

GZ: DSB-D124.1183/0002-DSB/2019 from September 4th, 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 the minor□

Karl A*** (appellant) of 26 July 2019 v. Österreichische□

Data Protection Authority - DSB (Respondent) for violation of the right to object□

as well as the right to restriction of processing as follows:□

~ The complaint is rejected.□

Legal bases: § 7, § 9 and § 13 paragraph 3 of the General□

Administrative Procedures Act 1991 (AVG), Federal Law Gazette No. 51/1991 as amended; § 21, § 158, § 170,□

Section 177 of the General Civil Code (ABGB), JGS No. 946/1811 as amended; Article 6□

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

from May 4th, 2016, p.1 as amended; § 4 of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended.□

REASON□

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

1. By letter dated July 26, 2019, the minor complainant Karl A***□

Complaint to the DSB, in which he on the one hand a violation of the right of objection□

and on the other hand alleged a violation of the right to restriction of processing.□

The complaint was settled - directed against the respondent - application for□

Objection of April 19, 2019, in which the complainant at the same time□

restriction of processing had asserted. The application referred to the□

processing of the complainant's date of birth by the DPO,□

To which the complainant stated that "it (...) is evident that the DPO my□

Date of birth processed to my detriment (...)" . The complaint too□

attached was the DSB's reply to the letter dated May 17, 2019□

application for objection. In essence, the DSB stated in its reply that□

that they do not correspond to the request for objection made by the complainant□

will, since the complainant's reasons arising from his particular situation□

result, have not explained. The mere fact that the complainant did not□

is of legal age and therefore not sufficient without the permission of a legal representative□

is process-capable, does not justify a specific one in the data processing□

Disadvantage. But also in the case of a justified application - the data protection authority continues□

- the processing of the complainant's date of birth would predominate□

interest of the DSB. So the DSB is legally responsible for the treatment of□

Complaints have been dealt with, which also requires that the DPO the "relevant□

state of affairs". The "relevant facts" can also, as in the case of□

Complainant's date of birth include the Complainant's date of birth, if any□

his minority and – deriving from this – his lack of legal capacity.□

Furthermore, the activity of the DSB and here in particular the conduct of proceedings□

because of alleged data protection violations in the “general public□

Interest of a member state” and whether these are compelling reasons worthy of protection that□

interests, rights and freedoms of the objection applicant would prevail. In your□

In a letter of reply dated May 17, 2019, the DSB also stated that it also accepted the application□

will not comply with the restriction and essentially co-justified this□

the same arguments as before for non-compliance with the right to object.□

2. The DSB granted the minor complainant in a letter dated August 5, 2019□

a defect rectification order. In it, the DSB stated that the complainant□

is a minor (date of birth: September 11, 2003), which is why he is asked to

Approval of the filing of a complaint by a legal guardian or a

to other lawful representatives.

3. DSB then received - together with a copy of Dr. Gerard

A*** - the following input:

[Editor's note: The original inserted here as graphic data and

The document reproduced cannot be pseudonymised with reasonable effort.

Referred to as the "Power of Attorney (Consent)" it essentially contains the

explanation of dr. Gerhard A*** to give his son Karl A*** power of attorney, "himself in the

Within the framework of the complaint according to Art. 77 DSGVO and § 24 DSG before the

to represent the data protection authority on my behalf." The exact content is in the next

reproduced in the factual statements below.]

B. Subject of Complaint

The object of the complaint is basically the question of whether the DSB the mj. Complainant

in his right of objection as well as in his right to restriction of processing

has hurt.

As a preliminary question, however, it must be clarified whether it corresponds to that submitted to the data protection authority

"Declaration of Power of Attorney (Consent)" by the legal representative to lodge a complaint

has been legally approved.

C. Findings of Facts

1. The applicant is a minor, he was born on September 11, 2003. His

legal representative is Dr. Gerhard A***.

Evidence assessment: That the complainant is a minor, as is his

Date of birth, resulting from the submitted "Declaration of Power of Attorney (Consent)"; this

is the DSB but now also from numerous - from mj. Complainant - before the

DSB-led procedure officially known. Also that Dr. Gerhard A*** around the

legal representative of mj. Karl A*** is, in particular, from the submitted□

"Declaration of power of attorney (approval)", the DSB is also made up of numerous -□

by the mj. Complainant - conducted before the DSB officially known.□

2. On July 26, 2019, the complainant, who was a minor, lodged a complaint of infringement□

in the right to object and due to alleged violation in the right to restriction of□

processing against the DSB.□

Evidence assessment: This finding results from the complaint filed on□

July 26, 2019.□

3. The DSB issued the minor complainant with a letter dated 5 August□

2019 a defect rectification order. The DSB presented this letter to the statutory□

