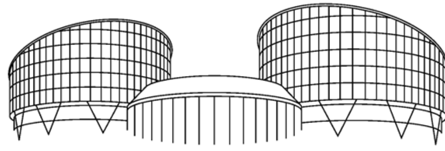

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF LIEBSCHER v. AUSTRIA

(Application no. 5434/17)

JUDGMENT

Art 8 • Respect for private life • Positive obligations • Requirement to enter full divorce settlement containing personal data into the public land register for property transfer within the ambit of Art 8 • Domestic courts' failure to comply with procedural obligation to conduct a comprehensive assessment of requirement's compatibility with effective enjoyment of applicant's privacy rights and to address Convention issue at stake

STRASBOURG

6 April 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Liebscher v. Austria,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Ana Maria Guerra Martins, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 5434/17) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Christoph-Herwig Liebscher ("the applicant"), on 11 January 2017;

the decision to give notice to the Austrian Government ("the Government") of the complaints concerning Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 16 March 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant complains that the obligation to present the entire divorce settlement (as opposed to an excerpt of it) in order to have his share of a real estate property transferred to his former wife amounted to a violation of his right to respect of his personal data (Article 8 of the Convention). Moreover, he complained that the Austrian legal order did not foresee any effective remedy before a national authority in that respect (Article 13 of the Convention read in conjunction with Article 8), and that the refusal of the transfer infringed upon his right to make use of his property (Article 1 of Protocol No. 1).

THE FACTS

2. The applicant was born in 1957 and lives in Vienna.

3. The Government were represented by their Agent, Mr H. Tichy, Ambassador, Head of the International Law Department at the Austrian Ministry for Europe, Integration and Foreign Affairs. The applicant was

authorised to present his own case (Rule 36 § 2 *in fine* of the Rules of Court).

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On the occasion of a divorce by mutual consent (*einvernehmliche Scheidung*), the applicant and his wife on 21 May 2013 concluded a divorce settlement under section 55a(2) of the Marriage Act (*Scheidungsvergleich*; see paragraph 15 below) before the Döbling District Court (*Bezirksgericht*), acting as the family court (*Familiengericht*). This settlement regulated the division of matrimonial assets, the custody and residence of the two minor children and the alimony agreement. Moreover, the settlement contained an overview of the assets and the income of the applicant.

6. On 13 December 2015 the applicant requested the same court, acting as the land register court (*Grundbuchsgericht*), to enter into the land register (*Einverleibung ins Grundbuch*) the transfer of his share of their joint property to his divorced wife. For this purpose, the applicant presented to the land register court a partial engrossment of the divorce settlement issued by the family court on 1 December 2015. The engrossment was designated "excerpt from the ... divorce settlement" and only reproduced the text of the chapter of the settlement concerning "real estate". The excerpt also contained a note by the family court that the document "(contained) ... all agreements pertaining to the real estate property".

7. Pursuant to section 7(1) of the 1955 Land Register Act (*Allgemeines Grundbuchgesetz* – hereinafter, "the LRA" – see paragraph 21 below), the land register is open to the public and can therefore be consulted by anyone without restriction.

8. By decision of 25 February 2016, the land register court rejected the applicant's application, essentially stating that the presentation of a partial engrossment and not the "original" did not meet the criteria of section 87 of the LRA (see paragraph 24 below). The court referred also to section 94(1) of the LRA (see paragraph 26 below), according to which the land register court must examine the attachments of a request for the establishment of ownership in detail. A partial engrossment could be accepted only if, among other things, this was justified by the content of the documents submitted, and the documents were in the appropriate form for the approval of the required entry. The court held that on the basis of a partial engrossment which was not an original one, it could not assess whether the settlement contained conditions or legally relevant facts which would impede the entry into the land register, or the occurrence of which constituted a condition for establishment of ownership. An original document could only exist in one single version, namely the complete version. Thus, by definition, an excerpt could not be an original. The submission of a complete document for the entry into the land register was not only required for examining the merits

of the legal entitlement, but also pursuant to the clear wording of section 87 of the LRA.

9. The applicant appealed. He stated that because of the refusal to incorporate the transfer of ownership of his real estate share to his former wife, his right to freely dispose of his property was infringed. He argued that the partial engrossment of his divorce settlement – which, in addition, had been issued by the very same judge at the family court who had dealt with his divorce – indeed complied with section 87 of the LRA, as it was clearly stated in it that it reproduced the part relevant for the transfer of ownership. Moreover, he complained that the request by the land register court to present the full divorce settlement did not comply with data protection laws, as it would mean that highly personal and sensible data, such as the names and places of abode of minor children and his former spouse, amount of alimony payments, and custody agreements would be publicly accessible in the document archive. He considered this requirement as being in violation of Article 8 of the Convention, section 1(2) of the Data Protection Act (*Datenschutzgesetz 2000*; see paragraph 27 below), and Article 52 of the EU Charter of Fundamental Rights. In particular, he argued that there was no legitimate aim to have his private data published, and no public interest which would outweigh his interest in keeping his privacy.

