

GZ: DSB-D130.033/0003-DSB/2019 from 7.3.2019□

[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 data protection complaint of Dr. Ulrich A\*\*\*□

(Appellant) of July 23, 2018 against N\*\*\*, Inc (Respondent),□

established in CA 9\*3\*2 T\*\*\*, USA, represented in the Union by N\*\*\* Nederland B.V.,□

established in \*\*\*\* Amsterdam, Netherlands, for violating fundamental rights□

Privacy as follows:□

- The complaint is upheld and it is established that the□

Respondent thereby grants the complainant the fundamental right to data protection□

infringed by sending them a promotional email on July 19, 2018□

has sent, although no consent was given.□

Legal basis: Article 5 paragraph 1 letters a, c and e, Article 27, Article 57 paragraph 1 letter f and Article 77□

Paragraph 1 of the General Data Protection Regulation (GDPR), OJ No. L 119 of 4 May 2016, p. 1; §§ 1□

Para. 1, 24 Para. 1 and 5 of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended; Article 8□

Paragraph 1 of the Charter of Fundamental Rights of the European Union (EU-GRC), OJ C 326 dated□

October 26, 2012, p. 391.□

REASON□

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

1. With a submission dated July 23, 2018, the complainant alleged a violation of the□

Right to information and the illegality of the processing of his data.□

In summary, on May 26, 2018, he submitted to the data protection declaration of the

Respondent submitted a request for information to the e-mail address provided. the

However, the Respondent did not respond to this request. reason for the application

is an e-mail from the Respondent dated May 18, 2018. In the context of this e-mail

the Respondent informed the Complainant that his consent was required

to keep in touch with him. However, the complainant

also received a promotional email on July 19, 2018, although he did not

have given consent. The Respondent therefore processes his data

unlawful. The input is the request for information from May 26, 2018 as well as a

Attached screenshot of email of May 18, 2018 and July 19, 2018.

2. In a letter dated November 28, 2018, the Respondent summarized

from that on November 6, 2018, they sent subsequent information to the complainant

have granted. A copy of the email dated November 6, 2018 is attached to the letter.

3. The Data Protection Authority granted the complainant by letter dated

December 3, 2018 Hearing of parties in accordance with Section 24 (6) DSG. The Complainant

no longer objected to the information subsequently provided on November 6, 2018, which is why

the data protection authority the procedure with regard to the alleged violation in

Informally discontinued the right to information in a letter dated January 24, 2019. Simultaneously

the data protection authority asked the complainant to submit his complaint in

with regard to the alleged illegality of the processing of his data

and to assert a data subject right.

4. In his statement of January 27, 2019, the complainant brought

summarized before, the Respondent in the processing of his

personal data violate the fundamental right to secrecy by

the principles for processing in accordance with Art. 5 GDPR and against legality

of processing pursuant to Art. 6 GDPR.

5. With a statement dated February 13, 2019, the Respondent brought□  
summarized, that the complainant at the end of 2014□  
Respondent registered to attend a marketing event and his□  
submitted contact information. Before the GDPR came into force, the complainant had an e-□  
Received an e-mail asking you to confirm if you receive further e-mails□  
Mails on the part of the Respondent were still desired. The complainant has□  
not agreed to further communication, but still emails from□  
Respondent received, which should not have happened. In view of□  
of which it is confirmed that the complainant "in all future marketing□  
Communications from N\*\*\* is completely removed".□

#### B. Subject of Complaint□

Based on the submissions of the appellant, it follows that□  
The subject of the complaint is whether the respondent is the complainant□  
thereby violated the fundamental right to data protection by contacting them on July 19, 2018□  
sent an e-mail for advertising purposes, although no corresponding consent□  
was caught.□

