

GZ: 2020-0.550.322 from October 19, 2020 (case number: DSB-D550.249)□

[Editor's note: Names and companies, legal forms and product names, addresses□

(incl. URLs, IP and e-mail 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.]□

penal decision□

Accused: A\*\*\* F\*\*\* (born DD.MM.YYYY), [zip code] [place], [street] [HNr.]□

Time of crime: DD.MM.2019, 7:35 p.m.□

Crime scene: [zip code] [town], [street, ONr.] (toilet facilities on the upper floor next to the police station \*\*\*)□

As the person responsible within the meaning of Art 4 Z 7 of Regulation (EU) 2016/679□

(General Data Protection Regulation, hereinafter: GDPR), OJ No. L 119 of 05/04/2016 S 1, re□

time of the crime at the crime scene specified above the following administrative offence(s)□

realized:□

You have a female while she was using one of the toilet stalls, under a□

Image data processing captured by using a mobile phone under a toilet cubicle partition□

(smartphone with camera function) pushed through, whereby the screen of the□

mobile phone facing up and the mobile phone's front camera during the□

was active throughout the process and thus processed image data from the person concerned□

became.□

Through this unlawful undertaking of image data processing, you have against□

Principles for the processing of personal data in accordance with Article 5 (1) (a) GDPR,□

by name□

-□

against the principles□

“lawfulness, fair processing,□

Transparency”,□

such as ☐

- ☐

against the permitted circumstances conclusively standardized in Art. 6 Para. 1 GDPR ☐

violated ☐

This is because the image data processing carried out is not based on the consent of the ☐

data subject, nor on one of the other permissions of Art. 6 Para. 1 GDPR ☐

can be supported. ☐

By doing so, you have breached the following legal provisions: ☐

☐ ☐

Article 5(1)(a), Article 6(1) in conjunction with Article 83(5)(a) of the Regulation (EU) ☐

2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural ☐

persons in the processing of personal data, on the free movement of data and on ☐

Repeal of Directive 95/46/EG (General Data Protection Regulation), OJ L 2016/119, 1 as amended ☐

L 2016/314, 72 and L 2018/127, 2 ☐

The following penalty will be imposed on you for this administrative offence(s): ☐

fine of euros ☐

if this is irrecoverable ☐

is, ☐

substitute imprisonment ☐

from ☐

according to ☐

€ 150.00 ☐

9 hours ☐

Article 83 paragraph 5 ☐

lit a GDPR ☐

in ☐

Connection with § 16 VStG, BGBl. ☐

No. 52/1991 ☐

Any other statements (e.g. on crediting prior detention, on forfeiture or on ☐

claims under private law): ☐

Furthermore, you have to pay according to § 64 of the Administrative Penal Act 1991 - VStG: ☐

15.00 ☐

Euro as a contribution to the costs of the criminal proceedings, that is 10% of the fine, ☐

but at least 10 euros (one day imprisonment equals 100 euros); ☐

Euro as a replacement for the cash expenses for ☐

The total amount to be paid (penalty/costs/cash expenses) is therefore ☐

165.00 ☐

Euro ☐

Payment term: ☐

If no complaint is lodged, this penal decision is immediately enforceable. The total amount ☐

is in this case within two weeks after entry into force of law to the BAWAG account ☐

P.S.K., Georg-Coch-Platz 2, 1018 Vienna, IBAN: AT460100000005490031, BIC: BAWAATWW, ☐

made payable to the data protection authority. As purpose may the ☐

Business number and the completion date are given. ☐

If no payment is made within this period, the total amount can be dunned. In this ☐

In this case, a flat-rate fee of five euros must be paid. Still happens ☐

no payment, the outstanding amount will be enforced and, if uncollectible, the ☐

substitute imprisonment corresponding to this amount. ☐

Reason: ☐

I ☐

The following decision-relevant facts are due to the carried out ☐

evidentiary procedure: ☐

1.□

On November 2, 2019, at around 7:35 p.m., the accused used the public toilet□

Facilities on the upper floor next to the police station \*\*\* in [zip code] [town], [street, ONr]. searched there□

he first used the premises of the men's toilet, but left it because two of the three there□

toilet cubicles were occupied and the third existing toilet cubicle was heavily soiled. In further□

Due to the urgency of the bowel movement, he went to the premises of the local ward□

Ladies toilet and entered one of the toilet cubicles to use it. Entered a short time later□

several women in the women's toilet and had a good time for the accused□

audibly with each other. One of the females then entered the toilet cubicle□

immediately next to the toilet cubicle used by the accused.□

2.□

The accused then started the camera application on his mobile phone and□

also activated the front camera of the device to see it under the partition of the toilet□