10. The Vienna Regional Civil Court (*Landesgericht für Zivilrechtssachen*) rejected the appeal by decision of 25 April 2016 (file no. 47 R 108/16d). It essentially confirmed the view of the land register court that a partial engrossment of a divorce settlement was not the "original" document and did therefore not meet the requirements for establishment of ownership required by the clear wording of section 87(1) of the LRA. Even though the family court had stated in the partial engrossment of the divorce settlement (see paragraph 6 above) that it contained all information relevant for the transfer of real estate, it was up to the land register court to examine this question – which it had not been able to do, as it was not provided with the original, full settlement. The court quoted a decision by the Supreme Court on essentially the same matter (no. 5 Ob 250/15y, judgment of 25 January 2016), which stated that a document submitted to the land register had to be complete. As regards Article 8 of the Convention and section 1(2) of the Data Protection Act, the court held that there could not have been a violation of these provisions, as there was a legal basis for the interference.

11. On 24 June 2016 the applicant filed an extraordinary appeal on points of law with the Supreme Court (*Oberster Gerichtshof*), repeating that the lower instances' interpretation of section 87 LRA was incompatible with the right to data protection under Article 8 of the Convention and other national and international laws. At the same time, he requested a referral to the Court of Justice of the European Union (hereinafter, "the CJEU") for a

preliminary ruling, and a referral to the Austrian Constitutional Court for a review of the constitutionality of the law in question.

12. By decision of 11 July 2016 (no. 5 Ob 125/16t), the Supreme Court rejected the extraordinary appeal. In its reasoning, it pointed out that it had already decided in its decision no. 5 Ob 250/15y (see paragraph 10 above and paragraph 24 below) that the submission of a partial engrossment of a divorce settlement was not sufficient under section 87(1) of the LRA. The fact that in the applicant's case the excerpt confirmed that it contained "all agreements pertaining to the real estate property" could not lead to a different conclusion. Pursuant to section 94(1) of the LRA the land register court had to comprehensively examine any application for establishment of ownership and the relevant supporting documents. It could only approve an entry into the land register, *inter alia*, if the application was justified by the content of the enclosed documents (subparagraph 3) and these documents were presented in the form required for approving the establishment of ownership (subparagraph 4). The family court (which had issued the partial engrossment of the divorce settlement) could therefore not confirm in a binding manner for the land register court whether the excerpt from the divorce settlement actually contained all agreements pertaining to the property in question.

13. As regards the alleged violation of Article 8 of the Convention, the Supreme Court held as follows:

> "The data protection concerns raised by the applicant deriving from Article 8 § 2 [of the Convention] and Article 52 of the Charter of Fundamental Rights of the European Union cannot be shared either. The examination of the entire document, which the establishment of ownership shall be based on, is mandatory according to sections 87(1), 94(1) [of the] LRA and serves (*inter alia*) the protection of the constitutionally guaranteed right to (registered) property (sections 1(2), 8(1) subparagraph 1 of the 2000 Data Protection Act). The inclusion of documents into the document archive (*Urkundenarchiv*) [of the land register] is not subject matter [or] preliminary question of the instant decision. Therefore, there is no reason to initiate a preliminary ruling procedure or proceedings to review the constitutionality of the law, as requested by the applicant."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE CONSTITUTION

14. Article 140 §1 (1)(d) of the Federal Constitution (*Bundes-Verfassungsgesetz*), as amended by Federal Law Gazette I (*Bundesgesetzblatt*) No. 114/2013, which entered into force on 1 January 2015, provides that an individual may apply to the Constitutional Court to challenge the constitutionality of a law (*Parteienantrag auf Normenkontrolle*) in the course of a law suit. The relevant passages of that provision read as follows:

> "The Constitutional Court pronounces on the unconstitutionality
>
> 1. of laws
>
> ...
>
> d) upon application by an individual claiming that his/her rights as a party to a lawsuit decided upon by an ordinary court of first instance have been violated by applying an unconstitutional law, at the occasion of the legal remedy sought against that court decision;
>
> ..."

Such an application can only be lodged after a decision of an ordinary court of first instance, and not at a later stage in the civil proceedings.

II. THE MARRIAGE ACT

15. Section 55a(2) of the Marriage Act (*Ehegesetz*), as amended by Federal Law Gazette I No. 59/2017, provides that a marriage may only be divorced by mutual consent, if the spouses conclude before a court a written agreement (*Scheidungsvergleich*; divorce settlement) on care or custody of their children, on personal contacts and alimony concerning their children, as well as on their mutual alimony rights and their legal property claims. This means that the spouses must agree on all the consequences of their divorce.

