advocatur meier

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EFTA-Gerichtshof

1, Rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 09.07.2025

**TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT**

**WRITTEN OBSERVATIONS**

submitted pursuant to Art. 20 of the Statute of the EFTA Court by

**UNIVERSITY OF LIECHTENSTEIN, FOUNDATION UNDER PUBLIC LAW, FÜRST-FRANZ-JOSEF-STRASSE, 9490 VADUZ**

represented by Dr. Paul Meier, Advocatur Dr. Paul Meier AG, Heiligkreuz 43, 9490 Vaduz, e-Mail: office@advocaturmeier.li, Tel: +423 237 55 66 in

**Case E-5/25**

**Rainer Silbernagl**

**vs.**

**University of Liechtenstein**

concerning the request of the Princely Supreme Court (*Fürstlicher Oberster Gerichtshof*) of 04.04.2025 to provide an advisory opinion.

## A. Facts

1. The University of Liechtenstein ("the University") is an autonomous public-law foundation. By employment contract of 15.10.2019, Rainer Silbernagl was employed as a data protection officer at 0.5 full-time equivalent. Employment was open-ended. It was agreed by employment contract of 15.10.2019 that the employment relationship could be terminated by either party at any time with a period of notice of four months.

   As per ancillary agreement of 16.10.2019, Rainer Silbernagl was employed at 0.3 full-time equivalent as a postdoctoral researcher of the University at the Chair of Banking and Financial Market Law.

   On the basis of a performance agreement entered into with the University, the Government of the Principality of Liechtenstein requested a concept for the promotion of young researchers which had the objective of providing effective training to upcoming researchers. Among other things, postdoctoral researchers were to be relieved of non-scientific and administrative duties. Subsequently, incompatibility rules were included in the Service and Salary Regulations (*Dienst- und Besoldungsordnung*), which concerned various categories of junior scientists. It was laid down that employment as a postdoctoral researcher could not be combined with any other employment / position at the University. The Service and Salary Regulations and the incompatibility rule laid down there were not created because of Rainer Silbernagl and the exercise of his duties as a data protection officer but to promote junior scientists and in to carry out current changes to organisation.

   As a result of the incompatibility rule, the University terminated the employment relationship with Rainer Silbernagl in his position as data protection officer on 27.01.2021, since he was employed as a research assistant at the same time. This was a regular termination with the period of notice agreed upon, so that the employment relationship ended on 31.05.2021.

   The court has found that Rainer Silbernagl was able to exercise his duties as a data protection officer until 31.05.2021.

The Supreme Court correctly stated that following termination, Rainer Silbernagl was free to apply for the position of data protection officer once again. However, he would have had to decide what his professional career was going to be, namely either as a research assistant or as a part of administration in the position of data protection officer.

Ultimately, a different person was appointed to carry out the duties of data protection officer after the end of the employment of Rainer Silbernagl; that other person was not a research assistant at the University.

2. In the first run of the proceedings, the Supreme Court took the position in its judgment of 03.05.2024 that the data protection officer was not subject to regular termination, that regular termination was void, and that the employment relationship (contractual relationship) was still intact. According to this position, the University would have appointed two data protection officers, and the employment relationship with neither could be ended by way of regular termination.

3. This judgment was challenged by the University by complaint to the State Court (*Staatsgerichtshof*) for the violation of rights guaranteed by the ECHR and by the Liechtenstein Constitution.

   By judgment of 02.09.2024, the State Court granted the individual complaint lodged by the University and set aside the judgment of the Supreme Court for violation of the prohibition of arbitrariness; it did not discuss the other violations of fundamental rights that had been asserted.

4. The origin and subject of this legal dispute is formed by Art 7(3) 3rd sentence and (4) DSG.[1] These provisions read as follows:

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1 In the context of non-public bodies (that is, private businesses) Art 38(1) DSG applies: pursuant to this provision, the dismissal of the data protection officer is also permissible only under the

Art 7(3) 3rd sentence DSG* reads:

> *The data protection officer shall not be dismissed or penalised by the public body for performing the data protection officer's tasks.*

Art 7(4) DSG reads:

> *The dismissal of the data protection officer shall be permitted only by applying Article 24 of the State Employee Act mutatis mutandis.*