Pass through the cabin to view the display in real time using the mobile phone's camera□

recognize who was in the next cabin and around the female person - similar to a□

Mirror function – to be able to look at. This operation was carried out by the female person who□

used the adjacent toilet cubicle, noticed; she saw the mobile phone with it switched on□

Display and activated camera, as this from the accused under the cabin partition□

passed through, the female person recognized herself on the screen of the□

device.□

3.□

The female person then left the toilet cubicle immediately and called for the accused□

to also leave the toilet cubicle and hand over the mobile phone. The accused□

then handed the used mobile phone out of the cabin, the female person took it□

Device and tried to find out in the photo application whether image data of her, how she is□

located in the toilet cubicle, were present. In any case, they were at this point in time□

Image data of other naked women on the memory of the accused's mobile phone, the  
this transmitted by work colleagues in the course of time before the incident in question  
got.

4.

Subsequently, the woman affected by the incident went in front of the

Premises of the women's toilet, where several other people are already using the

Toilets waited and described the incident to those present. A few minutes later he came too

Accused of leaving the premises of the women's restrooms and was taken away by the people waiting

when leaving the location until the arrival of the police officers summoned by telephone,

prevented.

5.

The police officers who intervened then postponed the questioning of the accused

the incident on the PI \*\*\*. The cell phone was voluntarily handed over to the police by the accused.

The police could not find pictures or videos of the incident in the picture gallery

determine. The mobile phone used by the accused at the time of the crime has been in

around the end of January 2020 no longer in his possession because he had the device in a public place

lost means of transport.

6.

According to the performance confirmation submitted by the suspect, the accused receives the benefits

Minimum security (social assistance) in the total amount of € 995.04 per month, with a relevant

Part of it is needed for housing costs.

[Evidence: Display of the LPD \*\*\* from the TT. November 2019, GZ PAD/\*\*\*, Transcript of the

Interrogation of the accused before the data protection authority of the TT. August 2020, GZ \*\*\*]

II. The determinations are made on the basis of the following assessment of evidence:

1.

The findings with regard to the criminal act of the accused, according to which his

Mobile phone with camera function, with activated front camera, under the toilet cubicle partition with  
has pushed through the resolution, using the device's screen, the female person in the  
Observing the neighboring cabin when it wanted to use the toilet can be derived from the  
relevant information in the advertisement of the LPD \*\*\* and the corresponding statements  
of the accused as part of his interrogation before the data protection authority.

2.

Regarding the question of whether the accused at any time had image data from the incident  
stored on his mobile phone, no findings could be made. in the

As part of the reporting by LPD \*\*\*, it is stated that a corresponding

Image material when the officials inspected the device – the accused left that up to him

Mobile phone given to the officers voluntarily for this purpose – could not be noticed; the

The accused himself states before the data protection authority that he never took photos

or saved video recordings of the incident. However, it cannot be complete

it can be ruled out that the accused has deleted any stored image material.

However, the question of whether image data was also stored can - what within the framework of the legal  
assessment will have to be entered into – with regard to the behavior punished in the verdict  
remain.

III. Legally it follows:

1.

Art. 83 (5) lit. a GDPR stipulates that in the event of violations of the provisions of Art

and 6 GDPR fines of up to 20,000,000 euros or in the case of a company of up to

4% of its total worldwide annual sales for the previous financial year

may be imposed, depending on which of the amounts is higher. According to § 22 paragraph 5 DSG

the jurisdiction to impose fines on natural and legal

Persons for Austria as the national supervisory authority at the data protection authority.

To the saying:

2.□

The GDPR defines the term processing in Art. 4 Z 2 GDPR by listing□

a number of possible uses. This includes the collection, recording,□

the organization, ordering, storage, adaptation or modification, reading out,□

the retrieval, use, disclosure by transmission, dissemination or otherwise□

form of provision, matching or linking, restricting, deleting or□

the destruction. The procedural use of the camera application of the□

cellphones by the accused in order to – similar to a (digital) mirror –□

a female person□

Watching in a toilet cubicle represents a processing□

personal data within the meaning of Art. 4 Z 2 DSGVO and is the factual□

The scope of Art. 2 GDPR is hereby opened. This legal classification results□

based on a consideration of the technical process of digital image data processing□

Using a commercially available mobile phone with a camera function. fall during such a process□

Beams of light hit the camera's light sensor, which are then processed by an image processor in□

converted to digital image data and stored in the device's main memory for access by the camera□

Application kept ready; the latter shows the resulting live image on the screen of the device□

, the user can then by pressing a hardware or software button on the device□

Save image data permanently. Thus, regardless of whether the user presses a button (den□

trigger) activated, a digital image data processing on the mobile phone. the□

In the given context, the data protection authority assumes that the production of□

In any case, live images using a smartphone camera should be subsumed under the term “collection”.□

is. "Collection" is the gathering of data about the data subject. As long as the procurement is targeted□

done, the way doesn't matter. The processor can retrieve data electronically,□

Request documents or interview people. Also consulting an internet search engine,□

to obtain information about a specific person falls under the term (cf. Ernst in□

Paal/Pauly, General Data Protection Regulation, Art. 4 para. 23). Apart from that, every process that  
personal data used, to be considered as processing, regardless of whether it is related to  
or carried out without automated procedures. Already the collection of data is considered  
processing (cf. Klabunde in Ehmann/Selmayr, General Data Protection Regulation,  
Art. 4 para. 19). This means that the collection of data from data subjects using optical-technical devices (such as  
video cameras) to qualify as processing within the meaning of the GDPR.

