

[Note editor: Names and companies, legal forms and product names, Addresses (incl. URLs, IP and email addresses), file numbers (and the like), etc., as well as their initials and abbreviations may be abbreviated for reasons of pseudonymization and/or changed. Obvious spelling, grammar and punctuation errors have been corrected.]

NOTICE

S P R U C H

The data protection authority decides on the privacy complaint of the Anton A***

(complainant) of January 11, 2019 against N*** Mobilfunk GmbH

(Respondent) for violation of the right to erasure as follows:

1. The complaint is partially upheld and it is found that the

Respondent thereby waives the right of the complainant

Deletion has violated by personal data of the

complainants who are older than seven years, about an admissible period processed;

2. the Respondent is instructed, within a period of

4 weeks in case of other execution, personal data of the

to delete or anonymise the complainant in accordance with clause 1;

3. Otherwise the complaint is dismissed.

Legal basis: Section 24 (5) of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999

idgF; §§ 92 Para. 3 Z 3 and 4, 92 Para. 2 and 99 of the Telecommunications Act 2003

(TKG 2003), Federal Law Gazette I No. 70/2003 as amended; § 132 para. 1 Federal Tax Code (BAO) BGBl.

No. 194/1961 as amended; Section 212 of the Austrian Commercial Code (UGB) Federal Law Gazette I No. 114/1997 as amended;

Article 5(1)(e), Article 17, Article 58(2)(d) and Article 77 of Regulation (EU) 2016/679

REASON

A. Submissions of the parties and course of the proceedings

1. With input from 10.1.2019, ho. Received 2019-01-11, improved by submission

from 24.1.2019, ho. received on January 25, 2019, the complainant alleged (in

further consequence: BF) a violation of the right to deletion by the

Respondent. There are no longer any outstanding reciprocal claims

between him and N*** Mobilfunk GmbH (hereinafter: "N*** Mobilfunk"). He has

at "N*** Mobilfunk" requests information about personal data concerning him and

request the deletion of all his data contained in the information, by letter dated

21.12.2018 issued by "N*** Mobilfunk" are included.

2. The data protection authority requested "N*** Mobilfunk" in a letter dated February 22, 2019,

GZ: DSB-D124.024/0002-DSB/2019, to comment on the statements of the BF

take.

3. The data protection authority requested "N*** Mobilfunk" in a letter dated March 21, 2019,

GZ: DSB-D124.024/0003-DSB/2019, to comment on the statements of the BF

take.

4. With a submission dated March 19, 2019, "N*** Mobilfunk" submitted a statement in which it

stated that the BF had terminated his contract with "N*** Mobilfunk" on September 30, 2018

and the last outstanding invoice was settled on November 26th, 2018. On 12/2/2018

the BF submitted an application for information in accordance with Art. 15 GDPR to "N*** Mobilfunk". The

Information was given on December 21, 2018. For the data of the BF given in the information

are master and contract data as well as interactions with the

customer service, which also display billing-related information. The BF has with me

Letter dated December 24th, 2018, received by "N*** Mobilfunk" on January 4th, 2019, the deletion

requested his personal data. In a letter dated January 8th, 2019, "N***

Mobile communications" informed the BF that the data will be sent immediately after the legal basis or after cessation of the respective purpose would be automatically deleted. "N*** Mobile communications" is due to various legal regulations (in particular tax laws, Civil law, civil procedure law, etc.) even after the end of the Customer contractual relationship obliges certain data to continue to be available hold. More detailed explanations - according to "N*** Mobilfunk" in the letter of January 8th, 2019 - can be found in the data protection declaration at www.n***.de/datenschutz. It be there to infer that master data and other data associated with a phone number be, as well as invoices and all invoice-related information, within seven years after the end of the contract (sole purpose: audits according to tax laws with sole access to the departments/persons entrusted with it). would. According to § 99 TKG, traffic data would be sent within six months origin of the data deleted (purpose according to TKG: offsetting or operational purposes). According to § 100 TKG, the latter also refers to Individual call records. Since the contract was terminated on September 30, 2018, the last traffic data on March 30, 2019 is automatically deleted. The rest of the data would by means of automatic deletion routines within the seven-year Storage obligation deleted.

5. With the completion of GZ: DSB-D124.024/0005-DSB/2019 of April 1, 2019, the

Data protection authority grants the BF the right to be heard.

6. The BF took with submission of April 9th, 2019, ho. arrived on April 12, 2019, position and replied that it was clear from the pleadings of "N*** Mobilfunk" that

the last traffic data on 3/30/2019 and the remaining data by means of automatic

Deletion routine - whereby the BF could not understand what was meant by this -

would be deleted within the seven-year retention period, this notification

however, is too imprecise and not specific enough. This will make the decision which

Data are then deleted subject to the judgment of the BF, this is not
Purpose of providing information about the deletion and the deletion itself. The reference
on the data protection declaration and on relevant civil law norms is not
expedient, since the BF would in turn be forced to hire a data protection expert
commission what cannot be within the meaning of the regulations. The Respondent
should say firmly - they have to judge this themselves - which data for which
appointment would be deleted. Everything else misses the purpose of data protection law
regulations.

