

# AUSTRIA

## Submission of epicenter.works for the UN Universal Periodic Review

**37<sup>th</sup> Session of the UPR Working Group, 2-13 November  
2020**

### **Authors**

Andreas Czák, campaigner  
Lisa Seidl, LL.M., policy advisor

### **For further Information**

epicenter.works - Plattform Grundrechtspolitik  
Widerhofergasse 8/2/4  
1090 Wien  
<https://en.epicenter.works>

Thomas Lohninger, executive director  
[thomas.lohninger@epicenter.works](mailto:thomas.lohninger@epicenter.works)  
[+43 1 890 70 71](tel:+4318907071)

Lisa Seidl, LL.M., policy advisor  
[lisa.seidl@epicenter.works](mailto:lisa.seidl@epicenter.works)  
[+43 1 890 70 71](tel:+4318907071)

### **About epicenter.works**

Epicenter.works (formerly Arbeitskreis Vorratsdaten Österreich, AKVorrat) was registered in 2010. The association promotes the support of a democratic political system, of fundamental rights, as well as the preservation of informational self-determination in the age of increasing digitalization, interconnectedness and automation. The non-profit organization has a focus on data protection and surveillance. Further tasks are the education of citizens and the scientific development in these fields.

# United Nations Human Rights Council

## Universal Periodic Review Austria

### Executive Summary

In this report, we focus on our main fields of expertise, which are monitoring potential infringements of human rights through national law. While doing this we are reporting unconstitutional national law especially in the fields of privacy and right to private life. The national legislation of surveillance and the use of automatic processes for decision-making is developing very fast and we try to catch up these developments.

This report does not take legislative amendments into consideration, which were introduced during the Covid-19 crisis beginning Austria in in March 2020 as we are still monitoring these ongoing developments.<sup>i</sup>

### 1. Right to private life, right to privacy

(1) State Protection Act<sup>ii</sup>: During the second Universal Periodic Review in November 2015, Austria supported the recommendation of “revis[ing] the draft State Protection Act so that it contains robust safeguards with respect to the full enjoyment of the right to privacy and other human rights in compliance with international human rights law”.<sup>iii</sup> Since then, the Austrian Parliament approved the State Protection Act and adopted it regarding the Police and Justice Data Protection Directive 2016/680/EU.

Furthermore, the State Protection Act contains numbers of provisions that entitle the Federal Office for the Protection of the Constitution and Counterterrorism (BVT) to investigate (eg. by access to data from all authorities and all companies) without the requirement of judicial approval. The broad definition of “endangering the constitution” contains more than the defense against terrorism (eg. whistleblowers, protesting people), which is a requirement of investigation. Around 100 crimes are defined as an attack endangering the constitution, 40 of them if they are committed with religious or ideological motives.

#### **Recommendation:**

Introduce the requirement of judicial approval for any measures that affect the rights to private life, privacy and freedom of speech. Revise the definition of “attack endangering the constitution” regarding the human rights law.

(2) Government Spyware: In December 2019, the Austrian Constitutional Court pronounced that the planned introduction of government spyware would be incompatible with Austrian constitutional law (Art 8 ECHR).<sup>iv</sup> The coalition agreement between the conservative (Neue Volkspartei) and the green (Grünen) parties of January 2020 states that an introduction of the legal basis for government spyware is planned again.<sup>v</sup> Technically, a state trojan that exclusively accesses online communication (full or partly) cannot exist. It always has to infiltrate the entire system. Therefore, every kind of government spyware is an infringement of the right to private life because of its excessive intensity.

#### **Recommendation:**

Ban governmental spy software and consolidate the integrity of IT systems in the constitution.

(3) Passenger Name Records: According to the EU PNR Directive<sup>vi</sup>, every person who flies to or from the EU must be recorded in a database controlled by the state (in opposite to the existing database of airlines). In Austria, the PNR Act was passed to implement the directive and has been in force since 16 August 2018.<sup>vii</sup> The EU requirements are “gold plated”, because data on flights within the EU is also recorded in Austria. This over-fulfilment of directives is particularly inappropriate in the area of personal data (and can be qualified as mass monitoring without suspicion).

#### **Recommendation:**

End the over-fulfillment of the EU PNR Directive.

(4) Mass surveillance measures:

Facial Recognition: Austria's Minister of the Interior announced to introduce facial recognition in Austria without details of the legal basis.<sup>viii</sup> We criticize that these computer programs analyzing images of human faces for the purpose of identifying persons can be used for general, suspicionless surveillance systems.

Considering the authorities' rights of access to video surveillance and the introduction of the duty to register SIM cards in January 2019, these investigations are an intense infringement of the right to private life.

**Recommendation:**

Ban facial recognition in public and take international human right standards and strict proportionality into consideration.

## 2. Conditions of Detention

(1) Video and Audio Recording in Prisons: The draft of the amendment of the Prison Administration Act<sup>ix</sup> reduces the requirements of video and audio recording during use of force in prisons. This draft raises concerns regarding right to privacy especially when video cameras are used in private spaces like sanitary facilities.