16. Section 55a(3) of the Marriage Act provides that such a divorce settlement is not required inasmuch as its subject matter has already been settled by a final court decision. This also applies to a – prior – agreement concluded before the court on custody, care and personal contacts, and on the amount of statutory alimony for a child (see Article 190 of the Civil Code).

17. Similarly, pursuant to sections 81 et seq. of the Marriage Act, such a divorce settlement on the division of assets before the court is not required, if the spouses have already settled that matter by an enforceable notarial act (section 97 of the Marriage Act).

III. THE LAND REGISTER ACT ("LRA")

18. Section 1 of the 1955 LRA, as amended by Federal Law Gazette I No. 87/2015, provides that the Austrian land register consists of the main ledger (*Hauptbuch*) and the document archive (*Urkundensammlung*; collection of deeds).

19. Section 6(1) of the LRA provides that a certified copy of each document on the basis of which an entry into the land register was made, must be kept with the land register. Paragraph 2 of that section provides that these copies constitute the document archive.

20. Since the conversion of the land register to automated data processing, the document archive is maintained by storing the documents in the electronic database. The retention of copies was discontinued (see section 2(4) of the Land Register Conversion Act (*Grundbuchumstellungsgesetz*), as last amended by Federal Law Gazette I No. 30/2012).

21. Section 7(1) of the LRA provides that the land register is public. Pursuant to paragraph 2 of that section, anybody may have access to the land register in the presence of a land register official and make copies or excerpts from the register.

22. Section 61(1) of the LRA provides that anybody whose civil rights appear to have been violated by the establishment of ownership, may contest the correctness of an entry into the land register by a so-called cancellation action (*Löschungsklage*).

23. Section 75(1) and section 76 of the LRA provide that entries into the land register are subject to approval and require an application with the land register court.

24. Section 87(1) of the LRA provides that an application for an entry into the land register must be accompanied by "the originals" of the relevant documents. In the case of court settlements, not the original script, but the engrossment is considered to be the original. An engrossment needs to be presented in its entirety; an excerpt is not sufficient (see Supreme Court decision no. 5 Ob 250/15y). A partially blackened divorce settlement could not be regarded as an "original document" within the meaning of section 87(1) of the LRA either (see Supreme Court decision no. 5 Ob 151/19w). In the case of notarial acts, the engrossment provided according to the Notaries' Regulation (Notariatsordnung) shall be deemed the original (see Supreme Court decisions nos. 5 Ob 119/92, 5 Ob 62/02 and 5 Ob 254/02).

25. Section 91 of the LRA provides that the land registrar shall confirm *ex officio* on the deposited copies that these copies correspond to the original documents. Since the conversion of the document archive to automated data processing, recording and storing of the documents shall be deemed a confirmation of the conformity of the stored documents with the originals (see section 2(3) of the Regulation by the Federal Ministry of Justice on the general conversion of the document archive of the land register, Federal Law Gazette II No. 23/2006).

26. Section 94(1) of the LRA provides that the land register court must comprehensively examine the application and the enclosed documents and may approve an entry into the land register only if:

> "1. the land register does not show any obstacle in view of the property or its entitlement to the requested entry;
>
> 2. there is no justified concern about the personal capacity of the persons involved in the entry in disposing of the object to be entered, or against the authority of the applicant to request such entry;

3. the request seems to be justified by the content of the enclosed documents and

4. the documents are available in the form required for approving the establishment of ownership, provisional entry or notice in the land register."

IV. THE DATA PROTECTION ACT

27. Section 1 of the 2000 Data Protection Act, as amended by Federal Law Gazette I No. 14/2019, is a provision which has constitutional status (*Verfassungsbestimmung*). It reads as follows:

"Fundamental right to data protection

(1) Every person shall have the right to secrecy of the personal data concerning that person, especially with regard to the respect for his or her private and family life, insofar as that person has an interest which deserves such protection. Such an interest is precluded if data cannot be subject to the right to secrecy due to the data's general availability or because they cannot be traced back to the data subject.

(2) Insofar as personal data are not used in the vital interest of the data subject or with the data subject's consent, restrictions of the right to secrecy are permitted only to safeguard overriding legitimate interests of another person, namely in the case of interference by a public authority only on the basis of laws which are necessary for the reasons stated in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Federal Law Gazette No 210/1958. Such laws may provide for the use of data that, due to their nature, deserve special protection only in order to safeguard substantial public interests and, at the same time, shall provide for adequate safeguards for the protection of the data subjects' interests in confidentiality. Even in the case of permitted restrictions, a fundamental right may only be interfered with using the least intrusive of all effective methods.

(3) Insofar as personal data concerning a person are intended for automated processing or processing in files managed manually, i.e. files managed without automated processing, every person shall, as provided for by law, have

1. the right to obtain information as to who processes what data concerning the person, where the data originated from, for which purpose they are used, and in particular to whom the data are transmitted;

2. the right to rectification of incorrect data and the right to erasure of illegally processed data.

