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Preslmayr Attorneys at Law

Has Supreme Court sounded death knell for customer data protection?

In a recently published decision (Case 4 Ob 50/04p) the Austrian Supreme Court has dealt with the issue of whether an employee who processed data collected by his former employer violated the Austrian Data Protection Act 2000.

The plaintiff was the former employer of the first defendant; the second defendant was the company that currently employs him. The first defendant provided the second defendant with data acquired by him when he worked for the plaintiff concerning its suppliers, customers and products.

The Supreme Court held that pursuant to the Data Protection Act a data subject is a natural or legal person that is *not* identical to the data controller (ie, the natural or legal person that processes data for a specific purpose) (Section 4(4)) and that therefore the data subject and controller must be two different people. Further, the court stated that the processing of one's *own* data does not fall under the act, although generally the data of one's customers and suppliers is protected.

The court agreed that the first defendant had given information to the second defendant concerning the plaintiff's protected data. Yet, surprisingly, it ruled that in bringing the case the plaintiff was merely seeking protection for its *own* data. The court cited as an example the plaintiff's request for protection of its conditions of sale. It argued that such data, which it classed as data belonging to a data controller, was not protected by the act. Accordingly, the Supreme Court dismissed the claim.

This is astonishing as data concerning commercial activities (eg, relationships between a corporation and its suppliers and customers, as well as business secrets) is protected in Austria. Naturally, it is irrelevant if somebody processes his/her own data (eg, using his/her own computer). Yet as soon as this data is transmitted to a third person who then processes the data for its own purposes, the original processor of the data becomes the data subject. It is true that originally the plaintiff's customers and suppliers were the data subjects and the plaintiff was the data controller. However, this situation changed when the first defendant gave the data to the second defendant. By processing this data for its own purposes, the second defendant became the data controller while the plaintiff became the data subject.

This decision was only made in the injunctive proceeding to the main proceedings, so hopefully the Supreme Court will revise the decision and give data subjects the right to protect their own data.

Rainer Knyrim and Bettina Mozelt, Preslmayr Rechtsanwälte, Vienna