**Recommendation:**

Revise the draft according to right to privacy; especially define the circumstances under which the video and audio recording can be used in private spaces.

## 3. Non-Discrimination

(1) AMS<sup>x</sup>-Algorithms: Austria plans to introduce an algorithm-based decision making system that affects the allowance of educational courses for all unemployed people based on specific factors (f.e. gender, origin, age, disability) in July 2020 (it got delayed because of the covid19-crisis)<sup>xi, xii</sup>. The system is not transparent and without any legal basis, so its implications cannot be completely analyzed. In any case, this categorization, which can have serious personal and financial consequences, can be qualified as discrimination and cannot be implemented in accordance with recommendations, which were noted by Austria during the second Universal Periodic Review in 2015.<sup>xiii</sup>

**Recommendation:**

Ensure full transparency of the algorithm and establish an impact assessment before this system is implemented.

## 4. Migration

(1) Data retention of biometric data of migrants: Subsequent to the CJEU's decision on data retention,<sup>xiv</sup> in 2014 the Austrian Constitutional Court declared the national data retention laws to be disproportionate and unconstitutional (right to privacy).<sup>xv</sup> The reason was the broad scope of applicability. The coalition agreement states that biometric data of persons in visa procedures has to be saved for 5 years after leaving Austria.<sup>xvi</sup> It has to be assumed, that the mass monitoring without suspicion of migrants and the long data retention period is unproportional and can be qualified as an infringement of the right to privacy and right to private life.

**Recommendation:**

Data retention of data of migrants should be allowed only under certain reasons (suspicion) and only during their stay in Austria.

- 
- <sup>i</sup> See: <https://epicenter.works/content/eine-analyse-der-covid-19-gesetze>  
<https://epicenter.works/content/sms-warnsysteme-was-erlaubt-ist-und-was-nicht>  
<https://epicenter.works/content/analyse-der-stopps-corona-app-des-roten-kreuzes>  
<https://epicenter.works/content/die-justiz-in-zeiten-der-krise>  
<https://epicenter.works/content/die-covid-19-lockerungsverordnung>  
<https://epicenter.works/content/neuer-tag-neue-verordnung>.
- <sup>ii</sup> Polizeiliches Staatsschutzgesetz (PStSG) BGBl I 5/2016 idF BGBl I 32/2018, see: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009486>.
- <sup>iii</sup> Report of the Working Group on the Universal Periodic Review – Austria, A/HRC/31/12 and its addendum, A/HRC/31/12 Add.1 - recommendation 141.51 (Czech Republic).
- <sup>iv</sup> VfGH, 11.12.2019, G 72-74/2019, G 181-182/2019, see: [https://www.vfgh.gv.at/downloads/VfGH\\_Verkuendung\\_11.12.2019\\_G\\_72\\_2019.pdf](https://www.vfgh.gv.at/downloads/VfGH_Verkuendung_11.12.2019_G_72_2019.pdf).
- <sup>v</sup> Coalition agreement, page 216, see: <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html>.
- <sup>vi</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, see: <https://eur-lex.europa.eu/eli/dir/2016/681/oj>.
- <sup>vii</sup> Bundesgesetz über die Verarbeitung von Fluggastdaten zur Vorbeugung, Verhinderung und Aufklärung von terroristischen und bestimmten anderen Straftaten (PNR-G) idF BGBl I 64/2018, see: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010284>, became inoperative on 16th of June 2020.
- <sup>viii</sup> <https://orf.at/stories/3143858/>
- <sup>ix</sup> [https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME\\_00166/index.shtml#tab-Uebersicht](https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00166/index.shtml#tab-Uebersicht).
- <sup>x</sup> Public Employment Service Austria.
- <sup>xi</sup> <https://www.noen.at/niederoesterreich/wirtschaft/ams-verschiebt-algorithmus-einfuehrung-niederoesterreich-redaktionsfeed-ams-coronavirus-202653967>.
- <sup>xii</sup> <https://liveblog.tt.com/398/vorschau/58238/ams-algorithmus-kategorisiert-arbeitslose>.
- <sup>xiii</sup> Report of the Working Group on the Universal Periodic Review – Austria, A/HRC/31/12 and its addendum, A/HRC/31/12 Add.1 – recommendation 141.30 (Switzerland), 141.33 (Rwanda), 141.35 (Trinidad and Tobago).
- <sup>xiv</sup> Joined Cases C-293/12 and C-594/12 Judgment of the Court (Grand Chamber) of 8 April 2014, see: <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A62012CJ0293>.
- <sup>xv</sup> VfGH, 27.6.2014, G 47/2012 u.a., see: [https://www.vfgh.gv.at/downloads/presseinformation\\_verkuendung\\_vorratsdaten.pdf](https://www.vfgh.gv.at/downloads/presseinformation_verkuendung_vorratsdaten.pdf).
- <sup>xvi</sup> Coalition agreement, page 193, see: <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html>.