

Judgement of 17<sup>th</sup> June 2008, [K 8/04](#)

## FISCAL CONTROL

(OTK ZU 2008, No. 5A, item 81)

<b>Type of proceedings:</b> <a href="#">abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> 5 judges	<b>Dissenting opinions:</b> 0
<b>Legal provisions under review</b>		<b>Basis of review</b>
Authorisation of fiscal control organs to gather, make use of, and process personal data also without the knowledge or consent of the person whom the data concern. [Article 7b of the Fiscal Control Act]		Principle of informational autonomy [Constitution: Article 51 paragraph 2]

The Commissioner for Citizens' Rights challenged those provisions of Fiscal Control Act which authorise fiscal control organs to gather, make use of and process personal data, also without a consent of the person whom the data concern. The Commissioner pointed out that the challenged regulation specified the authorisation of fiscal control organs in too general a manner, in particular, as regards lack of a requirement that the information gathered be necessary for a case under investigation or that the request to access the information contain a justification. The Commissioner's reservations also encompassed lack of a control mechanism of requests submitted in accordance with the challenged Article 7b of the Fiscal Control Act (hereinafter referred to as: the FCA).

The Commissioner found that the authorisation to acquire personal data granted by the challenged regulation to fiscal control organs for the purpose of non-contentious proceedings is wider than the same authorisation stemming the Code of Criminal Procedure or the Fiscal Criminal Code. In the opinion of the Commissioner such situation cannot be reconciled with the principle of informational autonomy, as expressed in Article 51 paragraph 2 of the Constitution.

### RULING

**1. Article 7b of the Act of 28<sup>th</sup> September 1991 on Fiscal Control does not conform to Article 51 paragraph 2 of the Constitution.**

**2. Article 36e paragraph 2 point 4 of the Act referred to in point 1 above is not inconsistent with Article 51 paragraph 2 of the Constitution.**

## PRINCIPAL REASONS FOR THE RULING

1. The principle of informational autonomy should be understood as both the right of an individual to autonomously decide on the disclosure to other persons of any information concerning themselves, and the right to exercise control over such information where other subjects are in possession of it. Yet, the right does not and should not be of absolute nature. This particularly concerns the relation between the citizen and public authority.
2. The scope of the notion of informational autonomy encompasses both personal data and data concerning the property and the economic situation of an individual. Nonetheless, in relation to the latter case the jurisprudence of the Constitutional Tribunal envisages the admissibility of setting less rigorous criteria as regards the limitation of the autonomy.
3. The provision constituting the constitutional basis of review in the present case fulfils two fundamental functions. On the one hand, it legalises activities of public authorities aiming at the acquisition, gathering and making accessible the information about individuals, obtained from other sources than the individuals themselves. On the other hand, however, the provision specifies prerequisites of legality of such activities. The prerequisites limit the obligation to make such data accessible to only some strictly defined situations, hence representing an expression of respect to informational autonomy of an individual. Simultaneously the arbitrary nature of lawmaker's activities, shaping the scope of this obligation, has been limited. Accordingly, the fundamental elements making up the content of the right to private life have been realised.
4. The norm expressed in Article 51 paragraph 2 of the Constitution is not fully autonomous due to lack of specification of those constitutional values that should be taken into consideration during the assessment of the admissibility of any limitation upon the informational autonomy of an individual. Within this scope, it is necessary to refer to a general regulation of Article 31 paragraph 3 of the Constitution, which consists of a cumulative list of prerequisites of admissibility of any limitations upon constitutional rights and freedoms. The content of Article 51 paragraph 2 also comprises some elements of the principle of proportionality, i.e. the inadmissibility to acquire, gather and make accessible information on citizens other than that which is necessary in a democratic state ruled by law.
5. The ordinary lawmaker's observance of the principle of proportionality within the scope of limitations upon the informational autonomy of an individual should be assessed against the background of the two Constitutional provisions indicated in point 4 above. Accordingly, there must exist an interest encompassed by the catalogue contained in Article 31 paragraph 3 of the Constitution. Furthermore, it is necessary to demonstrate the fulfilment of the prerequisite of lawfulness of encroachment into the sphere of informational autonomy. It stems from the prerequisites that the introduced regulation must enable the attainment of the assumed purposes (the principle of usefulness), must be necessary for the protection of the public interest with which it is connected (the principle of necessity), and the effects thereof must be proportionate to the burdens imposed by the regulation upon the citizen (the principle of proportionality in the strict sense).
6. The challenged provision of Article 7b of the FCA envisages an obligation incumbent upon data administrators to make the data accessible to fiscal control organs on the basis of a named written authorisation signed by the Minister of Finance, the General Inspector of Fiscal Control or a director of a fiscal control organ. Yet, the acquisition of information on persons on the basis of this provision is permissible only in specified circumstances

and upon fulfilment of special conditions. Such circumstances and conditions have not been identified in the content of the challenged provision.

7. The provision of Article 7b of the FCA may not constitute the basis for a refusal to provide specific information by data administrators, since the general requirement of usefulness contained in the content thereof relates solely to the assessment of activities of fiscal control organs. Accordingly, the regulation does not fulfil any guarantee function as regards the protection of personal data against any unjustified access by that authority.
8. The clause contained in the content of Article 7b of the FCA, according to which the gathering and processing of personal data is admissible solely for the purpose of realisation of statutory tasks of fiscal control, does not meet the requirements stemming from Article 51 paragraph 2 of the Constitution. This is because such general nature of a reference may not be reconciled with the requirement of precision which, pursuant to Article 2 of the Constitution, is required in circumstances where state authorities encroach into the sphere of constitutionally guaranteed rights and freedoms. Furthermore, the relation existing between the type of data gathered, i.e. concerning a particular person, and the purpose of the activity, for the realisation of which fiscal control organs are gathering the data, has not been specified. The prerequisite of purposefulness, as stemming from the challenged provision, does not correspond to the constitutional requirement of necessity within the meaning contained in Article 31 paragraph 3 and Article 51 paragraph 2 of the Constitution.
9. As regards the challenged provision of Article 36e of the FCA, fundamental doubts arise in relation to point 4 thereof, according to which information may be made accessible to other authorities in cases and on principles specified in separate statutes. However, the provision itself, detached from the “separate statutes” it refers to, is insufficient to formulate a norm that could be subjected to a review as regards the conformity thereof to the constitutional principle of informational autonomy. Accordingly, the constitutional basis of review stemming from Article 51 paragraph 2 of the Constitution has to be rendered inadequate.

#### EFFECTS OF THE JUDGEMENT

1. The removal of Article 7b of the FCA from the legal order will not impede any currently pending or future control proceedings, since basic rules concerning fiscal control, including the scope of powers vested in authorities, the circle of authorised controllers as well as the procedure and instruments of such control have been laid down in Article 2a of the FCA.
2. Future constitutional review of Article 36e paragraph 2 point 4 of the FCA is possible, on condition that the article in question is presented in conjunction with another provision of a “separate act”, which would constitute an indispensable complement of the challenged regulation.

#### Provisions of the Constitution

**Art. 31. [...] 3.** Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

**Art. 51 [...] 2.** Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.