

GZ: DSB-D213.679/0003-DSB/2018 from April 16, 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 within the framework of an official examination procedure□

against N\*\*\* Bergbahnen GmbH, represented by B\*\*\* C\*\*\* D\*\*\* Rechtsanwälte GmbH,□

due to violation of the right to secrecy as a result of impermissible image processing□

as follows:□

1. The official examination procedure was justified and it is determined that□

that made by N\*\*\* Bergbahnen GmbH□

Image processing (automatically operated photo system on the□

summer toboggan run) on the basis of an inseparable with the contract of use□

associated declaration of consent is unlawful.□

2. N\*\*\* Bergbahnen GmbH is instructed, within a period of□

eight weeks, otherwise execution, the data processing by the□

Image processing system only allow if either□

a) the person concerned, regardless of the contract of use□

has given consent to data processing or□

b) overriding legitimate interests of the individual□

Responsible or a third party exist and the□

proportionality is given.□

3. N\*\*\* Bergbahnen GmbH is instructed to use the current form of the□

Image processing (i.e. on the basis of a contract of use□

inseparably linked declaration of consent) with immediate effect□

to refrain from any other execution.□

Legal basis: Sections 1 (1), 12 (1) and (2) of the Data Protection Act (DSG), Federal Law Gazette I□

No. 165/1999 as amended, as well as Article 7 and Article 58 Paragraph 1 Letter b and Paragraph 2 Letter d and f of□

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

from May 4th, 2016, p. 1.□

REASON□

A. Submissions and Proceedings□

On July 27, 2018, the data protection authority was subsequently anonymous□

processed e-mail to the automatic photo system of N\*\*\* Bergbahnen GmbH□

pointed out. The photo system would customers of the summer toboggan run during the ride□

take pictures automatically and save the images automatically. You can do these pictures□

view and buy after the ride. It will not be announced where and how□

long these images are stored. You can also use the automatic ones□

Do not refuse photo shoots on site.□

N\*\*\* Bergbahnen GmbH issued a statement dated August 30, 2018□

summarized before, located in the route of the operated summer toboggan run□

a so-called action cam, which automatically takes a photo of the tobogganing guests on a□

previously marked sufficiently clearly and visibly. the□

The photograph is made automatically, in which the toboggan guest with the□

respective toboggan run through a light barrier. In the entrance area of□

Lift system and at the entrance to the summer toboggan run are bilingual signs□

set up, which would point to the action cam. Through these signs they would□

Tobogganing guests are clearly informed that driving on the□

Summer toboggan run and the opportunity to purchase a corresponding one□

Actioncam souvenir photos a common and uniform□

would constitute the subject matter of the contract. By purchasing the ticket, the□

Tobogganing guests have valid (conclusively granted) consent to the image recording. in the□

Various signs are posted at clearly visible points along the toboggan run□

would point out to the toboggan guest how many meters away the action cam is□

be positioned. This means that every toboggan guest has the opportunity to find suitable ones in good time□

To take measures to avoid being photographed by the action cam. Also□

the tobogganing guests would be explicitly informed about the photograph on the homepage□

will. At the same time, potential toboggan guests would be informed that□

each person purchasing a ticket agrees that a□

corresponding souvenir picture is taken during the toboggan run. The duration of□

Image storage would be a maximum of 14 hours, the photo data would be every□

day at 11:00 p.m.□

B. Subject of the proceedings□

The subject of the proceedings is the question of whether the tobogganing guests in relation to the image processing□

be encouraged to give consent that does not meet the requirements of□

GDPR, and the right to secrecy is violated as a result.□

Another legal basis was not provided by N\*\*\* Bergbahnen GmbH□

put forward.□

The question of whether the□

Image processing for another intervention according to Art. 6 DSGVO or § 12□

Para. 2 DSG can be supported.□

C. Findings of Facts□

The N\*\*\* Bergbahnen GmbH operates at the address E\*\*\*-Weg \*7, \*\*\*3 N\*\*\*□

summer toboggan run. In the route of the operated summer toboggan run is□

a so-called "Actioncam" of the model Axis P1357-E.□

The following information can be found on the N\*\*\* Bergbahnen GmbH website□

(spelling as in the original):□

"Each guest declares himself by purchasing the ticket or walking through the turnstile□

agree that the N\*\*\* Bergbahnen GmbH during the descent with the□

Sommerrodelbahn Action photos of adults and their associated children for□

24 hours for later sale to the tobogganists□

saves/publishes. A use for any other purpose is□

excluded and requires a separate written consent of the□

customers."□

In the course of the toboggan run, there are various signs that are clearly visible□

point out to the toboggan guest how many meters away the action cam is□

is positioned. In order not to be recorded by the action cam□

for example only the possibilities to cover the face or to the side□

rotate. The Actioncam was temporarily installed by N\*\*\* Bergbahnen GmbH on August 8th, 2018□

taken out of service.□

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

N\*\*\* Bergbahnen GmbH from August 30th, 2018 as well as the information on the homepage□