7. The data protection authority called for "N*** portable radio" with a request for supplementary
Statement on GZ: 124.024/0006/-DSB/2019 of April 18, 2019 to announce
which data will be deleted at what time and requested "N*** Mobilfunk"
also to announce on which legal basis or on which considerations
further processing of the individual data is based.

8. With a submission dated May 14, 2019, "N*** Mobilfunk" submitted a statement in which it
stated that, as set out in its first opinion, certain data
would continue to be made available by "N*** Mobilfunk". Specifically, all data would
except for traffic data, i.e. the master data and others in the information letter dated
21.12.2018 listed data kept. The retention period is seven years
from the end of the contractual relationship or the end of the year in which the
contractual relationship has ended. The legal basis for this storage is
§ 132 BAO and § 212 UGB, since the data mentioned serve as the basis for entries in the
serve books or are in documents (invoices and others
invoice-relevant documents) that serve the same purpose. So it is about
these data and documents are "records" and "receipts" within the meaning of the above
Provisions that would be subject to corresponding retention requirements. The
The purpose of this storage is any invoice checks in accordance with the

to be able to comply with tax laws that may take place in the said period.

9. With completion of GZ: DSB-D124.024/0007-DSB/2019, from May 20th, 2019 the

Data protection authority the BF party hearing.

10. The BF took with input from 28.5.2019, ho. arrived on June 4th, 2019, position and

stated that "N*** Mobilfunk" only answered in general terms and was not comprehensible

have shown which data is still kept on which legal basis

Need to become. It is not known to him what traffic data or traffic data is about

master data handle. This is not an answer to a request for information.

B. Subject of Complaint

Based on the arguments of the BF, it follows that the subject of the complaint is the question

is whether "N*** Mobilfunk" violated the BF's right to deletion by

did not comply with his request for deletion of December 24th, 2018.

C. Findings of Facts

1. "N*** Mobilfunk" operates a telecommunications service and had with the

Complainant concluded a mobile phone contract, this on November 26, 2018

ended.

2. In a letter dated November 4th, 2018, the BF submitted an application for information to "N***

mobile communications".

3. "N*** Mobilfunk" provided the following information in a letter dated December 21, 2018:

[Editor's note: the graphic file (letter from N*** Mobilfunk dated 12/21/2018

regarding information according to Art. 15 GDPR to the complainant) was removed because

it cannot be displayed pseudonymised in the RIS.]

4. The BF submitted a request for deletion in a letter dated December 24th, 2018, which is contained in this

Information listed data.

5. "N*** Mobilfunk" responded to the cancellation request with the following letter dated

01/08/2019:

[Editor's note: the graphic file (letter from N*** Mobilfunk dated 01/08/2019

regarding request for deletion to the complainant) was removed because it was in the RIS cannot be displayed in a pseudonymised form.]

6. "N*** Mobilfunk" has the BF's traffic data for a period of six months

stored, which were deleted by means of an automatic deletion routine on March 30th, 2019 became.

Evidence assessment: The findings are based on the undisputed and credible submissions of the BF and "N*** Mobilfunk".

D. In legal terms it follows that:

1. Regarding the concept of master data or traffic data:

The BF complains that he does not know what master data or traffic data. According to § 97 Para. 3 Z 3 TKG, master data is

all data, including personal data, necessary for the establishment, processing, change, or termination of the legal relationship between the user and the provider or are required for the creation and publication of subscriber directories. These are:

Surname (surname and first name for natural persons), academic degree natural persons, address (residential address for natural persons), subscriber number and other contact information for the message, information about Type and content of the contractual relationship, creditworthiness, date of birth. According to § 92 Para. 3 Z 4, traffic data is data that is used for the purpose of Forwarding of a message to a communications network or for purposes of billing of this operation are processed.

With regard to the information provided by the complainant from "N*** Mobilfunk" (see Findings) it must be stated that these are only master and Contract data as well as interactions with the customer service of "N*** Mobilfunk".

Traffic data cannot be extracted from it. This also brought "N***

cell phone" in its statement of March 19, 2019, which the complainant in
was transmitted as part of the hearing of the parties. This was in the present proceedings
irrelevant, however, since the object of the complaint was only one alleged
violation of the right to erasure.

2. Re points 1 and 2

§ 97 paragraph 1 TKG standardizes a strict earmarking for the processing
personal data.