(4) Restrictions of the rights according to para. 3 are only permitted under the conditions laid out in para. 2."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant complained that the obligation to submit the original divorce settlement in its entirety to the land register court, where it would be publicly accessible with all the sensitive data contained therein, in order to have the request for the transfer of his ownership share granted, amounted

to a violation of his right to respect for his private life, in particular the protection of his personal data, as provided in Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Victim status

29. The Court notes that the Government has not contested the applicant's victim status. However, this issue concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 93, 27 June 2017). The Court considers that the applicant's victim status arises from the fact that the domestic courts rejected his request for the establishment of ownership, as a result of his refusal to submit the full divorce settlement to the land register court, and thus to waive his right to informational self-determination as regards his private data (ibid., § 137).

2. Compatibility ratione materiae

30. The Court notes that the parties have not disputed the applicability of Article 8 to the applicant's complaint about the requirement to submit his full divorce settlement to the land register court, where it would be publicly accessible. As the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, the Court will examine it at the admissibility stage (*Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018).

31. The Court has held on many occasions that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. This article provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form and manner that their Article 8 rights may be engaged (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 137). Domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see, in relation to personal health data, *Z v. Finland*, 25 February 1997, § 95, *Reports of Judgments and Decisions*

1997-I). In *Satakunnan Markkinapörssi Oy and Satamedia Oy* (cited above, § 138) the Court held that providing details of the taxable earned and unearned income of individuals, as well as their taxable net assets, clearly concerned their private lives. In the cases of *M.N. and Others v. San Marino* (no. 28005/12, § 51, 7 July 2015) and *G.S.B. v. Switzerland* (no. 28601/11, § 51, 22 December 2015) the Court considered that information related to bank accounts undoubtedly amounts to personal data, irrespective of it being sensitive information or not. The Court considers that the same applies when, as in the present case, a document which includes data on finances, income and property of a person, as well as data concerning custody and place of residence of his or her children, is to be stored in an official register, where it will be accessible to the public.

32. The Court therefore finds that the complaint falls within the ambit and scope of Article 8 § 1 of the Convention and that this provision applies in the present case.

3. The Governments objection of non-exhaustion of domestic remedies

33. The Government objected that the applicant failed to exhaust the available domestic remedies. Their objection is two-fold and refers to the applicant's omission to apply to the Constitutional Court, as well as to settling real estate issues in a separate document.

34. The Court will examine separately these two allegedly effective remedies.

(a) Application to the Constitutional Court

(i) The Government's objection

35. The Government submitted that the applicant did not apply to the Constitutional Court to review the constitutionality of the relevant legislative act pursuant to Article 140 § 1 (1)(d) of the Federal Constitution (see paragraph 14 above).

36. The applicant could have filed such an application when he lodged his appeal against the decision of the land register court of 25 February 2016 (see paragraph 8 above). In such an application, he could have raised his constitutional concerns, in particular with regard to section 87 of the LRA (see paragraph 24 above), as he had done four months later in his extraordinary appeal with the Supreme Court (see paragraph 11 above). Subsequently, the Constitutional Court would have reviewed the concerns raised – also against the background of the Court's relevant case-law.

37. Such an application would have resulted in a temporary suspension of the appeal proceedings before the Vienna Regional Civil Court. After the service of the judgment of the Constitutional Court, the regional court would have had to continue its proceedings (Article 528b § 3 of the Code of Civil Procedure) and rule on the dispute in line with the Constitutional Court's judgment. In the Government's opinion, there were no indications that an application to review the constitutionality of the respective provisions of the LRA would have been futile from the outset and could therefore not be considered as an effective legal remedy within the meaning of Article 35 § 1 of the Convention.

(ii) The applicant's reply

38. The applicant submitted that he had exhausted the available domestic remedies, namely by filing appeals with the Vienna Regional Civil Court and the Supreme Court. He argued that he did not question the constitutionality of the LRA neither as a whole nor in certain of its sections, but rather its interpretation by the domestic courts. The domestic courts should have disregarded the wording of section 87(1) of the LRA and have chosen an interpretation which was in conformity with the Constitution. When filing an application with the Constitutional Court under Article 140 §1 (1)(d) of the Federal Constitution (see paragraph 14 above), an applicant had to request that the entire law, or specific parts of it, be declared unconstitutional. However, it was not possible to challenge an unconstitutional interpretation of a legislative act. Therefore, in the circumstances of the present case, an application for the review of constitutionality was not an effective remedy.

(iii) The Court's assessment

39. The general principles on exhaustion of domestic remedies have been summarised in *Vučković and Others v. Serbia* ([GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

40. The Court reiterates that, in the event of there being a number of domestic remedies in different fields of law which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 177, 25 June 2019, and *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010, both with further references). Accordingly, the Court has to determine in the instant case whether the Government have submitted any arguments that would indicate that the remedy provided for in the Federal Constitution and the civil-law remedy do not have "essentially the same objective" with regard to the applicant´s complaint, that is to say, whether the

constitutional-law remedy would add any essential elements that were unavailable through the use of the civil-law remedy which the applicant pursued (*ibidem*).