In the first run of the proceedings, the Supreme Court failed to interpret and apply these provisions in accordance with the legal rules for interpretation.[2] This fact led to the mentioned individual complaint to the State Court, which carried out an interpretation of the provisions and set aside the decision of the Supreme Court for arbitrariness. As to the provisions, it observed: *"Accordingly, Art. 7(3) last sentence DSG must be interpreted in a GDPR-conformal manner to mean that the absolute protection against dismissal generally applies where employment is terminated only as a result of the correct exercise of the tasks of the data protection officer. In other words, this protection against dismissal applies where the data protection officer exercises his or her tasks correctly and termination is the result of the very fact of correct exercise. However, the dividing line between the correct and incorrect exercise of these tasks is fluid. Accordingly, it constitutes a sensible supplement to the protection of the data protection officer if he or she cannot be dismissed from the position of data protection officer for any exercise of that position that is, in the employer's opinion, incorrect. It certainly makes sense to permit such dismissal only pursuant to the modalities of the termination of employment without notice and therefore only for important reason. With this in mind, it is easily possible to interpret Art. 7(4) DSG to mean that the 'dismissal' of the data protection officer is only possible for important reason. As a result of the above considerations, it also makes sense that in contrast to para. (3) last*

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conditions of the labour law provisions on termination without notice on important grounds pursuant to § 1173a Art. 53 ABGB (*Allgemeines Bürgerliches Gesetzbuch*, General Civil Code).

* DSG = *Datenschutzgesetz*, Data Protection Act.

2 National law offers the following methods of interpretation (a) verbatim (grammatical) interpretation, (b) systematic-logical interpretation, (c) teleological interpretation, and (d) historical interpretation.

*sentence, Art. 6(4) DSG* [meaning Art. 7(4) DSG] *does not include the wording 'for performing of his tasks'. For this case is not about dismissal due to the correct exercise of duties but about dismissal where the data protection officer has not (correctly) exercised his or her duties."* [3]

A result of an interpretation of Art. 7(3) and (4) DSG of a national supreme court is available.

5. It is the legal view of the State Court that Art. 7(3) and (4) DSG regulate matters concerning the dismissal of the data protection officer. It stated, however, that the termination of the employment contract with the data protection officer was not regulated, in contrast to the template from which the rule was adopted. *"This means in turn that in contrast to the German legal situation, it is possible under Liechtenstein law to terminate the employment contract (outside of the context of exercising the function of the data protection officer) under the usual requirements of employment contract law and without important reason – as was done in the case subject to complaint by regular termination in compliance with the period of notice, but without an important reason. Where, however, the regularity of termination is merely professed and it is intended to dismiss the data protection officer for the very reason that he or she is doing his or her job properly, this is abusive termination as laid down in § 1173a Art. 46 et sqq. ABGB ("retaliatory termination") with the corresponding legal implications (...)."*[4]

According to the State Court's legal view, grammatical, teleological, and historical interpretation jointly oppose the result achieved by the Supreme Court's interpretation with such clarity that the decision subject to challenge was considered untenable and was set aside on the grounds of being arbitrary.[5]

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3 Judgment of the State Court of 02.09.2024 under StGH 2024/056, cons. 2.5.3. and 3.2.
4 Judgment of the State Court of 02.09.2024 under StGH 2024/056, cons. 2.5.3.
5 Judgment of the State Court of 02.09.2024 under StGH 2024/056, cons. 2.9.

The State Court has made it clear that the DSG – including Art. 7(3) and (4) DSG – does not contain any provisions of labour law, but that violating these provisions may have legal implications under applicable labour law.

Furthermore, the State Court has noted that the abusive regular termination of a data protection officer's employment does not lead to the voidness of such termination, since *"Liechtenstein employment contract law, which was adopted from Swiss employment contract law, does not know such unlimited protection from termination"*.[6]

The result at which the State Court arrived is the following: if regular termination and the reason for it are merely professed and the resulting dismissal is in fact in connection with the fulfilment of tasks, this constitutes – according to the State Court – abusive termination as laid down in § 1173a Art. 46 et sqq. ABGB[7], so that the legal implications of this will ensue. Accordingly, termination will be maintained, but the data protection officer whose employment has been terminated is entitled to reimbursement.[8] The threat of Art. 40 DSG in conjunction with Art. 83(4) GDPR remains unaffected.

6. The proceedings are now in their second run, and it is in the course of this second run that the Supreme Court has referred the subject questions to the EFTA Court.

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6 Judgment of the State Court of 02.09.2024 under StGH 2024/056, cons. 3.2.

7 ABGB = *Allgemeines Bürgerliches Gesetzbuch*, General Civil Code.

8 Judgment of the State Court of 02.09.2024 under StGH 2024/056, cons. 2.5.3. and 3.2.

## B. Introductory notes

### a) The Data Protection Act (DSG) and the Liechtenstein legislation procedure

7. As a result of the adoption of the GDPR into the EEA Agreement, European data protection law has become law directly applicable in Liechtenstein without the necessity of any further acts of transposition.

