SECOND STUDY COMMISSION

AUSTRIAN REPORT

SUBJECT:

CIVIL ISSUES REGARDING THE PROTECTION OF PRIVACY
(WITH PARTICULAR FOCUS ON SUCH MATTERS AS AFFECTED BY THE INTERNET)

A. Laws and Regulations
1) What laws apply to protection of privacy issues in your legal system? Are there civil code/legislative/common law provisions that protect individuals against privacy violations regarding:

In Austria privacy is protected by the following statutes:

- General Civil Code (name/domain/sphere of privacy/honour)
- Copyright law (protection of correspondence and pictures)
- Media Act (defamation, libel, slander)
- E-Commerce Act
- Labour Relations Act
- European Convention of Human Rights
- Criminal Code
- Data Protection Act

a) In the Public Sector
Access by individuals to information collected by various government agencies about them?
Protection from disclosure of that information to third parties?
   Access by the media or members of the public to government records, for example those regarding government decision-making and action, and put on that access?
   Limitations put on information sharing between government agencies?

The Data Protection Act applies to the prerequisites for the lawful processing and transfer of data relating to persons from the use of automated data processing. Section 1 of this Act, which is a constitutional provision, guarantees a fundamental right of secrecy of data relating to persons which is not limited to data generated by automated data processing, if the person concerned has a legitimate interest in these data being kept secret. This interest is determined by balancing the interest of the person concerned in keeping the information
secret on the one hand and the interest of others in obtaining the information under certain well-delineated safeguards. In addition, the Act provides for a right of information of individuals and for a right to have false data corrected and to have data deleted which have been processed unlawfully, if data relating to persons are intended to be processed automatically or in manual databases.

Subject to a few exceptions the **same rules apply to the public and private sector.** The culpable violation of provisions of the Data Protection Act gives rise to a liability in damages for the user and the processor. In case of a particularly serious violation of interests of secrecy by way of use, in a way by which this information is accessible to the public, of sensible data, data relevant under criminal law or information as to a person’s credit-worthiness, the effects of which are similar to a person being exposed to public ridicule as defined in the Media Act, there is also a right to **non-pecuniary damages.** The most important difference between the public and the private sector is found in procedural law. The fundamental right to data protection in the private sector is to be asserted before the ordinary courts, whereas in all other cases the Data Protection Commission, an independent body not subject to any other authority’s directions, has jurisdiction.

**b) In the Private Sector**

Protection from disclosure to third parties of personal information collected in the world of e-commerce, for example

- personal information provided through the use of credit/debit cards and other electronic transfers of funds;
- personal information in relation to credit reporting and banking transactions;
- records of a customer’s usage (telephone; online activity);
- records kept for insurance coverage and other social services benefits provided by the private sector?

Protection from surreptitious collection of information via the internet, for example, through internet electronic surveillance technologies such as “spyware” or “adware”?

See item A 1 a.

In Austria jurisdiction for violations in the internet is determined according to the Regulation of the Council of the European Union on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. If the defendant has his residence outside of Austria, Austrian courts may have jurisdiction. A person living or working in Austria can sue before an Austrian court, if his personality rights have been violated by way of an online medium.
Data protection and secrecy protection prevent the publication of data on websites only if the person concerned did not publish the data himself or had to publish the data. In all other cases the interest in keeping the information secret has to be balanced against the interest of others in obtaining the information concerned.

In case of online-archives, if the original publication was unlawful in the first place because of a violation of personality rights, the operator has to delete the information even if he neither knew nor had to know about the unlawfulness of the publication. If the article was published lawfully, but had to be revoked later or in case a reply had to be published, it can remain in the archive. Revocation of or reply to the article have been published in a manner which ensures that the internet user sees the connection to the article concerned.

2) What laws apply with respect to the investigation and enforcement of privacy rights?

- How strong is the protection?
- Are the laws binding or advisory?
- How does an individual make a complaint when a private actor or government breaks privacy laws?
- Who prosecutes or enforces – for example, a privacy commissioner, administrative body, such as a privacy tribunal?
- Is there a right to a court remedy?
- Are there out-of-court dispute resolution options?

See item A 1 a.

The scope of protection of privacy depends on the personality right which was violated. The rights to life, body integrity and liberty are better protected than a person’s honour, his right to pictures of his own, privacy or freedom of expression. Thus, the protection of the latter rights is lower (i.e. no or lesser protection under criminal law).