41. Whether an individual application to the Constitutional Court is required by Article 35 § 1 of the Convention will depend largely on the particular features of the respondent State's legal system and the scope of its Constitutional Court's jurisdiction (see *Uzun v. Turkey* (dec.), no. 10755/13, §§ 43-48, 30 April 2013, with further references). The Court has stated that in a State where this jurisdiction is limited to reviewing the constitutionality of legal provisions and their compatibility with provisions of superior legal force, applicants will be required to avail themselves of a complaint to the Constitutional Court only if they are challenging a provision of a statute or regulation as being in itself contrary to the Convention. The procedure of an individual constitutional complaint cannot serve as an effective remedy if the alleged violation resulted only from erroneous application or interpretation of a legal provision which, in its content, is not unconstitutional (see, *mutatis mutandis*, *Grišankova and Grišankovs v. Latvia* (dec.), no. 36117/02, 13 February 2003; *Liepājnieks v. Latvia* (dec.), no. 37586/06, § 73, 2 November 2011).

42. Turning to the circumstances of the present case, the Court observes that the Austrian Constitutional Court examines, *inter alia*, pursuant to Article 140 §1 (1)(d) of the Federal Constitution (see paragraph 14 above) individual complaints lodged to challenge the constitutionality of a legal provision or a law as a whole if it has been applied by a first instance court. An individual constitutional complaint can only be lodged against a legal provision where an individual considers that the applied provision itself infringes his or her constitutional rights. If the Constitutional Court considers the respective legal provision to be unconstitutional, it repeals it, and the first instance court must continue its proceedings under section 528b § 3 of the Code of Civil Procedure and rule on the dispute in keeping with the Constitutional Court's judgment. The Court notes that in the instant case the Government did not argue that in its constitutional review the Constitutional Court could have upheld the contested legal provision in finding that it should have been subject to a certain different interpretation in conformity with the Convention, and that such an interpretation would also have been observed by the land register court. In this context, the Court considers that the Government failed to explain how an application to the Constitutional Court against the land register court's decision would have, within the meaning of the Court's above-mentioned case-law, added any essential element that was unavailable through the use of the civil remedy which the applicant pursued.

43. The Court notes that in the present case the applicant did not primarily allege that the relevant provisions of the LRA should be considered as unconstitutional, but focussed on his allegation that the

violation of his right to respect for private life originated in their wrong interpretation by the domestic courts (see paragraph 38 above). He argued that an interpretation in line with the Constitution was possible without the LRA having to be repealed as unconstitutional. With regard to this aspect of his complaint, the Court considers that the ordinary courts (*ordentliche Gerichtsbarkeit*), before which the applicant brought his appeals, had in any event jurisdiction to decide, and were – as far as possible on the basis of the law's explicit wording – also under the obligation to interpret ordinary laws in line with the Federal Constitution.

44. Having regard to the above, the Court is of the opinion that in view, notably, of the applicant's complaint concerning the failure to interpret the law in conformity with the Constitution, the Government has not convincingly argued that an individual application to the Constitutional Court pursuant to Article 140 §1 (1)(d) of the Federal Constitution was, in the circumstances of the applicant's case, an effective legal remedy within the meaning of the Court's case-law.

45. It follows that the first branch of the Government's objection of non-exhaustion of domestic remedies should be dismissed.

(b) Settling real estate issues in a separate document

(i) The Government's objection

46. The Government submitted that the applicant could have settled the mutual alimony rights and property claims of his divorce settlement by two separate agreements in such a way that only those data absolutely necessary for transferring real estate property were disclosed to third persons. The wording of section 55a of the Marriage Act did not imply that only one document may be drawn up. Furthermore, a written agreement concluded before a court is not required with regard to subject matters that are already resolved by a final court decision or by an enforceable notarial act (see section 55a(3) and 81 of the Marriage Act, quoted in paragraphs 16-17 above). Therefore, in view of the necessary establishment of real estate ownership into the land register, the applicant could have included the items of his divorce settlement regarding real estate property in a separate settlement before the family court or in an enforceable notarial act in advance. In doing so, he would have been required to present to the land-register court only the settlement or the enforceable notarial act (each in its entire version), as those documents would have exhaustively settled the division of the former spouses' joint real estate property.

(ii) The applicant's reply

47. The applicant replied that if it was sufficient to include the points of the divorce settlement concerning the entry into the land register in a separate document before the family court, that same court would equally

decide which points of the settlement were necessary for this entry. However, by not accepting the “excerpt” of his full divorce settlement as an “original” document, the domestic courts as well as the Government disputed the competence of the family court to assess which information is relevant for the purposes of the land register. In the applicant’s view, requiring him to request such a separate document ran counter the Government’s own argument in that respect.

