

GZ: DSB-D122.974/0001-DSB/2019 from 20.8.2019□

[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 Peter A***□

(complainant) of June 4, 2018 against N*Mediengesellschaft m.b.H.□

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

- The appeal is dismissed.□

Legal bases: §§ 1 paragraphs 1 and 2, 24 paragraphs 1 and 5 of the Data Protection Act (DSG),□

Federal Law Gazette I No. 165/1999 as amended; Art. 4 Z 11, Art. 7, Art. 57 Para. 1 lit. f and Art. 77 Para□

Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR), OJ No. L 119□

from May 4th, 2016, p. 1; Section 96 (3) of the Telecommunications Act (TKG 2003), Federal Law Gazette I□

No. 70/2003 as amended.□

REASON□

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

1. In his complaint dated June 4, 2018, the complainant brought improvements□

by submission of June 17, 2018, essentially that since the entry into force of□

DSGVO on May 25, 2018 the website of the respondent only under the□

Subject to the consent of the data protection declaration or used against payment□

could become. The Respondent offers journalistic□

information. These were free until May 25, 2018. According to the GDPR□

it is forbidden to link a service to the processing of data.□

2. In its statement of September 12, 2018, the Respondent brought□

Essentially, online media such as n*mediengesellschaft.at so far only because of that□

were able to make their product available free of charge because the□

Costs of the journalistically prepared content through the business model□

personal advertising were covered.□

The Respondent placed the cookie notice when accessing the website in such a way that□

that the users of the website would not have the opportunity to read the content before□

unaware of the decision to process their personal data□

would have dissected data through cookies. You made sure□

ensure that no cookies can be set when the website is accessed.□

Users would have the option of either opting in to using the website in the□

paid XY** version (without using cookies) or for the free one□

use of the website (with the use of cookies). The offering□

These two versions do not constitute a violation of Art. 7 Para. 4 GDPR since the□

data protection consent by the XY** version of the use of the content□

the complainant was decoupled. The XY** subscription makes it possible to□

to use editorial content without data protection consent. A□

XY** subscription can be purchased for ** euros / month. Regarding pricing□

the complainant ensures that the amount of the subscription price□

advertising-free and above all tracking-free full use of their online offer□

not thwart.□

The Respondent is a privately autonomous company that per□

Definition is economically oriented. You see no reason from an economic point of view□

for offering their content without the possibility of refinancing.□

3. In the oral hearing of November 28, 2018, which took place within the framework of the ho.□

Proceedings to GZ: DSB-D213.665/0005-DSB/2018 brought the□

Respondent essentially before that they § 96 paragraph 3 TKG 2003 as

Legal basis for consent regarding cookies for digital advertising measures

("Advertising Cookies"). Access to the website differs between the

XY** version and the free version do not have content. There is only one exception

that external scripts from third parties (e.g. social networks) only then appear on the website of the

XY** subscribers are displayed if the consumer gives consent for this.

In the context of the XY** version, only the absolutely necessary data (e-mail,

Payment data) stored to establish the business relationship with the consumer

to be able to process. This version is free of any advertising. The consideration in

The core of the XY** version is the journalistic activity, which is freedom from advertising

only one characteristic of the service offered.

4. As part of the hearing of the parties, the complainant brought input dated

10/03/2018 that the argumentation of the respondent is not in order

find and he reserves the right to the legal examination of the argument.

B. Subject of Complaint

Based on the complainant's submissions, the question arises as to whether the

Respondent gives the complainant the right to secrecy

has violated by allowing free viewing of journalistic content on the

Website https://www.n*mediengesellschaft.at to consent to the use of

Cookies or - alternatively - a paid subscription without setting

of cookies.

C. Findings of Facts

1. The Respondent operates on the website

https://www.n*mediengesellschaft.at is an online community and provides daily

journalistic articles on various topics available online. Among the articles consists for

User the opportunity to comment on the articles, the user contributions

be moderated. In some cases, up to 40,000 user postings are received every day.□

When the website is called up for the first time, a window ("pop-up") appears with the following□

Contents:□

[The specific content of the window has been removed for reasons of pseudonymization.□

Correspondingly, this contains information to the user, after which either a□

Consent to the use of cookies for advertising purposes on the website□

has taken place or - if this is not desired - with an XY** subscription the page without□