According to § 97 paragraph 2 TKG 2003 master data are at the latest after the end of the
to delete contractual relationships with the participant from the operator. exceptions
are only permissible to the extent that this data is still required in order to pay fees
charge or bring in, process complaints or other legal
to fulfill obligations.

"N*** Mobilfunk" relies on the storage of master data on the
seven-year period of § 132 BAO and the seven-year period of § 212 UGB.

Section 132 (1) BAO and Section 212 (1) UGB each standardize a retention obligation
of books and records for seven years. From the issued on December 21, 2018

Information (specifically: table regarding communication with the complainant)

shows that "N*** Mobilfunk" processes personal data of the BF and
refused to delete those from the period from 02/23/2004 to 04/30/2011

come. According to § 212 Section 1 UGB or § 132 Section 1 BAO with seven years
a specific retention obligation is thus the basis for their retention

disregarded as this data is more than seven years old. Another basis for

further processing of this data was not submitted by "N*** Mobilfunk" and

is also not recognizable. This data older than seven years would be from "N***
portable radio" had to be deleted independently after the end of this period.

The complaint was therefore to be granted on this point and the deletion of this data

to apply.

3. Regarding point 3

To the traffic data:

According to Section 99 (2) TKG 2003, the operator of a public communications network or service to store traffic data, provided this is for billing purposes

End customer or wholesale service charges is required. The traffic data is closed delete or anonymize as soon as the payment process has been carried out and the fees have not been objected to in writing within a period of three months.

The provision of Section 99 TKG 2003 sets Art. 6 of Directive 2002/58/EC of the European Parliament and Council of July 12, 2002 on processing personal data and protection of privacy in the electronic

Communications (Privacy Policy for Electronic Communications; ePrivacy RL) (cf. Feiel/Lehofer, Telecommunications Act 2003 [2004] 290).

According to Art. 6 Para. 4 e-Data Protection Directive, a distinction is made between the processing of Traffic data for billing purposes (Art. 6 Para. 2 leg. cit.) on the one hand and Processing for the purpose of marketing electronic communications services or to provide services with additional benefits (Art. 6 para. 3 leg. cit.) on the other hand.

Such a distinction can also be found in the definition of § 92 para. 3 Z 4 TKG 2003 (arg. "or").

Section 99 (2) TKG 2003 authorizes the processing of traffic data settlement purposes regulated. According to the wording of the law, the to delete or anonymize traffic data after a period of three months unless one of the exceptional circumstances set out in Z 1 to 4 applies.

The processing of traffic data for the purpose of marketing electronic communication services or to provide services with additional benefits (Art. 6 Para. 3 e-Privacy Directive) is regulated in § 99 Para. 3 TKG 2003, whereby in this

Provision also Art. 6 Para. 4 e-Privacy Directive was implemented (cf. again

Feiel/Lehofer, loc.cit., 290). According to Section 99 (3) TKG 2003, the scope of the processed

Limiting traffic data to the absolutely necessary minimum.

As the data protection authority already in a comparable complaint procedure

has expressed, a longer storage period than that specified in the law is available

three months not in accordance with Art. 5 Para. 1 lit. e GDPR (cf. notice of

Data Protection Authority from May 28th, 2018, GZ DSB-D216.471/0001-DSB/2018). This

According to the regulation, personal data must be stored in a form

which allows the identification of the data subject only for as long as is necessary for the

purposes for which they are developed ("memory limitation").

In the present case, "N*** Mobilfunk" was therefore only authorized to transfer traffic data

Billing purposes according to § 99 paragraph 2 TKG 2003 for a maximum of three

months or until the expiry of the periods specified in nos. 1 to 4 of this provision

save.

As submitted and established by "N*** Mobilfunk", the traffic data

of the BF already deleted on March 30, 2019. "N*** portable radio" brought in their statement

from March 19, 2019 that "master data and other data associated with a phone number

are linked as well as invoices and all invoice-related information within

be deleted from seven years after the end of the contract

Statement that "traffic data [...] according to § 99 TKG within six

Months after the creation" of "N*** Mobilfunk" can be deleted. As to the present

Time at which time the traffic data of the BF have already been deleted - the deletion

took place as stated on March 30th, 2019 - the complaint was therefore on this point

dismissed due to lack of appeal by the BF.

Regarding the other master data:

For the other personal data of the complainant, which is in the information

from 21.12.2018 - but are not older than seven years - are concerned

Information about the type and content of the contractual relationship and thus provide

Master data within the meaning of § 92 Paragraph 3 Z 3 lit. e TKG 2003. "N*** portable radio" is therefore authorized to use this master data in accordance with § 132 Para. 1 BAO or § 212 Para. 1 UGB for the duration

to be kept for seven years (cf. Riesz in Riesz/Schilchegger, TKG [2016] § 97

40 and the decision of the data protection authority of May 28, 2018, DSB-

D216.471/0001-DSB/2018).

It was therefore to be decided accordingly.