(iii) The Court’s assessment

48. The Court considers that, in substance, the applicant did in fact request the land register court to regulate real estate issues linked to the divorce on the basis of a separate document, which the family court had designated as an “excerpt” (see paragraph 6 above). Under these circumstances, it would be excessively formalistic to expect the applicant to file, under section 55a(3) of the LRA, a similar request with the family court. Analogous considerations apply in relation to a separate agreement before a notary. The Court further notes that sections 55a and 81 et seqq. of the Marriage Act (see paragraphs 15-17 above) give persons seeking a divorce three options for regulating real estate transfers: 1) within the divorce settlement; 2) in a separate document; or 3) in an act before a notary.

49. The Court notes that the Marriage Act does not appear to privilege one choice over the other, nor does it say that options 2) or 3) are to be privileged for the non-disclosure of private data in subsequent proceedings under the LRA. Therefore, the Court considers that by choosing the first option, the applicant cannot be considered as having failed to properly protect his personal data.

50. It follows that the second branch of the Government’s objection of non-exhaustion of domestic remedies must also be dismissed.

4. *Other grounds for inadmissibility*

51. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *Submissions by the parties*

(a) The applicant

52. The applicant submitted that apart from the agreement on the separation of real estate, the divorce settlement at issue also contained sensitive personal data, such as information regarding alimony payments,

parental custody arrangements, agreements on the separation of assets other than real estate, and a list of his income and assets. Pursuant to section 55a(2) of the Marriage Act (see paragraph 15 above), an agreement must be reached between spouses who seek an amicable divorce. It must be concluded in writing before a court.

53. The applicant pointed out that the family court and the land register court in his case were one and the same court – namely the Döbling District Court – which made it incomprehensible why the family court should not be in a position to filter out the relevant information for the registration of the transfer of ownership. Essentially, the court of first instance doubted the accuracy of an original document issued by the very same court. The applicant underlined that the extract of the divorce settlement was an original document and the competent judge had expressly confirmed its completeness. There was therefore no basis for the doubts expressed by the domestic courts.

54. The applicant agreed that the court responsible for the entry in the land register should have all the necessary information at its disposal – but this did not include sensitive data relating exclusively to his private life and his family. The requirement to submit the full divorce settlement irrespective of which data is contained therein violated not only his right to data protection, but also that of his minor children. He underlined the public nature of the document archive of the land register, where anyone could inspect the files without any restrictions. It was disproportionate to require him to submit the entire divorce settlement in order to have his request approved, as his legitimate interest to keep sensitive family data private outweighed any other public interests, in particular as other solutions would have been available, such as accepting the extract of the divorce settlement, or to provide the land register court with a copy for inspection, without publishing it.

55. The applicant argued that a literal interpretation of section 87 of the LRA (see paragraph 24 above) would lead to a violation of his fundamental rights to data protection and to respect of his private life. However, all Austrian courts are under an obligation to interpret provisions of ordinary law in conformity with the Federal Constitution, as well as in line with the Convention. He concluded that the Austrian courts failed to do so, which resulted in a violation of his rights under Article 8.

(b) The Government

56. The Government at the outset pointed out that no personal data of the applicant or his family members included in the divorce settlement has ever been published during the domestic proceedings.

57. The Government explained that the purpose of sections 87 and 94 of the LRA (see paragraphs 24 and 26 above) is to ensure that each entry into the land register is fully justified by the content of the documents presented.

Pursuant to section 94 (1), (3) and (4) of the LRA, it is the duty of the land register court to comprehensively examine the application and the enclosed documents; it may only approve an entry in the land register, *inter alia*, if the application is justified by the content of the enclosed documents and these documents are available in the form required for approving the establishment of ownership. Therefore, there must not be any formal or material law concerns (*formell- oder materiellrechtliche Bedenken*) against the document presented to the land register court caused by the incompleteness of an engrossment (the Government referred, on this point, to the Supreme Court's judgment 5 Ob 250/15y). In order to perform such an examination in each individual case, it is crucial that the respective document is presented in its entirety (see Supreme Court's judgments 5 Ob 12/77, 5 Ob 145/86 and 5 Ob 65/90). Moreover, sections 6 and 7 of the LRA (see paragraphs 19-21 above) shall ensure that the grounds for an entry pursuant to sections 87 and 94 of the LRA can still be examined *ex post* (the Government referred to the Supreme Court's judgment 5 Ob 76/95, and to Höller in Kodek, *Grundbuchsrecht*, 2nd edition, section 6 GBG, recital 1). This is of particular importance since anyone who alleges a violation of his or her land register rights is entitled to contest the correctness of an entry in the land register by a so-called cancellation action pursuant to section 61 of the LRA (see paragraph 22 above). Therefore, the relevant legal provisions are necessary in a democratic society within the meaning of Article 8 § 2 of the Convention to protect the rights and freedoms of others, and to prevent crime, thus responding to a pressing social need.

