

Case C-33/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

14 January 2022

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

14 December 2021

Appellant on a point of law:

Datenschutzbehörde (Austria)

Other parties to the proceedings:

1. W K; 2. President of the Nationalrat (National Council, Austria)

Subject matter of the main proceedings

Committee of inquiry – Data protection – Parliamentary activity – Separation of powers – Applicability of the General Data Protection Regulation (GDPR) – Supervisory authority – Data protection complaint

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Do activities of a committee of inquiry set up by a Parliament of a Member State in the exercise of its right to scrutinise the executive fall within the scope of EU law within the meaning of the first sentence of Article 16(2) TFEU, irrespective of the subject matter of the inquiry, with the result that 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; ‘the GDPR’) is applicable to the processing of personal data by a parliamentary committee of inquiry of a Member State?

If Question 1 is answered in the affirmative:

2. Do activities of a committee of inquiry which has been set up by a Parliament of a Member State in the exercise of its right to scrutinise the executive and which has as the subject matter of its inquiry the activities of a police State-protection authority, that is to say, activities concerning the protection of national security within the meaning of recital 16 of the GDPR, come within the scope of the exception set out in Article 2(2)(a) of the GDPR?

If Question 2 is answered in the negative:

3. If – as in the present case – a Member State has established only one single supervisory authority in accordance with Article 51(1) of the GDPR, does the competence of that authority in respect of complaints within the meaning of Article 77(1) of the GDPR, in conjunction with Article 55(1) thereof, already arise directly from the GDPR?

Provisions of EU law cited

Treaty on the Functioning of the European Union

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 (repealed by Regulation [EU] 2016/679)

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)

Provisions of national law cited

Bundes-Verfassungsgesetz (Federal Constitutional Law; ‘the B-VG’), Article 24, Article 53(1), Article 56(1), point 7 of Article 138(1)

Bundesgesetz zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten (Federal Law on the protection of natural persons with regard to the processing of personal data; ‘the DSG’), Paragraph 1(1), Paragraph 4(1), Paragraph 18(1), Paragraph 24(1)

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 20 April 2018, the Nationalrat (National Council) set up the Untersuchungsausschuss über die politische Einflussnahme auf das Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (Committee of Inquiry into political influence on the Federal Office for the Protection of the Constitution and for Counterterrorism; ‘the BVT Committee of Inquiry’) in accordance with Article 53(1) of the B-VG.
- 2 On 19 September 2018, the first of the other parties to the proceedings was questioned as an information source by the BVT Committee of Inquiry in a manner open only to media representatives. The verbatim record of the questioning, which was published on the website of the Austrian Parliament, contained his full forename and surname. By complaint lodged with the Austrian Datenschutzbehörde (‘Data Protection Authority’) on 2 April 2019, the first of the other parties to the proceedings requested a declaration that the publication of the record containing his full name infringed the GDPR and Paragraph 1 of the DSG. He asserted that he worked as an undercover investigator and that the publication of his name, contrary to his request, infringed his fundamental right to data protection and his right to erasure of impermissibly processed data.
- 3 The Data Protection Authority rejected the complaint by administrative decision of 18 September 2019. As grounds, it was stated that, although the GDPR does not prevent data protection supervisory authorities from supervising legislative bodies, the separation of powers is inherent in the European legal order, and, therefore, the executive is precluded from scrutinising the legislature. The BVT Committee of Inquiry is to be regarded as a body attributable to the legislature, with the result that the Data Protection Authority does not have competence.
- 4 The first of the other parties to the proceedings brought an appeal against that administrative decision before the Bundesverwaltungsgericht (Federal Administrative Court). The latter annulled the administrative decision of the Data Protection Authority and stated, in summary, that neither the GDPR nor the DSG provides for an exception to the competence of the Data Protection Authority to scrutinise the conformity of the processing of personal data within the framework of the legislature. The exception in Article 55 of the GDPR in respect of activities of courts acting in their judicial capacity cannot be generalised, with the result that it must be assumed that data protection supervisory authorities have unlimited competence in respect of all other independent bodies, including parliamentary committees of inquiry. Article 77 of the GDPR provides for effective judicial protection for matters coming within the scope of application of the regulation, whereby that protection is intended to enable every data subject to defend himself or herself against infringements of rights guaranteed by the regulation.
- 5 The Data Protection Authority brought an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court) against the judgment of the Federal Administrative Court.