The GDPR includes so-called exemption clauses, which give Member States the option to put the requirements of the GDPR into more specific terms by national rules. The Liechtenstein Data Protection Act (*Datenschutzgesetz*, DSG) carried out such specification. In doing this, the legislator followed the idea of "minimum transposition", only implementing in national law what required regulation under the requirements of European law.[9]

8. In transposition, it was the German Federal Data Protection Act (*Bundesdaten-schutzgesetz*, BDSG) which served as the basis for the Liechtenstein DSG. [10]

The German BDSG regulates the termination of employment of a data protection officer.

Art. 6(4) 2nd sentence of the German BDSG translates as follows:

> *"The termination of employment shall be inadmissible except where facts apply that justify the public body's termination of employment for important reason without observing the period of notice."*

The German BDSG includes protection of termination in terms of labour law.

9. The Liechtenstein legislator deliberately deviated from this template and expressly refrained from including any labour law provision.

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9 Report and Motion (*Bericht und Antrag*, BuA) of the Government to the Diet of the Principality of Liechtenstein Concerning the Full Revision of the Data Protection Act and the Amendment of Other Laws No. 36/2018 (hereinafter: "BuA 2018/36"), p. 31.

10 BuA 2018/36, p. 27.

The Liechtenstein DSG does not include any labour law provisions.

10. The legislative texts concerning the DSG show that one must distinguish between the dismissal and the termination of the employment of a data protection officer.

While dismissal means the end of the function to which the person was appointed, termination means that an employment relationship is ended. Therefore, dismissal does not automatically mean the end of the employment relationship, and an employment relationship can be continued even if there has been dismissal from the function.[11]

The legislative texts show that it was the dismissal (not the termination of employment) *as a result of the exercise of the data protection officer's tasks* which the legislator wanted to prohibit, which is why the legislator provided a restriction of dismissal as laid down in Art. 38(3) GDPR.

The legislator specifically prohibited the causal link between dismissal and the performance of tasks. It is only as an exception that the data protection officer may be dismissed for performing his or her tasks, but only for important reason.

However, the legislator expressly considers the dismissal of a data protection officer admissible, provided that such dismissal is not causally connected with the performance of tasks.

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11 It is stated in the legislative texts: *"The data protection officer will only be able to perform his tasks in an effective way if he or she may also state criticism of the body appointing him without having to risk sanctions. In accordance with Art. 38(3) GDPR, a restriction of dismissal and protection against termination are therefore provided. This provision does not affect the admissible term of appointment. The provision prohibits* ***the dismissal of the data protection officer (that is, not the termination of employment but only the dismissal from the appointed position) or his penalisation for performing his tasks. Thus, what is prohibited is a causal connection between dismissal and the tasks, but not dismissal in itself. Where dismissal is not causally connected with the function, it is admissible. Dismissal in connection with the function as an exception requires an important reason,*** *in which connection reference is made to the important reasons of the end of an employment relationship without notice. [...]"* (BuA No. 69/2018, 127, 128, author's emphasis; cf. also comment to the Diet on BuA No. 69/2018, 127 et seq.).

In summary, the legislative texts of the Liechtenstein legislator show without any doubt that the legislator differentiates with regard to the requirements for the dismissal of data protection officers:

The legislator generally prohibits the dismissal of a data protection officer where such dismissal is causally connected with that officer's tasks, unless an important reason applies. As a supplement, the legislator expressly declares dismissal to be admissible if it does not happen for the very reason that the data protection officer performed his or her tasks.

The legislator has refrained from making any other restrictions; therefore, dismissals that are not in connection with the data protection officer's tasks are possible at any time and without giving a reason.

11. The Liechtenstein legislator deliberately refrained from laying down stricter requirements for the termination of a data protection officer's employment, such as provided by the German BDSG in § 6(4), so that the Liechtenstein solution is clearly different from the German one. The Liechtenstein legal system has made a clear statement by expressly not taking over any labour law provisions from the template from which the Liechtenstein provisions were adopted.

12. Liechtenstein national law is in accordance with the requirements of the GDPR. As will be shown below, the GDPR does not include any labour law provisions, either, in particular no protection against the termination of employment.

13. The Liechtenstein legislator merely carried out a "minimum transposition", only putting into the national law what required being regulated as a result of the requirements of European law.[12] Therefore, the legislator did not issue any provisions that exceed the regulative content of the GDPR. A higher degree of

12 BuA 2018/36, 31.

protection for data protection officers, in particular any special protection against the termination of employment, was neither striven for nor enacted.

### b) Supervisory authority

14. Pursuant to Art. 10 DSG, it is the Data Protection Authority (*Datenschutzstelle*) that is competent for supervision. Liechtenstein has decided to install one single supervisory authority.