The complainant's representative, Dr. Gerhard A***, to his email address□

gerhard.a***@***isp.at by email dated August 22, 2019.□

Evaluation of evidence: These findings result from what is documented in the files□

Order to rectify defects dated August 5, 2019 together with the - available to the DSB -□

electronic confirmation of transmission of August 22, 2019, 3:34 p.m.□

4. The DSB was given a copy of Dr. Gerhard A*** and one of□

dr Gerhard A*** signed "Declaration of Power of Attorney (approval)" with the following content – as far as□

relevant, reproduced here – submitted (emphasis added by DPO):□

"I, Gerhard A***, (...) hereby authorize as father and legal representative of my□

my son Karl A*** (...), my son, Mr. Karl A***, born 11.9.2003, (...) himself□

within the framework of the complaint pursuant to Art. 77 DSGVO and § 24 DSG before the□

to represent the data protection authority on my behalf. I give this consent□

subsequently for all submissions made by my son to the data protection authority, for□

which my son has already stated that he does not have a declaration of consent. The Agreement□

does not apply, however, to proceedings that were not pending as of today.□

Written correspondence should continue to be sent to my email address□

gerhard.a***@***isp.at, from which I mean all incoming letters to□

son will pass on. However, I authorize my son to make any entries and□

to send replies via his email address karl.a***@***isp.at as long as I put in .cc□

become.□

In any case, this declaration of consent does not apply to procedural acts by which□

my son or I myself are confronted with possible cost risks. (...)"□

Evidence assessment: This finding is based on the August 22, 2019 at the DSB□

power of attorney received and documented on file, including a copy of the driver's license from□

dr Gerhard A***.□

D. In legal terms it follows that:□

First of all, it must be said that the data protection authority (as the successor authority to the□

Data Protection Commission) the present complaint against them notwithstanding□

any bias within the meaning of § 7 AVG has to be dealt with (cf. the cognition□

of the BVwG of May 22, 2019, GZ W253 2142374-1).□

On the legal capacity of the minor complainant:□

1. To conduct administrative proceedings (here: to conduct a□

Complaints procedure before the data protection authority) the parties to the procedure must□

be processable.□

2. Section 9 applicable here based on Article I Paragraph 2 Z 1 in conjunction with Article II Paragraph 1 EGVG□

AVG refers to party and process capability and refers to them as□

"Personal legal capacity and capacity to act". Strictly speaking, however, § 9 AVG contains□

no independent definition of procedural legal capacity and ability to act, but□

ties in with the substantive legal capacity and capacity to act, so that the principle□

applies that the legal capacity the party capacity and the capacity to act the□

Process capability justified (cf. on the whole Hengstschläger/Leeb, AVG § 9 Rz 1,□

As of January 1st, 2014, rdb.at).□

3. § 9 AVG stipulates: "Insofar as the personal legal capacity and capacity to act of

Stakeholders in question, it is from the authority if in the administrative regulations

unless otherwise determined, to judge according to the provisions of civil law."

4. The relevant administrative regulations here are the DSG and the GDPR. Although lays

§ 4 para. 4 DSG states that when information society services are offered, the

is made directly to a child, consent to the processing of personal data

The child's data is lawful in accordance with Article 6(1)(a) GDPR if the child

has reached the age of fourteen. From this provision, however, it is possible to

Process capability gain nothing.

5. The provisions of civil law are therefore to be applied: According to these

a person's legal capacity is primarily determined by their age, since

spiritual maturity typically depends on it. With the age of majority (= completion of

18 years of age) is reached by the mentally healthy Austrian citizen (cf. margin no. 4;

Thienel/Schulev-Steindl 90) full legal capacity (authority;

Koziol/Welser 13 54) and is therefore also capable of being processed.

On the other hand, there are minors, i.e. people who have not yet reached the age of 18

have (§ 21 Abs. 2 ABGB), under the special protection of the law (§ 21 Abs. 1 ABGB)

and can therefore without express or tacit consent of the legal

representative neither dispose nor commit themselves to legal transactions. so you are

basically legally incapable and therefore incapable of litigation (§ 170 Para. 1 ABGB; cf. on the whole

Hengstschläger/Leeb, AVG § 9 Rz 14, as of January 1st, 2014, rdb.at).