3.

Raising and grasping are not sharply distinguished; rising rather refers to  
the targeted acquisition of individual data, while capturing tends to be continuous  
recording of a data stream. Elevating and capturing can be done with one  
storage; However, such a connection is not necessary (cf. Herbst in  
Kühling/Buchner, General Data Protection Regulation, Art. 4 para. 22).

4.

Since in the demonstrative (Arg. "like") enumeration of Art. 4 Z 2 GDPR, among other things  
the word "storage" is explicitly mentioned, it can also be assumed that this is the case  
only one of the use cases of processing is concerned, and not theirs  
basic requirement. Also that the Union legislature on a regulation regarding a  
Live image surveillance, which can massively interfere with the rights of those affected, forgot or  
deliberately wanted to exclude such monitoring from the scope of the GDPR  
in view of the express aim of increased protection of the interests of data subjects in the  
DSGVO are in any case not subject to the European legislator.

5.

Consequently, the subject of the proceedings is a processing of personal data in the sense  
of the GDPR and the accused as responsible for this image data processing in  
to qualify within the meaning of Art. 4 Z 7 GDPR; after all, he made the decision to be  
using a smartphone to observe a female person in the toilet cubicle



he determined both the purpose and the means for data processing.□

6.□

On the lawfulness of image data processing:□

Art. 5 GDPR lays down and determines the principles for the processing of personal data□

its paragraph 1 lit. a, that personal data is processed lawfully, in good faith□

and processed in a manner that is comprehensible to the data subject□

("lawfulness, fair processing, transparency"). As stated above,□

Naturally, capturing image data in the toilet cubicle was not possible for the person concerned□

foreseeable and this already constitutes a violation of the principle of Article 5 Paragraph 1 lit□

GDPR.□

According to Art. 6 GDPR, processing is only lawful if at least one of the□

the following conditions are met:□

a) The data subject has given their consent to the processing of data relating to them□

personal data given for one or more specific purposes;□

b) the processing is for the performance of a contract to which the data subject is party□

is necessary, or to carry out pre-contractual measures, which are carried out at the request of the person concerned□

person take place;□

c) the processing is necessary for compliance with a legal obligation imposed by the□

Controller is subject to;□

d) the processing is necessary to protect the vital interests of the data subject or a□

to protect another natural person;□

e) the processing is necessary for the performance of a task that is in the public interest□

lies or takes place in the exercise of public authority that has been transferred to the person responsible;□

f) the processing is to safeguard the legitimate interests of the person responsible or a□

Third parties required, unless the interests or fundamental rights and freedoms of□

data subject who require the protection of personal data prevail, in particular□

when the data subject is a child.□

Leads to the lawfulness of processing operations with regard to Article 6 (1) (f) GDPR□

Recital 47, among other things, explains that this is due to legitimate interests□

of a person responsible can be justified, provided that the interests or fundamental rights and□

fundamental freedoms of the data subject do not prevail; here are the reasonable expectations□

of the data subject based on their relationship with the controller□

consider. In any case, the existence of a legitimate interest is particularly careful□

to be weighed up, whereby it must also be checked whether a data subject at the time the data was collected□

personal data and given the circumstances in which it occurs,□

can reasonably foresee that processing for this purpose may take place□

will. In particular, when personal data is processed in situations in which□

which a data subject cannot reasonably expect further processing□

must, the interests and fundamental rights of the data subject become the interests of the□

those responsible prevail.□

The European Court of Justice (ECJ) has already stated in the context of video surveillance that□

that three cumulative requirements must be met for (image data) processing as□

is to be classified as admissible (cf. the judgment of the ECJ of December 11, 2019, C-708/18, margin no. 40):□

On the one hand, this is the perception of a legitimate interest by the person responsible for the□

Data processing controller, then the necessity of data processing□

Realization of this legitimate□

interest and□

ultimately may□

during a□

Weighing of interests no predominance of the fundamental rights and freedoms of data protection□

data subject about the perceived legitimate interest.□

7.□

In the present case, the legality test in relation to the established fails□

Image data processing already on the first of three prerequisites. Whatever kind□