    Necessarily, the Data Protection Authority has all powers which the GDPR has conferred on the supervisory authority.[13]

15. Pursuant to the GDPR, violations of the appointing body of any duties resulting from Art. 38 GDPR are subject to a fine pursuant to Art. 83(4)(a) GDPR.[14]

    The authority competent to impose fines is the supervisory authority.[15]

    Liechtenstein has implemented these provisions. Pursuant to Art. 40 DSG, the Data Protection Authority must impose a fine for violations of Art. 38 GDPR. The courts of law have no jurisdiction.[16]

16. Neither the GDPR nor the DSG provide for a sanction under civil law for violations of Art. 38 GDPR.

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13 *Österreichische Datenschutzbehörde* ECJ 16.01.2024, C-33/22 para. 64.

14 Bergt/Herbort in Kühling/Buchner DS-GVO 4th ed. Art. 38 para. 47.

15 Bergt/Herbort in Kühling/Buchner DS-GVO 4th ed. Art. 83 para. 30.

16 The legislative procedure shows that the competence has expressly been conferred upon the Data Protection Authority; while it had been intended in the 1st reading that the criminal courts should be competent, this was changed in the 2nd and 3rd reading as a result of questions brought up with the Comment BuA 2018/69, and competence was assigned to the Data Protection Authority (Comment to the Diet concerning BuA No. 69/2018, 132 et sqq., in particular 148).

## C. Legal comments

### a) Subject and extent of the questions referred

17. The procedure pursuant to Article 34 SCA is based on a clear separation of tasks between the national courts and the EFTA Court. The assessment of the facts is up to the national court, which must take responsibility for the subsequent court decision, and it is the national court that has to interpret the national legal provisions in dispute and ultimately has to declare their compatibility with EEA law. However, in order to provide the national court with a relevant answer, the EFTA Court may provide guidance in every form it considers necessary in the spirit of cooperation with the national courts.[17]

18. The interpretation of the provisions of the DSG is up to the national court; in the subject case, that interpretation was made by the State Court.

19. The question whether the (national) DSG contains labour law provisions has also been answered by a national court, namely the State Court.

    The State Court has also commented on the implications under labour law offered by the Liechtenstein legislator in the event that the employment of a data protection officer is terminated in an abusive manner in violation of Art. 7 DSG.

20. The provisions of the national DSG and of labour law are not subject to interpretation by the EFTA Court in the present referral proceedings, which is why these provisions and their interpretation by the State Court will not be discussed in any more detail below.

    The subject and extent of the referral proceedings are limited to Art. 38(3) 2nd sentence of the GDPR, which reads:

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17 *Bygg* EFTA-Court 20.11.2024, E-3/24 para. 31.

*„The data protection officer shall not be dismissed or penalised by the controller or the processor for performing his or her tasks."*

**b) Legislation procedure of the GDPR**

21. The GDPR was issued by the European Parliament and the Council. The European Parliament and the Council of the European Union alone do not have legislative competence to issue substantive labour law provisions.[18] In the field of social policy, the European Union and the Member States have shared competence.[19]

The GDPR does not lay down protection against termination in terms of labour law.[20]

However, each Member State may issue special provisions for the termination (by the employer) of the employment of a data protection officer as far as such provisions are compatible with the GDPR.[21] The competence to issue provisions of labour law rests with the national legislators alone.

22. Most Member States have not issued any special provisions concerning the termination by the employer of a data protection officer's employment and have left it at the directly applicable prohibition of Art. 38(3) 2nd sentence GDPR.[22]

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18 *Leistritz* ECJ 22.06.2022, C-534/20, para. 31 and 32.

19 Cf. Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 43.

20 Bergt in Kühling/Buchner Komm DS-GVO BDSG², Art. 38 para. 32.

21 Cf. Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 44, pointing out that the Union legislator deliberately chose this option and did not follow the proposal of the Economic and Social Committee in the preparation of legislation, which proposal had stated that "the conditions related to the role of data protection officers should be set out in more detail, particularly in relation to protection against dismissal, which should be clearly defined and extend beyond the period during which the individual concerned holds the post", cf. item 4.11.1 of the Opinion of the European Economic and Social Committee on the "Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)" (OJ 2012, C 229, p. 94).

22 Cf. Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 45, the individual states being listed in footnote 33.

The GDPR does not regulate in any way how Art. 38 GDPR is to be implemented on the national level; in particular, it does not oblige Members States to introduce labour law provisions in order to achieve the protective purpose of the regulation.