Succinct presentation of the reasoning in the request for a preliminary ruling*Question 1*

- 6 The first of the other parties to the proceedings considers that his fundamental right to the protection of personal data was infringed by the publication of the record – which contains his full name – of his questioning before the BVT Committee of Inquiry. Publication constitutes, in principle, ‘processing’ of personal data within the meaning of the GDPR. The question that arises is whether such processing is excluded from the scope of Article 2(1) of the GDPR in accordance with Article 2(2)(a) thereof.
- 7 The Federal Administrative Court proceeds on the assumption that the GDPR applies to acts of the legislature (such as those of parliamentary committees of inquiry, for example), as the material scope is conceived in comprehensive terms and encompasses all data processing. According to the Federal Administrative Court, the legislature, as one of the functions of the State, is not excluded from the scope of the GDPR. The exception in Article 2(2)(a) of the GDPR must, in its view, be interpreted very restrictively and covers only national security.
- 8 The Data Protection Authority refers to the judgment of the Court of Justice of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, but disputes its competence by pointing to the principle of the separation of powers, which precludes bodies of the executive and judiciary from scrutinising the legislature.
- 9 In Case C-272/19, the Court of Justice held ‘that, in so far as a Petitions Committee of the Parliament of a Federated State of a Member State determines, alone or with others, the purposes and means of the processing of personal data, that committee must be categorised as a “controller”, within the meaning of [Article 4(7) of the GDPR], and consequently the processing of personal data carried out by that committee falls within the scope of that regulation’.
- 10 The first of the other parties to the proceedings considers that the GDPR is applicable, whereas the second takes the view that it is not.
- 11 Committees of inquiry set up by the National Council serve to exercise scrutiny and legislative functions, which, under the Austrian Constitution, are vested in the legislature. Parliamentary committees of inquiry act as supervisory bodies of the legislature and are organisationally and functionally attributable to the legislative branch. Each inquiry conducted by those committees concerns a specific, delineated process in the executive or judicial branch of the Federal Government, with the aim of clarifying processes for political purposes.
- 12 Persons who have been questioned as an information source may bring an appeal before the Verfassungsgerichtshof (Constitutional Court) against the decision of a committee of inquiry to publish a record of their questioning, on the grounds of an alleged infringement of the DSG. Such appeals are confined to an assessment of

the question as to whether the conduct specifically challenged infringes the personality rights specifically asserted by the appellant.

- 13 Proceeding on the basis of the judgment of the Court of Justice of 9 July 2020 (*Land Hessen*, C-272/19, EU:C:2020:535) and the case-law on Directive 95/46/EC cited in that judgment, the applicability of the data protection provisions does not require that the processing of personal data should take place specifically for purposes governed by EU law, is cross-border in nature or directly affects freedom of movement between Member States. The applicability of the GDPR can be excluded only if a specific exception in Article 2(2)(a) to (d) thereof applies.
- 14 In accordance with the case-law of the Court of Justice, Article 2(2)(a) of the GDPR must be interpreted strictly. That provision, read in the light of recital 16 of the regulation, must be regarded as being designed to exclude solely the processing of personal data carried out by State authorities in the course of an activity which is intended to safeguard national security or of an activity which can be classified in the same category. Those activities encompass, in particular, those that are intended to protect essential State functions and the fundamental interests of society.
- 15 However, by contrast to the judgment in Case C-272/19, which concerns a petitions committee of the Parliament of *Land Hessen*, committees of inquiry set up by the National Council do not merely contribute indirectly to parliamentary activity, but, as supervisory bodies, are involved in the core area of parliamentary activity. They serve to exercise political scrutiny and to obtain clarification for political purposes. The statements in the judgment in Case C-272/19 do not in themselves exclude the applicability of the exception to data processing in respect of the core area of parliamentary activity. Rather, it might be argued that, in principle, activities of parliamentary scrutiny also serve to protect essential State functions and the fundamental interests of society – a form of protection covered by Article 2(2)(a) of the GDPR.
- 16 There do not appear to be any provisions of EU law that regulate parliamentary activity in the Member States. The bases for such activity arise from the national legislation of the respective Member States. The fact that, in accordance with the judgment in Case C-272/19, no general exception is provided for with respect to parliamentary activities does not mean that at least some parliamentary activities cannot be covered by the exception in Article 2(2)(a) of the GDPR.
- 17 The principle of separation of powers is inherent in both EU law and national law. It is true that Article 55(3) of the GDPR excludes only the supervision of processing operations of courts acting in their judicial capacity from the competence of the supervisory authority. However, this might be understood as meaning that the core area of parliamentary activity is already excluded from the scope of application of the GDPR in accordance with Article 2(2)(a), as otherwise it would also have been taken into account in Article 55(3).