([https://e\\*\\*\\*berg.n\\*\\*\\*-info/](https://e***berg.n***-info/); last accessed on April 15, 2019).□

D. In legal terms it follows that:□

1. According to § 12 paragraph 2 DSG, image processing is permitted if the□

data subject has consented to the processing of their personal data.□

In accordance with Art. 7 GDPR and taking into account Art. 4 Z 11 and Recital 43□

GDPR, consent must be given voluntarily and may not be linked to the fulfillment of a□

contract, although consent to the performance of this contract is not□

is required. Consent is involuntary if, in the event of non-submission of the□

consent a disadvantage is to be expected.□

The former Art. 29 Data Protection Working Party has dealt with the concept of the

“Consent” and carried out a thorough analysis of the term (cf.

Art. 29 Working Party, Guidance on Consent under Regulation

2016/679, WP 259, rev. 01).

The element "free" implies that the individuals concerned have a real choice and the

have control In general, the GDPR requires that consent is not

is valid when the data subject has no real choice to consent

feels pressured or suffers negative consequences if she does not comply.

When consent is a non-negotiable part of terms and conditions, it will

assumed that the consent was not given voluntarily. Art. 7 para. 4 of the GDPR

points out, among other things, that a situation in which the consent with the

acceptance of contract terms is "bundled" or the performance of a contract

or the provision of a service with a request for consent to a

processing of personal data necessary for the fulfillment of the

contract are not required, is considered to be highly undesirable. Will

consent given in such a situation is deemed not to have been given voluntarily (cf.

Recital 43 GDPR).

When the controller is performing a contract with a request for consent

linked, a data subject who gives the person responsible their

does not wish to make personal data available for processing,

as a result, she runs the risk of being denied services she has asked for.

The controller must demonstrate that it is possible to obtain consent

refuse or revoke without suffering any disadvantages. For example, he has to

demonstrate that refusing or withdrawing consent will not result in costs for

the data subject leads to a clear disadvantage. Furthermore, the

controllers demonstrate that the data subject had a real or free choice,

whether she consents or not (cf. recital 42 GDPR; cf. also the decision of

30 November 2018, GZ DSB-D122.931/0003-DSB/2018).

When coupling the consent to a processing of non-contractual

personal data with the conclusion of a contract is fundamentally of this

to assume that the granting of consent is not voluntary, if not in

Individual case special circumstances for a voluntary data protection

consent (see the judgment of the Supreme Court of August 31, 2018,

GZ 6 Ob 140/18h mwN).

2. Applied to the present case, this means the following:

In this specific case, the ride on the summer toboggan run and the illustration by the

Actioncam according to the specifications of the N\*\*\* Bergbahnen GmbH a common and

uniform subject matter of the contract. The consent to take a photo and thus in

processing of personal data is necessary for the performance of a contract and

thus "coupled" to the use of the summer toboggan run, although the consent for the

Fulfillment of the contract - the use of the summer toboggan run for a fee - not

is necessary or required. A real or free choice whether to look from the camera

is included does not exist. If a data subject does not consent to

Recording decreases, so the consequence and the clear disadvantage is that

Not being able to use the summer toboggan run.

The possibility of covering one's face or oneself before passing through the light barrier

Turning to the side doesn't change anything, because even in these cases personal

data are available; In this case, users of the toboggan run can also pay a reasonable fee

Effort can be identified (cf. for a broad interpretation of the term "personal

Date" the judgment of the ECJ of October 19, 2016, C-582/14).

The performance mandate according to point 2 is based on Art. 58 Para. 2 lit. d GDPR,

that according to clause 3 on Art. 58 Para. 2 lit. f GDPR.

A period of eight weeks seems appropriate in order to comply with the performance mandate□

to correspond to point 2.□

A ban on the current form of data processing is required because it is□

is to be classified as unlawful.□

It was therefore to be decided accordingly.□