23. A violation of Art. 38 GDPR does not result in implications under labour law on the basis of the regulation.

The prohibition of the dismissal from office of the data protection officer for performing his or her tasks as laid down in Art. 38(3) 2nd sentence GDPR does not prescribe harmonisation of labour law.[23]

The GDPR does not prescribe labour law implications for a violation of Art. 38 GDPR.

**c) Interpretation of the GDPR**

24. There is settled case law of the ECJ concerning the questions referred in the present case. In interpreting provisions of EU law, it is necessary to consider not only their wording – by considering the usual meaning of such wording in everyday language – but also the context in which the provisions occur and the objectives pursued by the rules of which the provisions are part.[24]

25. According to the wording of Art. 38(3) 2nd sentence GDPR, the data protection officer shall not be dismissed or penalised by the controller or the processor for performing his or her tasks.

The terms "dismissed", "penalised", and "for performing his tasks" used in Art. 38(3) 2nd sentence GDPR are not defined in the GDPR. In everyday language, the prohibition to the controller or the processor from dismissing or penalising a

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23 Cf. Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 60 with a list of Member States.

24 *Leistritz* ECJ 22.06.2022, C-534/20, para. 18; *ZS* ECJ 09.02.2023, C-560/21, para. 14; *X-FAB Dresden*, ECJ 09.02.2023, para. 19.

data protection officer means that the data protection officer must be protected against any decision terminating his or her duties if he or she were placed at a disadvantage by such decision or if such decision constituted a penalty.[25]

On the basis of this, dismissal alone could already constitute a violation of this prohibition.[26]

26. However, according to the case law of the ECJ, Art. 38(2) 2nd sentence GDPR (*"for performing his tasks"*) constitutes a boundary as a result of which the dismissal of a data protection officer for reasons that relate to the performance of his or her tasks is prohibited; pursuant to Art. 39(1)(b) GDPR, these tasks include in particular to monitor compliance with the Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data.[27]

27. The ECJ substantiates the objectives pursued by Art. 38(3) 2nd sentence by invoking the 97th recital of the GDPR, according to which the data protection officers should be in a position to perform their duties and tasks in an independent manner. This independence must necessarily enable them to carry out their duties in accordance with the objective of the GDPR, which – as is evident from the 10th recital – is in particular directed at ensuring a consistent and high level of data protection for natural persons and at ensuring a consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data.[28]

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25 *ZS* ECJ 09.02.2023, C-560/21, para. 16 and 17; *X-FAB Dresden*, ECJ 09.02.2023, para. 21.

26 *ZS* ECJ 09.02.2023, C-560/21, para. 17, *X-FAB Dresden*, ECJ 09.02.2023, para. 20.

27 *Leistritz* ECJ 22.06.2022, C-534/20, para. 25; *ZS* ECJ 09.02.2023, C-560/21, para. 19; *X-FAB Dresden*, ECJ 09.02.2023, para. 24.

28 *Leistritz* ECJ 22.06.2022, C-534/20, para. 26; *ZS* ECJ 09.02.2023, C-560/21, para. 20; *X-FAB Dresden*, ECJ 09.02.2023, para. 25.

28. Further to Art. 38(2) 2nd sentence GDPR, the mentioned objective of ensuring the independent position of the data protection officer is also evident from Art. 38(3) 1st and 3rd sentence GDPR, according to which the data protection officer shall not receive any instruction concerning the exercise of his or her tasks and shall directly report to the highest management level of the controller or the processor, and from Art. 35(5) GDPR, which provides that with regard to that exercise, the data protection officer is bound by secrecy or confidentiality.[29]

29. The ECJ also notes that – by protecting the data protection officer against any decision which terminates his or her duties, places him at a disadvantage, or constitutes a penalty, where such a decision relates to the performance of his or her tasks – the second sentence of Article 38(2) of the GDPR must be regarded as essentially seeking to preserve the functional independence of the data protection officer and, therefore, to ensure that the provisions of the GDPR are effective. According to the case law of the ECJ, this provision is by contrast not intended to govern the overall employment relationship between a controller or a processor and staff members; this relationship is likely to be affected only incidentally, to the extent strictly necessary for the achievement of those objectives. It is the objective of the provision to preserve the functional independence of the data protection officer.[30]

30. The ECJ has made a teleological interpretation, which can be summarised as follows:

    The GDPR only regulates data protection. The GDPR protects the personal data of natural persons.

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29 *Leistritz* ECJ 22.06.2022, C-534/20, para. 27; *ZS* ECJ 09.02.2023, C-560/21, para. 21.

30 *Leistritz* ECJ 22.06.2022, C-534/20, para. 28; *ZS* ECJ 09.02.2023, C-560/21, para. 22; *X-FAB Dresden*, ECJ 09.02.2023, para. 30.

