appeal should be dismissed on procedural grounds or, in the alternative, on the merits.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 In connection with the data processing in question, it is necessary to determine whether the Office of the Provincial Government of Tyrol has the status of controller within the meaning of Article 4(7) of the GDPR.
- 9 Under the definition set out in Article 4(7) of the GDPR, 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of

personal data; where the purposes and means of such processing are determined by EU or Member State law, the controller or the specific criteria for its nomination may be provided for by EU or Member State law.

- 10 In accordance with the settled case-law of the CJEU, the term ‘controller’ is broadly defined in order to guarantee the effective and comprehensive protection of data subjects. The term can also refer to two or more parties involved in data processing. Any person who or which exerts influence over the processing of personal data, for his or its own purposes, and who participates, as a result, in the determination of the purposes and means of data processing, may be regarded as a controller. By contrast, persons cannot be considered to be controllers in the context of operations that precede or are subsequent in the overall chain of processing for which those persons do not determine either the purposes or the means. Liability is limited to operations involving the processing of personal data in respect of which the person in question actually determines the purposes and means. The determination of the purpose and means of processing in accordance with the underlying provisions need not (necessarily) be carried out by the use of written instructions. Any person who contributes to determining the purposes and means of data processing can be considered to be a controller (cf. on all of the above points the ruling of the Supreme Administrative Court of 27 June 2023, Ro 2023/04/0013, paragraphs 21 to 23, with reference to the judgments of the CJEU of 29 July 2019, C-40/17, *Fashion ID*, ECLI:EU:C:2019:629, paragraphs 66 to 70, 74 and 85; of 5 June 2018, C-210/16, *Wirtschaftsakademie Schleswig-Holstein*, ECLI:EU:C:2018:388, paragraph 31; and of 10 July 2018, C-25/17, *Jehovan Todistajat*, ECLI:EU:C:2018:551, paragraph 67).
- 11 According to the findings of the Federal Administrative Court, the Office of the Provincial Government of Tyrol merely drew up a ‘proposal’ for the purpose of the data processing (increasing the vaccination rate) and the means (targeted invitation of persons aged 18 years or older residing in Tyrol who had not yet been vaccinated against COVID-19, using data from the central vaccination register and the patient index – by way of the Province of Tyrol, represented by the Office of the Provincial Government of Tyrol, commissioning E GmbH – and linking each data subject’s place of residence with the proposed place of vaccination), which was subsequently ‘released’ and thereby approved by the Landeshauptmann, who, under Article 58 of the Tyrolean Provincial Code 1989, is head of the Office of the Provincial Government of Tyrol and, under Article 56(1) of the same code, represents the Province of Tyrol.
- 12 It follows that the Landeshauptmann alone, in his capacity as representative of the Province of Tyrol, and not, alone or jointly with him, the Office of the Provincial Government of Tyrol, determined both the purpose and the means of the processing of personal data. There is nothing in the facts established to indicate that, in the present case, the Office of the Provincial Government of Tyrol determined, alone or jointly with the Landeshauptmann, the purposes and means of data processing – not even in respect of individual stages of the data processing – or that it at least contributed to that determination for its own

purposes and bears responsibility for at least part of the data processing as an additional party alongside the Landeshauptmann. In the opinion of the Supreme Administrative Court, this alone would suffice to make the Office of the Provincial Government of Tyrol not a controller within the meaning of the first part of Article 4(7) of the GDPR.

- 13 However, the Federal Administrative Court also derives its classification of the Office of the Provincial Government of Tyrol as a controller from the Office's designation as a controller in Paragraph 2(1)(a) and (3) of the TDVG.
- 14 It is therefore necessary to determine whether it was possible validly to designate the Office of the Provincial Government of Tyrol as a controller within the meaning of the first part of Article 4(7) of the GDPR on the basis of that legal provision, irrespective of the fact that, not having determined the purposes and means of the processing of personal data, it does not have the status of a controller in accordance with the second part of Article 4(7) of the GDPR.
- 15 In principle, the Office of the Provincial Government of Tyrol has no executive function and no legal personality of its own. Although the provincial legislation can entrust the Office of the Provincial Government of Tyrol with official tasks on a case-by-case basis and thereby provide for it as a public authority, that did not happen in connection with the production and sending of the letter to the interested party in the present case.
- 16 That letter did not impose a legally binding obligation on the interested party to receive a COVID vaccination; on the contrary, it invited the interested party to receive a COVID vaccination at one of several simultaneously announced appointments at a specified location. The letter neither constitutes an act of public authority, nor is it connected with an act of public authority by way of preparing, accompanying or implementing such an act.
- 17 The Office of the Provincial Government of Tyrol is therefore neither a natural or legal person, nor is it a public authority in connection with the processing of the interested party's personal data in the present case. On the contrary, it acted in the present case purely as an auxiliary apparatus within the framework of administration delegated to the private sector, without full or partial legal personality.
- 18 In that context, the question arises whether a mere service, as an auxiliary apparatus of a public authority without full or partial legal capacity of its own – such as the Office of the Provincial Government of Tyrol in the present case – is to be understood as an 'agency or other body' within the meaning of the first part of Article 4(7) of the GDPR and can therefore, in accordance with the second part of Article 4(7) of the GDPR, be provided for as a controller by Member State law.
- 19 The GDPR does not refer to Member State law for the meaning and scope of the terms contained in its Article 4(7), in particular with regard to the terms 'agency'

and ‘other body’, with the result that those terms must be given an autonomous and uniform interpretation.