#### C. Findings of Facts□

1. The Respondent has its place of business in CA 9\*3\*2 T\*\*\*, USA and is located in the□  
Union by N\*\*\* Nederland B.V., established in \*\*\*\* Amsterdam, The Netherlands,□  
represent.□
2. The Respondent requested the Appellant, who resided in Austria□  
is, by email dated May 18, 2018, about giving consent to continue with□  
to be able to keep in touch with him.□
3. Although the complainant has not given appropriate consent to further□  
contact, the Respondent sent an email on July 19, 2018□  
for advertising purposes (offer to participate in an event in Germany).□

sent the complainant (ulrich@a\*\*\*.at).□

4. In a statement dated February 13, 2019, the Respondent submitted that the□

Email address of the complainant "in all future marketing communications from□

N\*\*\* is completely removed".□

Evidence assessment: The findings made are based on the undisputed□

Submission of the complainant of July 23, 2018, on the opinion of the□

Respondent of February 13, 2019 and on an official search by the□

Respondent's privacy policy ([https://www.n\\*\\*\\*.com/privacy-](https://www.n***.com/privacy-statement.html)□

statement.html, retrieved on March 6, 2019), which the factual findings□

is taken as a basis.□

D. In legal terms it follows that:□

1. Respondent and its representative in the Union□

First of all, it should be pointed out that the "One-Stop-Shop" mechanism according to Art. 60□

DSGVO does not apply in the present case, since the Respondent as□

The person responsible within the meaning of Art. 4 Z 7 DSGVO decides on the purposes and means of processing□

and is based only in the United States.□

In its data protection declaration, the Respondent mentions N\*\*\* Nederland B.V. as□

their representative in the Union area in accordance with Art. 3 Para. 3 in conjunction with Art. 27 Para. 1 GDPR, which□

according to the Respondent's privacy policy, however, none□

Decision-making authority with regard to the processing activities of the respondent□

due.□

Against this background, the complaint in question was pursuant to Art. 27 (4) GDPR□

to N\*\*\* Nederland B.V. to transmit. Since the appointment of a representative after the□

express regulation text according to Art. 27 Para. 5 DSGVO no transfer of the□

entails responsibility, the present decision is directed at the□

Data Protection Authority against the Respondent.□

## 2. To Directive 2002/58/EG as lex specialis□

In the present case, the Respondent sent an e-mail for advertising purposes to□

the complainant, although no appropriate consent was obtained for this.□

It should be noted that the sending of electronic mail for advertising purposes without□

Prior Consent of Subscriber ("Unsolicited Messages") under the Provision□

of § 107 Para. 1 TKG 2003 (Article 13 Para. 1 of Directive 2002/58/EC, the "e-□

Data Protection Directive", is to be assessed. In this regard, the legal situation has also changed□

Validity of the GDPR has not changed since May 25, 2018 (cf. Art. 95 GDPR, according to which the□

Regulation natural or legal persons in relation to processing in□

connection with the provision of publicly available electronic□

Communications services on public communications networks in the Union none□

additional obligations imposed, insofar as they are specified in the e-Privacy Directive□

subject to obligations that pursue the same goal).□

However, this does not mean that the complainant does not have a privacy complaint□

pursuant to Art. 77 Para. 1 GDPR. Although the admissibility of a□

Contact for advertising purposes - as explained - according to the provisions of the□

TKG 2003 or the e-Privacy Directive and not according to Art. 6 DSGVO. However, through□

a breach of the TKG 2003 or the e-Privacy Directive is also a violation□

of the right to secrecy according to § 1 Para. 1 DSG and also a violation of those□

There are provisions of the GDPR that do not impose any additional obligations on the person responsible□

iSv Art. 95 DSGVO (cf. the decision of the DSB of October 31, 2018,□

GZ DSB-D123.076/0003-DSB/2018).□

## 3. On the right deemed to have been infringed□

First of all, it should be noted that the complainant's submissions refer to□

a violation of Art. 5 and Art. 6 GDPR (therefore a lack of consent), which□

However, data subject rights are listed exhaustively in Chapter III GDPR (Articles 12 to 23).□

According to the case law of the data protection authority, a data subject can object to

Basically, nevertheless, rely on any provision outside of Chapter III of the GDPR,

if this results in a possible violation of the right to secrecy

according to § 1 para. 1 DSG (cf. the decision of the DSB of September 13, 2018,

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

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

Accordingly, a violation of the right to secrecy had to be checked, which -

as explained – is not covered by Art. 95 GDPR

4. On the right to secrecy in international matters

a) On the geographical scope of the GDPR

The e-mail address that is the subject of the proceedings consists of the first and last name of the

Complainant, which is why there is a personal reference.