However, the GDPR does not grant employee protection. No provisions of labour law were issued with the GDPR. The GDPR does not provide protection to the data protection officer against termination of employment.[31]

There is no provision in Union law that may serve as the basis for the special and concrete protection of the data protection officer against the termination of employment for a reason that is independent from the performance of his or her tasks.[32]

31. The ECJ considers its teleological interpretation to be also in accordance with the legislative procedure of the GDPR, that is, with a historic interpretation or approach.

It argues that, as is apparent from the preamble to the GDPR, that regulation was adopted on the basis of Art. 16 TFEU. Pursuant to Art. 16(2) TFEU, the European Parliament and the Council of the European Union are, by means of Regulations, acting in accordance with the ordinary legislative procedure to lay down the rules relating, first, to the protection of natural persons with regard to the processing of personal data by the EU institutions, bodies, offices or agencies and by the Member States when carrying out activities which fall within the scope of EU law and, second, to the free movement of such data.[33]

32. The ECJ then differentiates between the functional independence laid down in Art. 38(2) 2nd sentence GDPR and the issuing of rules for protection against the termination of employment. According to the ECJ, protection against termination has nothing to do with the protection of natural persons in the context of the processing of personal data or with the free movement of data; rather, this constitutes – if anything – social policy.

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31 Bergt/Herbort in Kühling/Buchner DS-GVO, 4th ed., Art 38, para. 32.

32 Cf. Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 42.

33 *Leistritz* ECJ 22.06.2022, C-534/20, para. 30; *ZS* ECJ 09.02.2023, C-560/21, para. 24.

Pursuant to Art. 153(1)(d) TFEU, the Union supports and complements the activities of the Member States in realising the social fundamental rights in the field of the protection of employees where their employment contract is terminated, but does not have its own competence; rather, it merely has shared competence pursuant to Art. 2(2) TFEU.

Since no rules were provided in the GDPR concerning the termination of a data protection officer's employment by the employer, each Member State is free to provide special protection against termination as long as those rules are compatible with the GDPR.[34]

As a side-note, it should be mentioned that Art. 66 et sqq. of the EEA Agreement regulate the improvement of the conditions of living and working under the chapter heading of Social Policy. However, no harmonisation of the provisions of labour law is laid down. Insofar, the competence to issue labour law provisions rests with the national legislators.

It is evident as a result of these predetermined competencies that no labour law provisions have been issued with the GDPR.

33. In accordance with Art. 3 EEA Agreement, it is the responsibility of the national courts in particular to provide the legal protection that individuals derive from the EEA Agreement and to ensure that those rules are fully effective. On the basis of Protocol 35 on the implementation of EEA Rules, national courts and tribunals must give full effect to *implemented EEA rules which are unconditional and sufficiently precise* and disregard any national rule or case law maintaining the legal effects of legislation that infringes such implemented EEA rules.[35]

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34 *Leistritz* ECJ 22.06.2022, C-534/20, para. 31, 32 and 33; see also Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 42, 43, and 44; *ZS* ECJ 09.02.2023, C-560/21, para. 24, 25, and 26; *X-FAB Dresden*, ECJ 09.02.2023, para. 31.

35 *Finanzmarktaufsicht* E-10/23 para. 46; RS E-11/22 para. 44 and 50

34. The GDPR has a clear regulatory scope, is sufficiently specific in its content, and does not lay down individual legal protection for data protection officers.

In particular, it does not lay down protection for data protection officers against the termination of employment, and no such protection can be deduced from the GDPR. The GDPR does not displace national labour law.

35. Art. 38(3) GDPR permits the dismissal of the data protection officer if such dismissal is not causally related with the performance of his or her tasks. The violation of the prohibition of dismissal or penalisation for the performance of his or her tasks requires that the data protection officer performs his or her tasks. If he or she does not, the prohibition cannot be violated. If he or she is dismissed or penalised for the very reason that he or she has performed his or her tasks, the prohibition has been violated. If he or she is dismissed or penalised independently from the performance of his or her tasks, the prohibition has not been violated. What is inadmissible is a causal relationship between the performance of tasks and the dismissal, but not dismissal in itself.[36]

As far as dismissal is permitted, it is therefore impossible for a termination of employment issued in the context of admissible dismissal to be unlawful or to constitute an abuse of rights. The regular termination of a data protection officer's employment that is not causally related with the performance of his or her tasks does not violate Union law.

36. If one considered the regular termination of employment and a dismissal in this context that is not causally linked with the performance of tasks to be a violation of Art. 38(3) 2nd sentence GDPR, this would exceed the regulatory scope and in particular the regulatory purpose of the GDPR.