6. The complainant is sixteen years old. So he is a so-called mature person

Minor, i.e. a person who is 14 but not yet 18 years of age,

has completed. Admittedly, minors of consent, like the complainant, have limited

Process capability, however, is based on processes that are freely available to them

refer to things left or to income from personal acquisition - ie to

property matters - limited (cf. in this sense also□

Hengstschläger/Leeb, AVG § 9, margin no. 14 (as of January 1, 2014, rdb.at)). In the present case□

but it is neither a property law matter nor a matter that□

Complainant was left at leisure, but to a□

data protection complaint based on the finding of an alleged violation in□

right of objection and the right to restriction of processing.□

The responsible person is responsible for conducting a data protection complaints procedure□

minor complainants therefore according to the provisions of civil law□

no legal capacity (cf. on the one hand the decision of the Administrative Court□

dated March 6th, 1987, ZI. 86/11/0121, where the process capability of a person with□

Ability to act of a responsible minor due to a lack of special□

Administrative regulations for applying for the reissuance of a driver's license□

has been denied; cf. also the - relating to the same complainant -□

Decision of the Federal Administrative Court of December 20, 2018, W258 2210629-1/3E,□

with which this has stated that the minor complainant who is of age□

the process capability to conduct a data protection complaints procedure□

the administrative courts and to provide a□

application for legal aid is missing).□

On the requirement that procedural acts of minor complainants by the□

legal representative to approve:□

7. Persons who are not able to stand trial attend through their legal representative□

administrative procedure. According to § 9 AVG, who is the legal representative is primarily determined□

according to the administrative regulations and subsidiary according to the regulations of the civil□

Right. In principle, minors are taken care of by their parents or the person in charge of custody□

represented (VwGH of October 18, 2018, Ra 2016/19/0351).□

8. In contrast to the lack of legal capacity and therefore no capacity to be a party (VwGH May 25, 1993,□

90/04/0223; 26.5.2011, 2008/07/0156) the VwGH is of the opinion that the lack of

Approval of the motion brought by a person unable to stand trial by the

legal representatives (e.g. trustees, parents) by way of a defect rectification procedure

iSd § 13 paragraph 3 AVG be eliminated (VwGH 6.5.1996, 95/10/0195; 17.9.2003,

2001/20/0188; on the VwGH complaint see VwGH 9/4/1986, 86/16/0100;

4/4/2001, 2000/01/0121; cf. on the whole Hengstschläger/Leeb, AVG § 9 Rz 6,

As of January 1st, 2014, rdb.at).

9. In this context, the data protection authority first refers to its

final decision of 25 February - concerning the same complainant

2019, GZ D123.360/000-DSB/2019, to which a "Declaration of Consent of

Guardians" from September 22, 2018, with which the

"Complaints and the management of the same in accordance with Art. 77 GDPR and § 24 DSG,

and all other related procedural acts".

should be.

In this decision, which is now legally binding, the data protection authority

February 25, 2019 as follows:

"The "Declaration of Consent of the Guardian" of September 22, 2018 refers

refers to the "complaint filing and management of the same in accordance with Art. 77 GDPR and

§ 24 DSG, as well as all other related procedural acts",

whereupon the minor complainant also stated in his e-mail of February 15, 2018

refers. The legal opinion represented therein that not the legal representative,

but the minor complainant - through an all procedural acts

covering declaration of consent - which can lead to closes the process

Data Protection Authority not to:

(...) In this context, the judicature of the Administrative Court applies

refer, after which a procedural act against the addressee then no

Legal effects unfold if the addressee of the procedural act at the

process capability is lacking. In this case, the authority can take procedural acts with legal effect

only to the legal representative (VwGH 25.2.2016, Ra 2016/19/0007,

Point 3.4.).

(...) Hengstschläger/Leeb also argue in this sense, according to which (limited)

Disabled (within the limitations) only through their legal representative

can act legally (Hengstschläger/Leeb, AVG § 9 (as of January 1st, 2014, rdb.at)).

In this context, Thienel argues that procedural actions are more incapable of proceeding

persons have no legal effects (Thienel, *Verwaltungsverfahrenssrecht*4, p.86).

(...) As a result, this means that the data protection authority has the procedure with the

legal representative has to lead: On the one hand, the authority has each individual

Procedural act against the legal representative - and not against the

minor complainants themselves – to set. On the other hand, the legal

representative - and not the minor complainant whom he represents - himself each

set individual procedural acts for the minor complainant. Otherwise

would the authority - through legally ineffective procedural acts against the

minor complainants - tainted their proceedings with procedural errors.

(...) The legal opinion that the legal representative of a minor

Complainant this the "complaint filing (...) and all other related

Related procedural acts" can therefore also not be permitted

to follow, because the legal representative thus assigns his power of representation to the

would delegate to minors. This intention can be given to the legislature by § 21 ABGB

("Personal rights of minors and other persons entitled to protection") and Section 170

ABGB ("the child's capacity to act") should not be assumed, but it would

the purpose inherent in these provisions of protecting minors

bypassed. Apart from that, a "general authorization" does not appear for this reason alone

instead, because the procedural actions to be taken are not yet certain ex ante and ever

may vary depending on the status of the proceedings."