58. The Government argued that the provisions of the LRA do not go beyond what is essential for pursuing these legitimate aims. In particular, it is not sufficient for an effective protection of the right of property to present merely an excerpt of a divorce settlement. Excerpts always carry the risk that the part of the document not included in the excerpt contains provisions that could be of importance for the entry in the land register. The land register court is not supposed to examine whether a presented – duly certified – engrossment of a settlement reflects the content of the actual settlement (the Government referred to the Supreme Court's judgment 5 Ob 91/03y). Conversely, the family court cannot be expected to confirm in a binding manner for the land register court, whether the partial engrossment actually contains all relevant agreements for the entry in the land register. Hence, it is not sufficient to deposit only a partial engrossment of a divorce settlement in the document archive.

59. Therefore, in the view of the Government, there has been no violation of Article 8 of the Convention in the present case.

2. *The Court's assessment*

(a) Whether the case concerns positive or negative obligations

60. The Court understands the applicant's complaint as concerning allegations that, in interpreting and applying domestic law, neither did the Austrian courts take due account, nor ensured full enjoyment of his right to protection of his personal data (see paragraphs 53 to 55 above). The Court notes, in that connection, that the applicant did not primarily complain about the fact that the land register court would be able to view the content of the divorce settlement, but rather about its publication in the public document archive, where third persons would have unlimited access to its content (see paragraphs 19 and 21 above). That being so, the Court considers it appropriate to analyse the case as one concerning the State's positive obligations to guarantee effective respect for private life by its legislative, executive and judicial authorities.

(b) Whether the State's positive obligations were complied with

(i) General principles

61. The Court reiterates that Article 8 of the Convention requires not only that the State should refrain from action that would unjustifiably interfere with an individual's right to privacy, but also that it should set up a system for its effective protection and implementation in cases of unlawful interference falling within its scope. This could require the adoption of measures designed to secure respect for private life, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures. Such a system should afford the possibility of an effective proportionality assessment of instances of restriction of an individual's rights (see *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, § 55, 16 October 2008, with further references).

62. While the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition, the applicable principles are nonetheless similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State (*Bărbulescu v. Romania* [GC], no. 61496/08, § 112, 5 September 2017).

63. In cases arising from individual applications the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see *Paradiso and Campanelli*, cited above, § 180, with further references).

(ii) Application to the instant case

64. The Court notes that the land register court, in its decision of 25 February 2016 (see paragraph 8 above), did not conduct any proportionality analysis of the competing rights at stake, nor did it give any consideration to data protection issues. It referred to the explicit wording of sections 87 and 94(1) of the LRA (see paragraphs 24 and 26 above) and rejected the applicant's request to enter into the land register the transfer of ownership of his real estate shares to his former wife. It did not discuss, for example, the question whether it could have been sufficient for the transparency purposes of the land register that the applicant present both the entire divorce agreement and the excerpt for an examination of the latter's completeness, which, if found to be complete, could have served as a basis for the requested entry into the land register and the publication in the document archive.

65. Ruling on the applicant's appeal against that decision, the Vienna Regional Civil Court in substance recognised that there would be an interference with the applicant's rights under Article 8 if the entire divorce settlement was to be published in the document archive of the land register (see paragraph 10 above). However, it considered that the applicant's right to respect of his private life could not have been violated, as the interference had a clear legal basis under Austrian law. The Court notes that the Regional Civil Court also did not conduct any proportionality assessment.

66. Lastly, the Court observes that the Supreme Court in its final decision of 11 July 2016 (see paragraphs 12 and 13 above) confirmed the interpretation of the relevant provisions of the LRA made by the lower courts. The applicant's arguments as to his privacy rights and his right to data protection (see paragraphs 9 and 11 above) were not examined, nor did the Supreme Court examine the proportionality of the impugned measure or alternatives that could have better protected the applicant's privacy.

67. The Court therefore cannot but conclude that the domestic courts never actually examined the core of the applicant's claim because of the lack of a comprehensive examination of the question whether the legal obligation to produce the full original divorce settlement – which could serve as basis for the entry in the land register and subsequently be published in the document archive – was compatible with the effective enjoyment, by the applicant, of his right to protection of his personal data. The domestic courts therefore have failed to comply with their procedural obligation under Article 8 of the Convention to conduct a comprehensive assessment of a matter affecting the applicant's privacy rights (compare *Lewit v. Austria*, no. 4782/18, § 87, 10 October 2019, and *Taliadorou and Stylianou*, cited above, § 58).