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[36] Bergt/Herbort in Kühling/Buchner DS-GVO, 4th ed., Art. 38, para. 30 with additional references.

37. The Regulation does not include any provision pursuant to which a violation of Art. 38 GDPR results in any legal consequence for the contractual relationship between the controller or the processor of the one part and the data protection officer of the other.

Civil-law effects and consequences of these contractual relationships must be assessed under the national civil law of the individual Member States and may differ depending on what has been laid down in the national law in question.

38. No individual legal protection concerning the dismissal of the data protection officer is laid down in the GDPR. There is no provision pursuant to which the data protection officer may challenge his or her dismissal in order to keep his or her position.

The wording of Art. 38(3) 2nd sentence GDPR prohibits any dismissal of the data protection officer that is causally related with the performance of his or her tasks, but says nothing about the legal options open to him or her in the event of dismissal in violation of the Regulation. The reason why the Regulation does not say anything about this is that it uses other means to achieve its regulatory goal.

39. Pursuant to Art. 37(1) GDPR, it is the controllers and processors who appoint the data protection officer; pursuant to Art. 38(3) 2nd sentence, it is they who also have the competence to dismiss the data protection officer.

The data protection officer is appointed and dismissed by way of a statement of will by the controller or the processor.

The Regulation does not include any rule saying that a dismissal violating Art. 38(3) 2nd sentence GDPR is ineffective.

The GDPR does not include any rule interfering with any such statement of will. In other words: the Regulation does not order that such statements of will shall be ineffective.

Even if the dismissal is made in violation of Art. 38(3) 2nd sentence GDPR, the Regulation does not provide that the statement / dismissal made shall be ineffective.

40. Pursuant to Art. 58 GDPR, the supervisory authority has neither the power to appoint a data protection officer instead of letting the controller or the processor do so, nor is the supervisory authority permitted to dismiss a data protection officer who has been appointed by the controller or by the processor but who is not qualified, is subject to a conflict of interest, or does not perform the tasks.

Even if the supervisory authority notes a violation of Art. 38(3) 2nd sentence GDPR and orders a supervisory measure or imposes a fine, it is still unable to declare the dismissal ineffective.

In other words: the GDPR does not regulate who is to declare that a dismissal is ineffective.

41. It is not required to achieve the regulatory goal of the GDPR that a dismissal be ordered to be ineffective or that a public authority or a court declare it ineffective. This is because the GDPR uses other means to achieve and ensure the regulatory goal of the GDPR.

First of all, it must be noted that functional independence is not the protective purpose of the GDPR but rather a means to achieve and ensure the protective purpose.

Another means is provided by the duty to appoint data protection officers, which is laid down in Art. 37(1) GDPR. As soon as the duty to appoint exists, it must be fulfilled.[37]

The dismissal of a data protection officer inevitably leads to the duty to appoint a successor.

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37 Bergt/Herbort in Kühling/Buchner DS-GVO 4th ed., Art. 37 para. 15 with additional references.

This rule ensures the uninterrupted, continuous occupation of the position of data protection officer. This ensures that the data protection officer's tasks are performed without any gaps.

The supervisory authority will thereby keep its contact in the sense of Art. 39(1)(e) GDPR without any gaps. The permanent and full implementation of the GDPR is ensured.

42. The duty to appoint does not leave any legal or factual room for a dismissal – once issued – being declared ineffective later, and the dismissed data protection officer resuming his or her function.

The duty that comes into being upon dismissal to appoint a replacement would lead to duplication if the dismissal of the prior data protection officer were to be declared ineffective later. The GDPR does not regulate how to handle such duplication.

43. In the present case, a new data protection officer was appointed after the termination of the employment relationship. In the first run of the proceedings, the Supreme Court took the legal view that regular termination of the data protection officer's employment was impossible, and that the contractual relationship as a data protection officer was still in force. To justify the voidness of termination, the Supreme Court invoked (mutatis mutandis) the time-limited protection from the termination of employment applying to employees who are ill or pregnant. It would have been the consequence of this legal view that the regular termination of the employment of both data protection officers would have been impossible. The University would have had to pay for a duplication of positions that would have been objectively unsuitable and economically burdening, which consequence would – lacking the necessity of a fine – be equivalent to a punitive measure, which was the reason why a violation of the protection of property pursuant to Art. 1 of Protocol No. 1 to the ECHR was asserted before the State Court. As has been mentioned above, the State Court

set aside the Supreme Court's decision for arbitrariness, so that there was no need to comment on the violation of the protection of property.