Advertising cookies can be used.]□

2. Visitors to the Respondent's website have the option of□

Mouse click on the "OK" button or towards an area outside the window□

Press , whereby the consent is given ("Variant 1"). If consent is given,□

the visitors can use the Respondent's website. The webpage will□

in this variant made available to third parties as advertising space. It is about this□

about the use of "advertising cookies".□

3. As an alternative, visitors to the Respondent's website can use the□

1 window described on the "XY**-Abo" button with a mouse click□

("Variant 2").□

4. Upon conclusion of a fee-based XY** subscription (currently: EUR xx-monthly, as of□

August 01, 2019) the entire webpage of the Respondent can be used,□

no data tracking takes place and no third-party cookies are set. no data□

Tracking means that all third-party scripts and cookies as well as social□

Media plugins are permanently disabled, with these set by the visitor individually□

can be activated.□

5. Variant 1 and variant 2 do not differ in terms of content□

Access to the Respondent's website.□

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

parties as well as an ex officio review of the publicly accessible website

of the Respondent, https://www.n*mediengesellschaft.at, retrieved on August 1st

2019) and the N*Mediengesellschaft article from April 8, 2019 ("The reader community

is changing" - https://www.n*mediengesellschaft.at/die-lesergemeinschaft-verändert

himself).

D. In legal terms it follows that:

1. On the competence of the data protection authority for "cookies" on websites of online

Newspapers:

The processing that is the subject of the complaint undoubtedly concerns data that is

the provision of the online N*Medium (Variant 1) by the implementation

so-called cookies are recorded. In the imprint of the website

https://www.n*mediengesellschaft.at/impressum/ appears to be the media owner of N*

Mediengesellschaft m.b.H. on.

Section 9 (1) DSG takes the application of certain chapters of the GDPR (including Chapter II

("Principles") and Chapter III ("Rights of the data subject")) in the processing of

personal data by media owners, publishers, media employees and

Employees of a media company or media service, insofar as the

Processing for journalistic purposes of the media company or media service

he follows.

In the opinion of the data protection authority, § 9 DSG does not apply in this case.

On the one hand, Section 9 (1) DSG stipulates that the application of individual chapters of the GDPR

does not apply, but not that § 1 DSG would also remain inapplicable (cf.

Bresich/Dopplinger/Dörnhöfer/Kunnert/Riedl, DSG (2018), margin no. 11 on Section 9), on the other hand

but the installed "cookies" and the data collected through them are the

In any case, readers of the Online N*Medium are not concerned about the processing of personal data

Data for journalistic purposes. The purpose of processing data using

The setting of cookies is more technical (e.g. maintaining a session)□

or of an economic nature (refinancing).□

The data protection authority is therefore responsible for the decision.□

2. Violation of § 1 Para. 1 DSG (fundamental right to secrecy)□

In the present case, the complainant alleges a violation of § 1□

DSG, since it is the lawfulness of the processing because of the linking of the□

provided service to the consent to the processing of personal data□

Data (cookies) are missing when the Respondent's website is called up, whereby the□

complainant until the conclusion of the present proceedings on it□

limited, Variant 1 offered by the Respondent (consent to□

to gain access to the content of the website) as non-GDPR-compliant□

and requested that the website www.n*mediengesellschaft.at - without data processing - for□

to release everyone.□

The data protection authority has already stated that the rights of data subjects in□

Chapter III GDPR (Art. 12 to 23) are listed exhaustively, a data subject□

however, within the framework of a complaints procedure, to any provision of the GDPR□

based, if this results in a possible violation of the law□

Confidentiality according to § 1 Para. 1 DSG (cf. DSB from September 13, 2018,□

DSB-D123.070/0005-DSB/2018, according to which the person responsible violated Art. 32□

can lead to a violation of § 1 Para. 1 DSG).□

3. On the voluntary nature of the consent and the "ban on coupling" within the meaning of Art. 7 Para. 4 GDPR□

in a specific case:□

The complainant accordingly argues that the approval of "Variant 1" is not□

voluntarily, since the provision of the service depends on the consent to□

Processing of personal data is made dependent, so that a□

service is linked to the processing of data.□

a. Applicable legal bases:□

Cookies can be used to collect information generated by a website and□

have been stored via the browser of an Internet user. It is about a□

small file or text information (usually less than a K byte) written by a□

Website via an internet user's browser on his computer's hard drive□

or mobile device (cf. Advocate General's Opinion□

Szpunar of March 21, 2019 on C-673/17, margin no. 36 with further references).□

With cookies, information is therefore stored on the client or browser (but in any case□

stored on the user's end device). The "storage" or "access to information□

on the end device" of a user is subject to the conditions of Art. 5 Para. 3 of the□