68. The Court reiterates, moreover, that the data in question were personal. They consisted of details on the division of matrimonial assets, the custody and residence of the two minor children, the alimony agreement,

and an overview of the assets and the income of the applicant (see paragraph 5 above). In these circumstances, the Court considers that in the applicant's case the domestic courts would have had to address the question how to ensure the effective enjoyment of his privacy rights under Article 8 of the Convention. As the State's positive obligations require the legislator to establish a legal framework guaranteeing the effective enjoyment of these rights (see paragraph 61 above), the Court cannot but concur with the applicant's argument that the domestic courts, who did not find it necessary to apply to the Constitutional Court themselves, failed to sufficiently assess possibilities to interpret the applicable provisions of the LRA in compliance with the Convention. As a result, the domestic courts refused to address the Convention issue, either as a problem of the domestic legislation or as one of its interpretation.

69. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

70. The applicant complained that his right to control the use of his property was violated.

He invoked Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

71. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

B. Merits

72. The applicant complained that by rejecting his request to transfer, on the basis of the documents submitted, his share of the marital property to his former wife, his right to control the use of his property was infringed, without there being a public interest. Moreover, even assuming that there was a public interest to present the entire divorce settlement to the land register court, the associated publication of the sensitive personal data

contained therein was not proportionate. The applicant argued that he had fulfilled the conditions for the establishment of ownership into the land register. The excerpt of the divorce settlement should have been considered sufficient by the domestic courts, by interpreting the relevant provisions in line with the Federal Constitution as well as the Convention.

73. The Government submitted that the applicant could have easily avoided the refusal of the entering of the transfer of his co-ownership to the land register by settling the real estate matters of his divorce in a separate document before the family court or a public notary (see paragraph 46 above). Moreover, there was a legitimate aim for the refusal, namely the protection of the property of others and the prevention of crime.

74. Having regard to the finding of a violation under Article 8 as a result of the failure of the domestic courts to comprehensively examine the applicant's claims, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 1 of Protocol No. 1 to the Convention (see, *mutatis mutandis*, *Babylonová v. Slovakia*, no. 69146/01, § 57, ECHR 2006-VIII).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

75. Lastly, the applicant complained under Article 13 of the Convention, read in conjunction with Article 8, that after the approval of the registration of the transfer of ownership in the land register, there was no legal remedy to challenge the publication of the documents on which the registration was based, and which contained sensitive and private data.

Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The applicant argued that there was no procedure to determine which parts of the documents submitted to the land register court may be published, and which data contained therein must be kept confidential. In its decision of 11 July 2016 (see paragraph 13 above), the Supreme Court had held that the inclusion of documents in the document archive of the land register court was not the subject matter of the proceedings.

77. Moreover, the applicant claimed that the domestic courts had based their decisions on incorrect legal opinions, and that he did not have any further possibilities to appeal after the Supreme Court's final decision.

78. The Government submitted that the applicant had been able to make use of his right to appeal to the Vienna Regional Civil Court as well as the Supreme Court, and that the latter has examined the question of a violation of the applicant's right to protection of personal data. The Government argued that it was therefore not necessary to provide for an additional legal remedy in order to examine the extent to which the documents submitted for

registration in the land register will be made public after the approval procedure.

79. The Court considers that the applicant indeed had legal remedies available to him to complain of the alleged violation of Article 8 of the Convention, which he made use of. In this respect, it should be recalled that the effectiveness of a remedy, for the purposes of Article 13, does not depend on the certainty of a favourable outcome (see, amongst many other authorities, *Pine Valley Developments Ldt and Others v. Ireland*, 29 November 1991, § 66, Series A no. 222). Thus, the mere fact that in the applicant's case the domestic courts gave an adverse interpretation of the relevant legal provisions did not render these remedies *per se* ineffective.

80. The Court therefore considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

82. The applicant has not made any claim in respect of pecuniary or non-pecuniary damage.

83. Accordingly, the Court is not called upon to make an award under this head.

B. Costs and expenses

84. The applicant claimed some of the costs of the domestic proceedings, namely the costs for legal advice from a legal counsel in the amount of 5,400 euros (EUR), as well as the court fees for the proceedings before the Vienna Regional Civil Court and the Supreme Court in the amount of EUR 84, thus EUR 5,484 in total. He further claimed EUR 1,790 for the costs and expenses incurred before the Court (consisting of EUR 800 for hiring a researcher, and EUR 990 for translation costs).

85. The Government considered these claims excessive and not sufficiently substantiated by the documents provided by the applicant. In particular, they argued that the bills submitted showed neither the basis on which the fees were calculated, nor the kind of services which were provided.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court agrees with the Government that the bill submitted for "legal advice" from a counsel for the domestic proceedings in the amount of EUR 5,400 is not sufficiently itemised. It therefore rejects the applicant's claim in this respect. However, it considers it reasonable to award the applicant EUR 84 for the court fees incurred in the domestic proceedings, as well as the full sum claimed for the proceedings before the Court (EUR 1,790), plus any tax that may be chargeable to the applicant.

87. The total award in respect of costs and expenses is thus EUR 1,874.

C. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 8 of the Convention and Article 1 of Protocol No. 1 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 1 of Protocol No. 1 to the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,874 (one thousand eight hundred and seventy four euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 April 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President