Furthermore, although the Respondent is not established in the Union,

the processing of the data of the complainant, who is resident in Austria,

in connection with the offering of goods or services (specifically:

Offer to participate in an event in Germany), which is why the GDPR

according to Art. 3 Para. 2 lit. a GDPR applies in spatial terms (cf. recital 23

GDPR, according to which the use of the language of a data subject in connection with

the possibility of ordering goods and services in this language

indicates that the person responsible intends to send goods or goods to persons in the Union

provide services).

b) On the fundamental right to data protection and the horizontal effect of Art. 8 (1) EU-GRC

According to the data protection authority, the GDPR is generally a fundamental right

Data protection is inherent and stands for the GDPR – as the most important European

Source of secondary law for handling personal data – in a narrow

Relationship to Art. 8 Para. 1 of the EU-GRC and serves to develop it in more detail. this

is already clear from Recital 1 GDPR, according to which "The protection of natural persons in the

Processing of personal data [...] [is] a fundamental right. Pursuant to Article 8(1).

the Charter of Fundamental Rights of the European Union [...] everyone has the right to

Protection of personal data concerning them."

Against this background, the data protection authority assumes that

Right of appeal according to Art. 77 Para. 1 GDPR - in addition to asserting the infringement

of data subject rights according to Chapter III of the regulation - also for international ones

A complaint option based on § 1 Para. 1 DSG in conjunction with Art. 8 Para. 1

EU GRC opened.

Based on these considerations and due to the fact that the GDPR also

Those responsible for the private (i.e. the non-sovereign) area are directly obliged to represent

the data protection authority is of the opinion that the fundamental right to data protection according to Art. 8

Paragraph 1 of the EU-GRC as well as § 1 DSG has a horizontal effect.

In other words: Because the GDPR inherently includes a general fundamental right to data protection

is, which is expressly anchored in Art. 8 Para. 1 EU-GRC, a data subject can

as a result also against legal entities that are set up in forms of private law,

lodge a complaint pursuant to Art. 77 Para. 1 GDPR and this complaint to a

Violation of Art. 8 Para. 1 EU-GRC (cf. the judgment of the ECJ of November 29th

2017, C-214/16, paragraph 31 et seq., according to which the ECJ recognizes such a horizontal effect of rights

not expressly denied under the EU-GRC; this becomes clearer in the Opinion

of the Advocate General in this case, which a

Horizontal effect of provisions of the EU-GRC expressly affirmed).

An alleged violation of the principles according to Art. 5 and 6 DSGVO can therefore be considered

alleged violation of Art. 8 EU-GRC.

5. The lawfulness of the processing

As already stated above, the lawfulness of the processing is exclusively determined

according to the e-Privacy Directive as a *lex specialis*.□

According to Art. 13 Para. 1 of the e-Privacy Directive, before sending electronic mail, a□

obtain consent from the data subject. It should be noted, however, that the e-□

Data Protection Directive no further conditions or definition for consent□

provides.□

However, with regard to the term "consent", the e-Privacy Directive refers to the□

Consent within the meaning of Directive 95/46/EC (Data Protection Directive; cf. Art. 2 lit. f□

e-Privacy Directive). The concept of consent according to the e-Privacy Directive therefore corresponds□

in systematic interpretation the concept of consent according to Art. 4 Z 11 or Art. 7□

GDPR, as follows from Art. 94 Para. 2 GDPR.□

The processing can therefore not be based on an alternative basis for permission under Art. 6□

DSGVO (e.g. legitimate interests according to paragraph 1 lit. f leg. cit.) are supported, which the□

Respondent has not claimed either.□

However, since, as stated, no consent to receive e-mails for advertising purposes□

was available, the complainant's personal data (his e-mail□

address with clear name) processed unlawfully (i.e. without permission), which is why□

there is a violation of § 1 Para. 1 DSG in conjunction with Art. 8 Para. 1 EU-GRC.□

Since the complainant - despite the request of the respondent by e-mail dated May 18□

2018 - has no longer given such consent, that would be□

Respondent was obliged to provide the complainant's e-mail address□

to delete; however, it should be noted that this obligation is not limited to□

of the GDPR, but already according to the old legal situation according to the data protection directive□

has passed.□

Since the Respondent already stated in its statement of February 13, 2019 that□

the email address of the complainant from "any future marketing communications□

was completely removed from N\*\*\*" was not a performance mandate in accordance with Section 24 (5) DSG□



or Article 58 (2) (c) GDPR.□

It was therefore to be decided accordingly.□