Data Protection Directive for Electronic Communication (RL 2002/58/EG as amended, e-□

Data Protection Directive). The recital 25 of RL/2002/58/EG and recital 66 of Directive 2009/136/EC□

(as amended by Directive 2002/58/EC) expressly mention the processing of□

cookies.□

As the data protection authority already stated in a decision on a similar matter□

GZ DSB-D122.931/0003-DSB/2018 of November 30, 2018 (RIS).□

The question of the legal basis or the legal basis for processing therefore arises□

of cookies exclusively according to the special legal standards of - in implementation of□

Art. 5 Para. 3 e-Data Protection Directive - national provisions, in particular□

therefore of § 96 para. 3 TKG 2003, according to which a determination of data (or the use□

advertising cookies) is only permitted if consent has been given.□

The TKG 2003 itself or the e-Privacy Directive does not contain any more detailed conditions□

or a definition for consent, however Art. 2 lit. f of the e-Privacy Directive refers□

to the (former) Data Protection Directive 95/46/EC. Art. 94 GDPR ("Repeal of□

Directive 95/46/EG") in turn – in addition to repealing Directive 95/46/EG□

with May 25, 2018 – that references to the repealed policy as references to the□

GDPR apply.□

The concept of consent according to the e-Privacy Directive or the TKG 2003 corresponds to in□
systematic interpretation therefore the concept of consent according to Art. 4 Z 11 and Art. 7□

GDPR.□

b. For consent and voluntariness within the meaning of Art. 7 GDPR:□

b.a. Art. 4 Z 11 DSGVO defines as consent any voluntary for the specific case, in□

informed manner and unequivocally given expression of will in the form of a□

Statement or other unequivocal affirmative action by which the□

the data subject indicates that they are compliant with the processing of data concerning them□

agrees to personal data.□

bb Art. 7 GDPR then defines the "conditions for consent" (e.g. if□

written consent relates to other matters or the right to□

revocability at any time and ultimately the relevant "coupling ban" in this case□

Art. 7 para. 4 GDPR).□

b.c. Art. 7 para. 4 GDPR reads:□

"When assessing whether the consent was given voluntarily, the circumstance in□

to the greatest extent possible, whether, among other things, the fulfillment□

of a contract, including the provision of a service, from consent to□

is dependent on the processing of personal data necessary for the fulfillment of the□

contract are not required."□

Kühling/Buchner, GDPR Commentary (2017), margin nos. 41ff. on Art. 7, name the following□

(Weighing criteria) Criteria for the voluntary or involuntary: "imbalance",□

"Necessity", "contract-characteristic service", "reasonable alternative" and□

"reasonable balance of interests".□

b.d. The criterion of "imbalance" is closely related to□

the consumer's freedom of choice and the question of a reasonable alternative. the□

Assumption that between businesses and consumers ipso facto an imbalance□

exists, is not justifiable (so also Kühling/Buchner, DS-GVO comment (2017),□

Margin no. 41 ff to Art. 7).□

b.e. The criterion of "necessity" in conjunction with the "contract-typical□

Performance" means that the performance of a contract is subject to consent to□

Processing of personal data is made dependent on this□

fulfillment of the contract are not relevant.□

Kühling/Buchner, DS-GVO comment (2017), paragraph 46 et seq. to Art. 7, affirm the□

Necessity, insofar as personal data itself is the subject of a□

Main obligation to perform if at least the exchange of services is complete□

is made transparent. Ingold in Sydow came to a similar conclusion□

(Ed.), European General Data Protection Regulation (2017), margin no. 33 on Art. 7, which applies to cases□

of commercialized consents, in which the data processing authority as□

consideration for a free service is purchased, in the absence of such□

of an autonomy conflict and the mere expansion of the possibilities for action□

in terms of valuation, there is no dependency. Likewise Gola, privacy□

Basic Ordinance (2017), margin no. 27 to Art. 7, the application of the ban on coupling□

on the consent-based disclosure of personal data with transparent□

quid pro quo, also from a socio-political point of view.□

In the present case, it should be noted that the Respondent in Variant 1□

(Consent to use the website) does not set any cookies until the visitor□

made a conscious decision on the website, i.e. gave consent□

whether he would like to take option 1. By linking in the window ("Pop-□

Up") to the data protection declaration and by listing the ones in use□

The Respondent also complies with the cookies ("Cookies Annex") in Section 96 (3).□