The right to one’s name, specified in the General Civil Code, provides protection against wrongful denial or use of one’s name. In the course of media reports there is normally no violation of such right because the person referred to by his name ordinarily is the person meant to be identified in that way. If the name is used without justifying circumstances, a violation of personality rights can be deduced from the statute. According to case law, the use of a name in an internet report requires a balancing of the public right to information and the protection of the name.

The right to privacy – apart from the Data Protection Act mentioned supra – is regulated in the General Civil Code, in the European Convention on Human Rights and in the
Media Act. In case of violations of privacy which can expose a person to public ridicule or shame, in addition to pecuniary losses there is a claim for damages for personal suffering (non-pecuniary losses). In this case the victim, by receiving „full compensation“, is better protected by the General Civil Code than by the Media Act which provides for low caps even though violation of privacy by way of media can be a lot more serious and have more serious consequences.

The right of **honour** can be divided into two categories: The first category comprises „per se violations of honour“. This category includes libellous statements as to a person’s character or behaviour (libel under criminal law), reference to a court sentence which has already been executed and slander. The second category relates to a person’s creditworthiness. This category is intended to protect a person’s good business standing. In case of a violation of the first category, only pecuniary damages are refunded, in the second category also non-pecuniary losses.

The right to **privacy** is also addressed in the **Copyright Act**. Under this Act, **letters, diaries and similar confidential information** may not be read in public or divulged in another manner by which they become accessible to the public, if this violates legitimate interests of the author or a close relative. “Similar confidential information” includes emails. Not only the interests of the sender are to be protected, but also the interests of the recipient. In addition, **pictures of persons** may not be exhibited publicly or divulged in another manner by which they become accessible to the public, if this violates legitimate interests of the person depicted on the picture or of a close relative. In both cases under the Copyright Act there is a right to non-pecuniary damages, even in case of simple negligence.

The **E-Commerce-Act** provides a legal framework for certain aspects of **electronic business transactions**. It deals with the permit for providers, their duties of information, the conclusion of contracts, the responsibility of providers, the principle of country of origin control and the cooperation with other member states of the European Union in electronic commerce. Violations of the provisions of the E-Commerce Act by providers carries administrative fines of up to EUR 3,000.

Pursuant to the **Labour Relations Act** the introduction of control measures and technical systems for control of employees require the consent of the employees’ council, if these measures (systems) affect the employee’s personal **dignity**. A control measure affects a person’s dignity if, under objective standards it is conceivable that such a system violates a person’s dignity. Personality rights also apply, albeit modified and reduced by the employment contract, also apply to a person’s job and protect employees from humiliation,
unfair and arbitrary treatment. An intensity of control measures which goes beyond what is necessary for fulfilling the intended purpose can affect the employees’ dignity in the sense of the Labour Relations Act. Injunctive relief against the use of these control measures can be applied for at the labour court.

B. Private-Sector Initiatives

1) Do particular companies, industries or professional associations in your country govern themselves regarding the protection of privacy? For example, are there privacy policies, professional codes, voluntary industry standards?

2) Who or what body, if any, ensures that these standards are met?

C. International and Cross Border Issues

1) How is privacy protected when information is exchanged or transferred to other countries?

No.

2) Are there any agreements, laws or international treaties or protocols, to protect privacy issues in this situation?
3) Does your country limit its exchange of information to countries with similar protections of privacy?

No.

The data protection directive of the European Union is based on the principle that within the territory of the European Union there is no restriction on the exchange of information with foreign countries. However, the exchange of information with non-member states is only permitted if an adequate level of data protection is guaranteed.

Under the Data Protection Act, fundamental requirement for the transfer of information to foreign countries is always that the use of the data in Austria is lawful. Pursuant to the Act, the transfer or exchange of data to European Union member states and to non-member states with adequate level of data protection does not require a permit. A regulation of the Federal Chancellor specifies what non-member states have an adequate level of data protection. Unless the prerequisites for a transfer or exchange without a permit are met, the applicant has to obtain a permit from the data protection commission before transferring or exchanging data with a foreign country.
As specified supra at A 1a, the data protection commission, which is not subject to any other authority's direction, is in charge of data protection in the sense of the Data Protection Act. In addition, a data protection council has been established in the federal chancellor's office which advises the federal government and the provincial governments on matters of data protection law if they so request.

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