- 20 The terms ‘agency’ and ‘other body’, used not only in the first part of Article 4(7) of the GDPR but also in relation to the definitions of ‘processor’ (point (8)), ‘recipient’ (point (9)) and ‘third party’ (point (10)) in Article 4 of the GDPR, are not defined in greater detail in the GDPR.
- 21 Under Article 24(1) of the GDPR, responsibility for data protection lies with the controller. He or it is therefore obliged in principle to put in place suitable technical and organisational measures to ensure that processing is compliant with the regulation and to review and to update those measures as required.
- 22 The existence of legal personality or full or partial legal capacity as a prerequisite for an ‘agency or other body’ would primarily correspond to the intention of Article 4(7) of the GDPR to guarantee the effective and comprehensive protection of the data subject. In the view of the European Data Protection Board, the controller must not only have at least a say in the purposes and means of the processing of personal data but is also supposed to have a genuine ability to exercise control (cf. its Guidelines 07/2020 on the concepts of ‘controller’ and ‘processor’ in the GDPR, version 2.0, of 7 July 2021, paragraph 23). Comprehensive protection of the data subject will be effective only if the controller is de facto able to take the necessary action, refrain from prohibited activities and uphold the obligations and fundamental principles of data processing laid down in the GDPR. That would require the controller to have at least partial legal capacity.
- 23 On the other hand, such a definition which relies on the existence of legal personality might be contested on the grounds that an ‘agency or other body’ would already be covered by the term ‘legal person’ in the first part of Article 4(7) of the GDPR.
- 24 In summary, it is unclear to the Supreme Administrative Court whether an ‘agency or other body’ within the meaning of Article 4(7) of the GDPR presupposes legal personality and whether the Office of the Provincial Government of Tyrol, which is neither a natural or legal person nor, in the present case, a public authority, can validly be provided for as a controller by Member State law under the second part of Article 4(7) of the GDPR.
- 25 In the view of the European Data Protection Board, the controller’s specific identification by law is determinative for establishing who is acting as controller (cf. its Guidelines 07/2020 on the concepts of ‘controller’ and ‘processor’ in the GDPR, version 2.0, of 7 July 2021, paragraph 23).
- 26 The Office of the Government of the Province of Tyrol is designated as a controller in Paragraph 2 of the TDVG without reference to any specific processing of the personal data of the Province of Tyrol, in particular to the processing of personal data for the purpose of producing and sending letters such

as that which was addressed to the interested party. On the contrary, the nomination of the Office of the Government of the Province of Tyrol as controller in Paragraph 2 of the TDVG refers to data processing in general, without further specifying that data processing. In the absence of any reference to specific data processing, the TDVG also does not set out the purpose or means of the individual processing of personal data that the Province of Tyrol conducts or commissions alone or for a controller other than the Office of the Provincial Government of Tyrol or for specified controllers.

- 27 It is unclear to what extent the purposes and means of data processing must be determined by Member State law within the meaning of the second part of Article 4(7) of the GDPR so that the controller may be provided for as a controller by Member State law and whether, in that respect, the nomination of the Office of the Provincial Government of Tyrol as a controller in Paragraph 2 of the TDVG, without reference to any specific processing of personal data and without stipulation of the purpose and means of such specific processing of data, is in alignment with Article 4(7) of the GDPR and is binding on the supervisory authority and the courts in proceedings concerning a complaint within the meaning of Article 77 of the GDPR.
- 28 Reference to specific data processing when nominating the controller in law under the second part of Article 4(7) of the GDPR is primarily decisive in relation to the permissibility conditions set out in Article 6(1)(c) and (e) of that regulation. Under those provisions, processing is lawful if the processing is necessary for compliance with a legal obligation to which the controller is subject (point (c)) or the 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 (point (e)).
- 29 It must also be concluded from the permissibility conditions decisive in the present case, which are set out in Article 6(1)(c) and (e) of the GDPR, and from the intention of Article 4(7) of the GDPR to guarantee the effective and comprehensive protection of the data subject, that a person can be designated as a controller under Member State law only if he or it is entitled by law and de facto able to determine, alone or jointly with others, the purposes and means of the specific processing of personal data, exercise genuine control and take the necessary action, refrain from prohibited activities and uphold the obligations and fundamental principles of data processing laid down in the GDPR.
- 30 As stated in paragraphs 9 to 12 above, the Office of the Provincial Government of Tyrol – even only in respect of individual stages of the processing of personal data on which the letter to the interested party was based – neither determined the purposes and means of the data processing nor at least contributed to that determination for its own purposes. In such a case, the Supreme Administrative Court has doubts as to whether the Office of the Provincial Government of Tyrol can be provided for as a controller by Member State law under the second part of Article 4(7) of the GDPR.