The accused's interest in allowing a female person to use a toilet cubicle□

can under no circumstances be considered a legitimate interest within the meaning of Art. 6 Para. 1 lit f□

DSGVO are evaluated. This means that no further suitability testing is required□

a weighing of conflicting interests. As the only suitable legal basis for the□

the present image data processing would be a consent of the person concerned, this□

is of course not available here and the data processing was therefore considered inadmissible in any case□

to qualify.□

8th.□

In application of the requirements and obligations under Article 5 Paragraph 1 lit. a and lit. b in□

Connection with Art. 6 Para. 1 DSGVO and § 12 Para. 4 Z 1 DSG to the present facts□

comes□

the□

recognizing authority□

to the result□

that□

the accused□

the□

image processing that is the subject of the proceedings would under no circumstances have without the consent of the persons

allowed to perform. Against the background of the facts established as proven, the□

Accused as the person responsible according to Art. 4 Z 7 DSGVO therefore the objective side of the facts□

administrative violation of Article 83 (5) (a) GDPR.□

IV. The following should be noted with regard to sentencing:□

1.□

According to Art. 83 Para. 1 GDPR, the data protection authority has to ensure that the□

imposition of fines for violations referred to in paragraphs 5 and 6 in each individual case effective,□

is proportionate and dissuasive. In more detail, paragraph 2 leg cit states that in the decision□

on the imposition of a fine and its amount in each individual case□

due consideration is given to:□

a)□

Nature, severity and duration of the breach, taking into account the nature, extent or□

the purpose of the processing in question and the number of people affected by the processing□

people and the extent of the damage suffered by them;□

b)□

intentional or negligent breach;□

c)□

any measures taken by the controller or processor□

to mitigate the damage caused to the data subjects;□

d)□

level of responsibility of the controller or processor□

Taking into account the technical and□

organizational measures;□

e)□

any relevant previous breaches by the controller or processor;□

f)□

Extent of cooperation with the supervisory authority to remedy the breach and□

mitigate its potential adverse effects;□

G)□

categories of personal data affected by the breach;□

H)□

How the violation became known to the supervisory authority, in particular whether and□

if applicable, to what extent the controller or processor acknowledges the breach□

has communicated;□

i)□

j)□

[...]□

[...]□

k)□

any other aggravating or mitigating circumstances in the particular case, such as□

financial benefits gained or losses avoided, directly or indirectly, as a result of the infringement.□

2.□

According to Section 19 (1) of the VStG, the basis for assessing the penalty is the meaning□

of the legal interest protected by criminal law and the intensity of its impairment by the act.□

Moreover, according to the purpose of the threat of punishment, the aggravating and□

Reasons for mitigation, insofar as they do not already determine the threat of punishment, must be weighed against each other.

Particular attention should be paid to the degree of culpability. Under consideration of□

Sections 32 to 35 of the Criminal Code are a peculiarity of administrative criminal law□

apply. The income and financial circumstances and any duties of care of the□

Accused persons are to be taken into account when assessing fines; this only in□

to the extent that the directly applicable provisions of the GDPR do not apply□

supersede the provisions of the VStG and to the extent permitted by Art. 83 (8) GDPR□

and recital 148 with regard to the procedural guarantees to be guaranteed□

will.□

3.□

Art. 83 Para. 3 GDPR standardizes this in deviation from Section 22 Para. 2 VStG□

Accumulation principle arranged that in cases of equal or related□

Processing operations that intentionally or negligently violate several provisions of□

GDPR is violated, the total amount of the fine does not include the amount

for the

exceeds the most serious violation. Thus, within the scope of the GDPR - as in

applied in the present case – the absorption principle of Art. 83 (3) GDPR.

4.

Based on the facts at hand, the following was determined when sentencing

considered aggravating:

-

Observing a female person with the help of a smartphone camera while she is

wants to use a toilet cubicle seriously interferes with the provisions of Art. 8 ECHR and

Art. 7 EuGRC protected legal interests of the private and intimate sphere of the persons concerned.

On the part of the accused, the image data processing was carried out with the

Intention to observe a female person in the adjacent toilet cubicle, granted

and therefore there is fault on the subjective side of the crime in the form of intent within the meaning of

Article 83 (2) (b) GDPR. The following was mitigating in sentencing

taken into account:

-

The accused took part in administrative penal proceedings before the data protection authority

and admitted to having carried out the image data processing, he has thereby to

contributed to finding the truth;

-

To date, the data protection authority has not had any relevant data against the accused

previous convictions.

6.

The concrete penalty imposed therefore appears taking into account the established one

Income of the accused measured with regard to the actual value of the crime

of up to € 20,000,000 in the available penalties of Art. 83 Para. 5 GDPR□

and commensurate with guilt and its imposition required to protect the accused and third parties from the□

committing the same or similar criminal acts.□