TKG 2003 in conjunction with Article 5 Paragraph 1 Letter a and Article 13 GDPR□

Information obligation and a clear and specific purpose is evident, whereby for

the data subject has control over the processing of their data

is ensured. Furthermore, the synallagmatic main and

Considerations presented in a sufficiently transparent and clear manner. It's for him

average consumer clearly sees that his consideration is either the

Consent to cookie data processing or the booking of a paid XY**

subscriptions is

b.f. The criterion of the "reasonable alternative" should be considered in an overall view of the

Circumstances ensure that the data subject does not have to agree only because he

otherwise a specific range of services cannot be used. If the

Those affected can access equivalent offers that do not require consent

Making a performance condition indicates that it is voluntary. Under "equivalent"

are to be understood as services that essentially contain the same range of services,

neither perfect identity, nor equality in price and/or access required

are (Kuhling/Buchner, DS-GVO comment (2017), margin no. 52 ff).

From the point of view of the data protection authority, the XY** subscription offers a price

of ** euros per month from the second month a not disproportionately expensive

Alternative. There is another possible alternative if consent is not given

in that the person concerned does not have the website of the respondent in

claims and resorts to an alternative offer of information.

b.g. In this case, the "criterion of the balance of interests" also seems to apply, since the

potential readers of the processing of their data in the context of cookies either

consents due to consideration for journalistic content, or - without advertising

Cookies – can take out a paid XY** subscription.

It should be noted that journalistic research and content, as provided by

Media company is provided, usually with or without charge (then

but usually via advertising financing). The media companies of online

Newspapers undoubtedly incur not inconsiderable costs (in this case

also for the operation and moderation of the online forum),

their form of compensation within the framework of what is constitutionally guaranteed

Private autonomy is fundamentally the responsibility of the company. The GDPR also provides in Art. 1

Para. 2 GDPR in conjunction with recital 4 second sentence not only the protection of personal

data, but emphasizes the appropriate balance with other, in the European

fundamental rights recognized in the legal area. That's basically how it is for the Respondent

reserved, journalistic content and the moderated online forum within the framework of

Private autonomy and within the scope of their freedom to work for a fee or against payment

To make available. Also the ECJ recognizes that a certain commercial success

even the indispensable condition for the continued existence of a professional

journalism (see the judgment of December 16, 2008, C-73/07, paragraph 59).

It should be emphasized in this context that the N*Mediengesellschaft online

Forum under each article with the possibility that users to the current political

Opinion can be done, being a moderation unlawful or against the good

Postings that violate customs or forum rules will be deleted, but not one

insignificant contribution to the right to freedom of expression in a democratic

company, and in individual cases also a direct (published) dialogue with

commentators and journalists allowed.

A basis for a claim, on the other hand – as the complainant apparently thinks

see - that everyone journalistic content including a moderated online forum without

receives any consideration made available, is not apparent.

bra. The former Art. 29 data protection group has come up with possible voluntariness

disabling disadvantages and came to the conclusion that

that such a disadvantage exists when there is a risk of deception,

intimidation, coercion or significant negative consequences. the

Controller must demonstrate that it is possible to refuse consent

or revoke it without suffering any disadvantages. Furthermore, the person responsible should

demonstrate that the data subject had a genuine or free choice as to whether to consent

or not (cf. Art. 29 WP, Guidance on consent under

Regulation 2016/679, WP 259, rev. 01, p. 5ff.; see also recital 42 GDPR).

The subject matter of the proceedings is not a significant one if consent is not given

Disadvantage before and is the affected person with no significant negative consequences

confronted, since reasonable alternatives exist.

bi. As a result, the data protection authority comes to the conclusion that the present

Consent to Variant 1 ("Consent to processing") the provisions of Section 96

Para. 3 TKG 2003 in conjunction with Art. 4 Z 11 and Art. 7 GDPR (cf. also the

already quoted notice of November 30, 2018).

The decision of the Supreme Court to 6 Ob 140/18h from

August 31, 2018, according to which the coupling of consent to processing

contract-independent personal data with the conclusion of a contract

In principle, it can be assumed that the granting of consent is not voluntary

takes place, unless there are special circumstances in individual cases for the voluntary nature of the

talk about data protection consent, since - as mentioned - not from one

"contract-independent" processing is to be assumed, but rather the "consent

for data processing" a synallagmatic consideration for otherwise only in return for payment

available journalistic services, whose objective value has no bearing whatsoever

there is doubt.

It was therefore to be decided accordingly.