10. Nothing else can apply in the present case:

The now submitted "Declaration of Power of Attorney (Consent)" dated August 19, 2019, which

as well as the "Declaration of Consent of the Guardian" of 22 September

2018, by the legal representative of the minor complainant, Dr. Gerhard A**,

is signed, has no legal effect:

The wording of the "Declaration of Power of Attorney (Consent)" from August 19, 2019 is - so far

relevant, reproduced here - as follows: "I, Gerhard A** (...), hereby authorize as

(...) legal representative of my son Karl A**, (...) my son (...) himself

(...) to represent on my behalf (...)"

It should first be noted that the legal representation according to § 158 ABGB -

in addition to care, education and asset management - is part of custody.

Furthermore, according to § 177 paragraph 1 ABGB "both parents are entrusted with custody."

Gitschthaler leads to "custody" in Schwimann/Kodek, ABGB: Praxiskommentar5, Rz 5

and 6, the following from:

"Custody includes (also) other matters that are hardly classified under care and

Education or wealth management can be subsumed, namely about the

Matters of § 167 paragraph 2 such as the naming or change (cf. §§ 155 ff)

or a change of nationality, as well as an acknowledgment of paternity (cf

§ 145), but also questions of data protection or the right of the child to their own image,

Author moral dispositions (exercise of personal rights

of the child), marriage and dissolution and the completion of service and

Apprenticeship contracts or existing contracts. (...)

Custody not only assigns duties to the person entrusted with custody, but also

rights to. Neither the obligations nor the rights can (at least not unilaterally)

be waived."□

The Supreme Court formulated this more forcefully in its decision of□

December 16, 2015, 7 Ob 189/15t:□

“A (contractual) waiver of parental rights – like custody here – is not□

possible. The law knows no unilateral waiver of parental rights and the associated□

related obligations.”□

In terms of the cited commentary literature and case law, Dr. Gerhard A*** according to□

§ 177 paragraph 1 ABGB not only with the legal representation - as part of custody -□

entrusted, but also “obligated” to do so. But that also means that Dr. Gerhard A*** die□

legal representative of the minor Karl A*** cannot "reverse" by having the□

legally represented (here: mj Karl A***) to the representative - through legal transactions□

Power of representation - power. This would be a circumvention of the ABGB□

standardized regulations - in particular for legal representation and custody -□

run out. Such an intention can, however, be left to the legislature, as already quoted□

Decision of the Data Protection Authority of February 25, 2019 executed, not subject□

will.□

11. In addition, the following should be noted: The nature of (direct) representation□

is the legal transaction (of the representative or authorized person) for another□

(the person represented or principal) on his behalf (on behalf of the person represented or□

principal). A legal relationship is to be established directly through the action of the deputy□

between the principal and a third party. The□

Legal acts of the representative appear as if the person represented had himself□

traded. For a valid representation, three requirements must be met□

(cf. Perner/Spitzer/Kodek, Bürgerliche Recht5 (2016), p. 123 ff):□

~ There must be power of representation,□

~ the representative must disclose to the third party that he is acting "on behalf of someone else",□

namely acts for the principal and□

~ the representative must have at least limited legal capacity.□

According to the wording of the present “Declaration of Power of Attorney (Consent)” dated August 19□

2019 authorized Dr. Gerhard A*** his son, himself "in my name" -□

namely in the name of Dr. Gerhard A*** - to represent. That would mean that Karl A***□

as authorized representative "on behalf of Dr. Gerhard A***", that means for the person giving the power of attorney□

dr Gerhard A*** could make declarations of intent with legal effect. dr Gerhard A*** is□

but neither a party to the present nor to any other pending before the DSB□

procedure. Procedural acts therefore do not have to be for Dr. Gerhard A***, but for□

the minor Karl A***, the party to the present proceedings and others□

proceedings pending before the DSB. Also for this reason□

the present “Declaration of Power of Attorney (Consent)” dated August 19, 2019 would be void□

to run.□

12. The result is the present “Declaration of Power of Attorney (Consent)” dated August 19th□

2019 as an inadmissible "general authorization" (cf. the decision of the□

Data Protection Authority of February 25, 2019). Thus, the with□

Defect remedy order from August 5, 2019 required approval for□

Complaints not proven. Rather, there was one at the time of the decision□

unimproved complaint, which according to § 13 para. 3 AVG□

was to be rejected.□