- 18 Therefore, the question that arises for the referring court is whether the core area of parliamentary activities, such as legislative processes and parliamentary scrutiny processes, comes within the scope of Article 16(2) TFEU and is thus covered by the material scope of the GDPR pursuant to Article 2(1), in accordance with Article 2(2)(a) thereof.

Question 2

- 19 The subject matter of the inquiry conducted by the BVT Committee of Inquiry was ‘the suspicion of a concerted, politically motivated exertion of influence by natural persons acting as executive organs of legal persons, by other (senior) officials and by employees of political offices of the BMI [Bundesministerium für Inneres – Federal Ministry of the Interior] on the performance of the tasks of the BVT [Bundesamt für Verfassungsschutz und Terrorismusbekämpfung – Federal Office for the Protection of the Constitution and for Counterterrorism], as well as the alleged associated infringement of legal provisions in connection with the executive branch of the Federal Government ...’.
- 20 The BVT (since 1 December 2021: Direktion Staatsschutz und Nachrichtendienst – Directorate of State Protection and the Intelligence Service; ‘the DSN’) acts as a police State protection authority and is responsible for, inter alia, protecting constitutional institutions and their ability to act. Thus, its remit includes ‘activities concerning national security’ within the meaning of recital 16 of the GDPR. Therefore, the subject matter of the inquiry conducted by the BVT Committee of Inquiry encompasses activities concerning national security, which do not come within the scope of EU law and are thus excluded from the material scope of the GDPR in accordance with Article 2(2)(a) thereof.
- 21 According to the judgment of the Court of Justice of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 101), ‘processing operations concerning public security, defence, [and] State security’ are ‘excluded, in a general way, from the scope of [Directive 95/46/EC], without drawing any distinction according to who was carrying out the data processing operation concerned’. The approach taken to identifying the actions excluded was therefore purposive.
- 22 In so far as the activities of parliamentary scrutiny carried out by a committee of inquiry come, in principle, within the scope of EU law, the question arises as to whether those activities are excluded from the scope of the GDPR at least where the subject matter of the inquiry concerns activities of the executive branch, which do not come within the scope of EU law.

Question 3

- 23 The Data Protection Authority is the only national supervisory authority, within the meaning of the GDPR, in Austria. If the GDPR is applicable to activities of

parliamentary scrutiny, its competence as the sole national supervisory authority in respect of acts of the legislature would require a constitutional basis due to the constitutional principle of separation of powers between the executive and the legislature. To date, there is no such basis.

- 24 However, every national court has, as an organ of a Member State, the obligation fully to apply the directly applicable law of the European Union and to protect the rights which that law confers on individuals.
- 25 If the first question is answered in the affirmative but the second in the negative, the question that arises for the referring court is whether, as Austria's only supervisory authority established in accordance with the GDPR, the Data Protection Authority's competence in respect of the right to lodge a complaint conferred on every person by Article 77 of the GDPR already arises directly from EU law.
- 26 In the event that, as Austria's only supervisory authority established in accordance with Article 51 of the GDPR, the Data Protection Authority's competence in respect of complaints within the meaning of Article 77(1) of the GDPR already arises directly from the GDPR, the want of a constitutional basis for the Data Protection Authority's competence in respect of data protection complaints concerning alleged infringements of the GDPR as a result of the processing of personal data within the framework of parliamentary scrutiny would not be relevant. This, however, presupposes that Articles 51 and 77 of the GDPR are applicable to activities of parliamentary scrutiny as such, and are specifically applicable in the present case of the BVT Committee of Inquiry. Those questions are therefore relevant to the decision to be given on the pending appeal on a point of law.