44. The GDPR uses several means to achieve its regulatory goal. In addition to the duty to appoint, these are the tasks regulated in Art. 39(1) GDPR. These tasks have been assigned in a mandatory way and must not be limited by the national legislator.[38]

In Art. 38(3) 2nd sentence GDPR, functional independence is laid down as another means to achieve the regulatory goal. As a supplement, the violation of this independence is punished by a fine pursuant to Art. 83 GDPR.

By way of this regulatory structure – duty to appoint, mandatory list of tasks, functional independence, and threat of fine in the case of non-compliance – the regulatory goal, i.e. the protection of personal data, is implemented and ensured in order to comply with the fundamental right for the protection of personal data laid down in Art. 8 of the Charter of Fundamental Rights and with the right to privacy guaranteed by Art. 8 ECHR.

This means in summary that the system of the provisions of the GDPR also does not permit a dismissal violating Art. 38(3) 2nd sentence GDPR to be ineffective.

45. It is not required to interpret the provisions of the GDPR under the principle of *effet utile* in the present case, since the regulatory goal is achieved with the regulatory means provided and their interaction. The permanent implementation of the GDPR is ensured by the regulatory means provided in the GDPR.

46. If one concedes to the data protection officer that he or she may assert the ineffectiveness of dismissal, this undermines the duty to appoint. For as long as there is no legally effective dismissal, there is no duty to appoint a new data

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38 Bergt/Herbort in Kühling/Buchner DS-GVO, 4th ed., Art. 39. para. 10.

protection officer. The permanent implementation of the provisions and of the protection of personal data provided in the GDPR would thereby be thwarted.

47. The GDPR, in particular also Art. 38(3) 2nd sentence GDPR, does not interfere with the contractual relationship entered into under national (civil) law by the controller or the processor of the one part and the data protection officer of the other.

The question whether unlawful dismissal in the sense of Art. 38(3) 2nd sentence GDPR will trigger legal implications concerning the legal relationship between the controller or the processor of the one part and the data protection officer of the other depends on the respective national law of the Member State in question.

For the Principality of Liechtenstein, the State Court has decided and declared that where the regular termination of employment is only professed and Art. 38(3) 2nd sentence GDPR is violated, this constitutes abusive termination in the sense of § 1173a Art. 46 et sqq. ABGB, so that the data protection officer whose employment has been unlawfully terminated is entitled to compensation.[39]

48. For the sake of completeness, it should be mentioned that a data protection officer appointed voluntarily pursuant to Art. 37(4) DSGVO has the same powers and duties as a data protection officer appointed as a result of a duty.[40] Legal implications such as the ineffectiveness or voidness of dismissal would also apply to voluntarily appointed data protection officers.

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39 Judgment of the State Court of 02.09.2024 under StGH 2024/056, cons. 2.5.3. and 3.2.

40 Bergt/Herbort in Kühling/Buchner DS-GVO, 4th ed., Art. 37, para. 25.

## D. Conclusion

On the basis of the above observations, it is applied that the Court answer as follows to the questions referred:

### a) First question referred

Art. 38(3) 2nd sentence GDPR is in conflict with any national rule that would prohibit the dismissal of a data protection officer who has not performed or not correctly performed his or her tasks and thereby inhibits the realisation of the Regulation's objectives.

### b) Second question referred

The purpose of the GDPR is the protection of personal data, not the protection of employees. The GDPR does not lay down any provisions of labour law. The definition of dismissal pursuant to the GDPR does not express any legal implication under labour law.

Dismissal means that the data protection officer can and may no longer perform his or her tasks; he or she is removed from his or her position, and the person concerned loses his or her function.

The contractual relationship agreed upon between the controller or the processor of the one part and the data protection officer of the other may have a different legal fate and must in each individual case be assessed according to the national provisions of civil law.

The end of the employment relationship inevitably causes the end of his or her tasks. The end of the employment relationship indicates his or her dismissal.[41]

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41 Cf. Conclusions of the Advocate General of 27 January 2022 in case C -534/20, para. 42.

## c) Third question referred

The functional independence laid down in Art. 38(3) 2nd sentence GDPR is not a protective purpose of the GDPR; rather, it is a regulatory means to achieve and ensure the protective purpose.

The GDPR does not order the ineffectiveness of dismissal, even where Art. 38(3) 2nd sentence GDPR has been violated.

Any interpretation of Art. 38(3) 2nd sentence GDPR to the effect that dismissal may be declared ineffective interferes with the duty to appoint pursuant to Art. 37 DSGVO and thwarts the regulated harmonised and permanent implementation of the provisions.

The civil-law implications of dismissal in violation of Art. 38(3) 2nd sentence GDPR for the contractual relationship with the data protection officer depends on the national law of the Member States.