

GZ: DSB-D122.995/0003-DSB/2018 from 13.12.2018□

[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 and/or changed for reasons of pseudonymization.□

Corrected obvious spelling, grammar, and punctuation errors.]□

NOTICE□

S P R U C H□

The data protection authority decides on the data protection complaint of Dieter A***□

(Appellant) of 06/08/2018 against N*** Mobilfunk GmbH (Respondent) because of□

Violation of the right to erasure as follows:□

1. The complaint is upheld and it is established that the respondents□

Complainant violated his right to erasure by using his□

personal data (traffic data in the sense of § 92 para. 3 Z 4 TKG 2003) via a permissible□

Processed beyond this period and, contrary to his request, did not delete it.□

2. The Respondent is instructed within a period of 2 weeks in other□

Execution to delete or anonymize the complainant's traffic data.□

Legal basis: §§ 24 paragraph 5 of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended; §§ 92□

Para. 3 Z 4 and 99 of the Telecommunications Act 2003 (TKG 2003), Federal Law Gazette I No. 70/2003 as amended; Article 5

Paragraph 1 letter e, Article 17, Article 58 Paragraph 2 letter d and Article 77 of Regulation (EU) 2016/679 (data protection□

Basic Regulation - GDPR), OJ No. L 119 p. 1.□

REASON□

A. Submissions of the parties and course of the proceedings□

1. In his complaint dated June 8, 2018, the complainant alleged a violation of the right to□

deletion and essentially argued that he had an affair with the Respondent□

Mobile phone contract concluded. According to his legal understanding, traffic data according to□

§ 99 TKG 2003 stored for a maximum of three months or would then have to be made anonymous. He□

sent the Respondent a request for deletion on June 5, 2018. Specifically, it's about the deletion of traffic data relating to invoice numbers 6147068962, 6148927261 and 9327594470. The Respondent has this request for deletion or anonymization declined.

2. By letter from the data protection authority dated June 12, 2018, GZ DSB-D122.995/0001-DSB/2018 requested the Respondent to comment on the complaint filed against them to take.

3. In a statement dated June 29, 2018, the Respondent submitted that it was processing data in Within the meaning of §§ 92 ff TKG 2003. In traffic data processing, on the one hand, between the Traffic data processing for billing purposes and on the other hand traffic data processing differentiated for operational purposes. Regarding traffic data processing Section 99 (2) TKG 2003 regulates those cases in which traffic data is not used for billing purposes delete. In addition to traffic data processing for billing purposes, the processing of traffic data is essential for a mobile phone company to operate the network and thus the To be able to ensure the fulfillment of service contracts with end customers. The TKG 2003 contains with regard to operational purposes, there are no regulations for specific retention periods. Rather lay Each operator sets these periods themselves in accordance with the general data protection regulations. This operational purposes are essential for the maintenance and operation of a functioning net. Reference is made to Section 99 (3) TKG 2003. The Respondent has the Retention periods in various company-internal process directories defined and documented. This is based on Art. 30 GDPR. Specifically, they would Traffic data is stored for six months for billing purposes. This duration can be justified several times. First of all, they are stuck with the settlement of end customer contracts together. These are usually billed to end customers on a monthly basis, so that With regard to the eight billing cycles that are usual for the Respondent, it could be that a The date can be up to four weeks old before it is printed on an invoice. Under

Consideration of the mail run for transmission to the end customer as well as for an objection and the three-month objection period according to Section 71 (1) TKG 2003 works out to be around 5 ½ months retention period. In addition, services from roaming partners are usually not so fast take place so that traffic data is exchanged with a time delay and is therefore only charged later. The billing of interconnection services at the wholesale level can take up to three years take place afterwards. This traffic data is also required for this. In view of that Arbitration proceedings at the regulatory authority according to § 71 Section 2 ff TKG 2003 could do this come that a complaint relates to an invoice whose connection data already exist more than three months ago. According to § 6 AStG, an end customer also has the Possibility to initiate an arbitration procedure within one year, so that the traffic data in the In view of this, they would even have to be kept for one year. The retention period of six months is also with regard to the RoamingIV Safeguard Monitoring (EU implementation regulation Commission 2016/2286) required. Here, the roaming surcharge after the sixth invoice, i.e. in fact only after about seven calendar months. in case of a objection, the reason for the roaming surcharges must be understandable. In addition, the Respondent submitted that the Complainant had previously Appeal the waiver of the statutory right to object to invoices aimed at. However, this is in view of the fact that this cannot be done unilaterally and it is anyway does not require the consent of the other contracting party - i.e. the respondent possible.

4. By letter from the data protection authority dated July 18, 2018, GZ DSB-D122.995/0002-DSB/2018 to the complainant in the context of the hearing of the parties the statement of the respondent transmitted.

5. In a statement dated July 23, 2018, the complainant essentially submitted that the Use of the traffic data after the three-month period has expired in accordance with Section 99 (2) TKG 2003 is possible if anonymization takes place. A personal reference is only with regard to the

End customer billing necessary. Since he was not in the period covered by the complaint□

stopped abroad, the arguments of the Respondent regarding the Roaming IV□

Safeguard monitoring not relevant. His mobile phone contract with the Respondent was dated□

June 1st, 2018 ended. He continues to request the deletion or anonymization of all□

Traffic data relating to invoices sent to him more than three months ago□

be.□

B. Subject of Complaint□

In the present proceedings, the question arises as to whether the complainant is thereby in his right□

was violated for deletion because the Respondent sent the traffic data concerning him after the□

has not deleted or anonymised the period of three months specified in Section 99 (2) TKG 2003.□

C. Findings of Facts□

The Respondent operates a telecommunications service and had with the□

Complainant concluded a mobile phone contract, which ended on June 1st, 2018.□

There is no exception according to § 99 Abs. 2 Z 1 to 4 TKG 2003.□

The Respondent stores traffic data for a period of six months.□

On June 5, 2018, the complainant sent the respondent a request for the deletion of the□

Traffic data relating to invoice numbers 6147068962, 6148927261 and 9327594470□

submitted, whereby the Respondent rejected the application.□

The complainant requests the deletion or anonymization of all traffic data relating to□

receive invoices that were sent to him more than three months ago.□

Evidence assessment: The findings are based on the undisputed submissions of the□

complainant and the respondent.□

D. In legal terms it follows that:□

1. The provision of § 99 TKG 2003 sets Art. 6 of the Directive 2002/58/EG of the European□

Parliament and Council of July 12, 2002 on the processing of personal data and the□

Protection of privacy in electronic communications (Privacy Policy for Electronic□

Communication; e-Privacy Directive) (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 providing services with□

Additional benefit (Art. 6 para. 3 leg. cit.) on the other hand. Such a distinction can also be made□

Refer to the definition of § 92 Para. 3 Z 4 TKG 2003 (arg. "or").□

2. Section 99 (2) TKG 2003 regulates the processing of traffic data for billing purposes.□

According to the wording of the law, the traffic data are available after a period of three months□

delete or anonymize it, unless it is one of those standardized in Z 1 to 4□

exceptions before.□

3. 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 Art. 6□

Para. 4 e-Privacy Directive was implemented (cf. again Feiel/Lehofer, loc.cit., 290). According to § 99 paragraph 3□

TKG 2003, the scope of the processed traffic data is reduced to the absolutely necessary minimum□

restrict.□

4. As already stated by the data protection authority in a comparable complaint procedure□

a longer storage period than the three months specified in the law is inconsistent□

with Art. 5 Para. 1 lit. e GDPR (cf. decision of the data protection authority of May 28, 2018,□

GZ DSB-D216.471/0001-DSB/2018). According to this provision, personal data must be□

stored in a form that enables the data subject to be identified only for as long as□

as necessary for the purposes for which they are prepared ("Storage Limitation").□

5. In the present case, the Respondent is therefore only authorized to transfer traffic data□

Billing purposes in accordance with Section 99 (2) TKG 2003 for a maximum period of three months or up to□

at the end of the periods specified in nos. 1 to 4 of this provision.□

6. The Respondent is to be followed that the TKG 2003 (and also not the e-Privacy

RL) an explicit deletion period for traffic data for the purpose of marketing electronic

Communication services or to provide services with additional benefits standardized. Given the

fact that in the present case the contractual relationship between the parties to the proceedings is undisputed

ended on June 1st, 2018, it is not clear why at the time of the current decision (in

December 2018) the processing of this traffic data is still necessary.

7. Since at this point in time the period of three months pursuant to Section 99 (2) TKG 2003

has elapsed, no application of para. 2 nos. 1 to 4 leg. cit. present and also for the further

Storage of traffic data for other purposes no justification is apparent

consequently to delete or anonymise all traffic data concerning the complainant.

8. The data protection authority was therefore responsible for restoring the data protection-compliant state

pursuant to Art. 58 (2) (d) GDPR in conjunction with Section 24 (5) DSG, the Respondent within

within a set period of time, according to the verdict, to restore the legally compliant state.

The appeal was therefore allowed as per the verdict.