

GZ: DSB-D122.931/0003-DSB/2018 from 30.11.2018□

[Note editor: 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 can be used for pseudonymization reasons□

be abbreviated and/or modified. Obvious spelling, grammar and□

Punctuation errors have been corrected.]□

NOTICE□

S P R U C H□

The data protection authority decides on Lukas A****s data protection complaint□

(complainant) of May 25, 2018 against N***-Zeitung Verlagsgesellschaft m.b.H□

(Respondent) for violation of the right to objection and confidentiality□

as follows:□

- The complaint 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; Article 6(1)(a), Article 7, Article 21, Article 57(1)(f) and Article 77□

Paragraph 1 of the General Data Protection Regulation (GDPR), OJ No. L 119 of 4 May 2016, p. 1; Section 96□

Paragraph 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. With a submission dated May 25, 2018, the complainant alleged a violation in□

Right to object and argued in summary that the website of□

Respondent could only be used against payment as soon as one□

Revoke consent to "marketing cookies". He got this message right after□

Received "Undo Click". Consent is not given voluntarily in accordance with the□

Principles of the GDPR, since the provision of the service depends on the consent to□

processing of personal data is dependent. The tracking of□

personal data is technically not necessary because the respondent

offer a payment option that does not require this tracking. An example for

personal cookies without an "opt-out option" is "google_pub_config". A

Corresponding screenshot was attached to the input.

2. With a statement dated June 12, 2018, the Respondent brought

summarized that media companies have relied on it for decades

would be to fund themselves through advertising, with this type of funding for

Online media has largely been the only source of income since the beginning. In the "GDPR

Implementation" the Respondent would not only have the standardized requirements

implemented, but also a data protection-conscious online product

developed: the O** subscription (hereinafter: "O** subscription"). With the O** subscription, there is no

Consent to advertising and would be purely technical

necessary cookies are set. In fact, the contradiction

Advertising measures in accordance with Art. 21 GDPR are possible on the website and are carried out by the

Contradiction to the fact that the website can no longer be used completely free of charge

could become. In this case, only selected pages would be without editorial contributions

accessible. Alternatively, full use of the O** subscription is possible. The

The requirement that consent be given voluntarily cannot lead to

Media companies would have to make their services available free of charge,

especially online advertising without data-based control in the current market environment

would not allow refinancing. As part of the pricing is on it

care has been taken to ensure that the O** subscription remains affordable for everyone and not for the

obstacle to using the online service free of advertising and tracking. The

Offering these two variants does not constitute a violation of the GDPR. Regarding

the missing "opt-out option" for the "google_pub_config" cookie should be noted,

that it was a technical error that had now been rectified, so that

An "opt-out option" is now available for all technically unnecessary cookies□

stand.□

3. The DPA cleared the complainant by letter dated June 14th□

2018 corresponding party hearing and transmitted the result of the□

preliminary investigation. The complainant admitted until the conclusion of the proceedings□

no more comment. A corresponding forwarding report is attached to the file□

and there is no error message from an email server.□

B. Subject of Complaint□

Based on the submissions of the complainant, it follows that the□

Complaint consists of two points:□

1. First, it must be checked whether the Respondent has the Complainant to do so□

has stopped giving consent that does not meet the requirements of the GDPR□

corresponds to which the complainant's right to secrecy was violated.□

2. In addition, it must be checked whether the respondent is the complainant□

in the right to object (or lack of possibility to withdraw consent)□

violated by not providing an "opt-out option" regarding the cookie□

"google_pub_config" was made available.□

C. Findings of Facts□

1. The Respondent operates an online community on the website□

https://www.n***-zeitung.at and provides - in addition to other services - daily□

journalistic articles on various topics online. When you visit the website for the first time□

a window ("pop-up") appears with the following content (formatting not 1:1□

reproduced): [Editor's note: Underlining in the following citation in the□

original HTML hyperlinks]□

"I agree to the use of cookies for web analytics purposes and□

digital advertising measures. Even if I continue to use this website, this applies□

as consent.□

I can revoke my consent here. I can find more information in the□

Data protection.□

Subscription without data consent□

With a n***-zeitung.at O** subscription, the entire website can be used without consent□

Cookies and without advertising are used. Subscription details.”□

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" or third-party cookies are in use.□

3. The Respondent provides in its privacy policy - in the form of a button -□

a way to withdraw consent. Will the consent□

revoked, the webpage of the Respondent can in principle no longer□

can be used or the window described under number 1 appears again.□

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

In the window described in section 1, click on the "O**-Abo" button□

("Variant 2").□

5. Upon conclusion of a chargeable O** subscription (currently: EUR 6.00 per month from the□

second month, as of November 29, 2018) the entire webpage of the□

Respondent are used, no data tracking takes place and will not□

Third-party cookies set. No data tracking means that all third-party scripts and□

Third-party cookies and social media plugins are permanently disabled□

these can be activated individually by the visitor.□

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

Access to the Respondent's website.□

7. The Complainant accessed the Respondent's website and□

Variant 1 was used in order to gain access to the content of the website.□

8. At the time of filing the Complainant's Complaint on May 25, 2018□

there was no "opt-out option" regarding the "google_pub_config" cookie. This□

Possibility was however in the further course of the complaint procedure on the□

Respondent's homepage implemented what the complainant was using□

letter from the Data Protection Authority dated June 14, 2018.□

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

publicly accessible website of the Respondent, http://n***-zeitung.at/□

(accessed on November 29, 2018), as well as the input of the□

Complainant dated May 25, 2018 and Respondent dated June 12, 2018.□

The complainant has the subsequent implementation of an "opt-out option"□

with regard to the "google_pub_config" cookie, despite the possibility to do so□

more denied.□

D. In legal terms it follows that:□

D. 1. On the right to confidentiality□

a) On the asserted right□

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; cf. DSB of October 31, 2018,□

DSB-D123.076/0003-DSB/2018, according to which a complaint was directly supported□

Art. 14 GDPR is possible).□

In the present case, the complainant [editor's note: im□

Original text due to an obvious editorial error: "Respondent"] die□

Voluntariness of his consent and submits that the part of the□

Respondent's requested consent when calling up their website□

meets the requirements of Art. 7 GDPR.□

It was therefore necessary to check whether the part of the Respondent was available□

Variant 1 provided (consent to gain access to the content of the website)□

is voluntary and if not, whether this has resulted in a violation of the right to secrecy□

of the complainant.□

b) On Section 96 (3) TKG 2003 as *lex specialis*□

The data protection authority has in the already mentioned decision of the DSB from□

31 October 2018 with the relationship between GDPR and Directive 2002/58/EC ("e-□

Data Protection Directive") or the corresponding implementation provision (TKG 2003, Federal Law Gazette I□

No. 70/2003 as amended).□

From the point of view of the data protection authority, the e-Privacy Directive and the TKG 2003□

DSG 2000 or now the GDPR as a *lex specialis* (cf. Art. 95 GDPR, according to which□

the Regulation to 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 special in the e-Privacy Directive□

subject to specified obligations that pursue the same objective; see also recital 173□

GDPR).□

In the present case, the question of the legal basis or the□

Permission to process according to § 96 paragraph 3 TKG 2003, according to which a□

Determination of data (or the use of advertising cookies) is only permitted if a□

consent has been granted. An assessment of the lawfulness of the processing is carried out

therefore not according to Art. 6 GDPR, but according to § 96 Para. 3 TKG 2003.

It should be noted, however, that the TKG 2003 does not contain any more detailed conditions or a definition for consent.

However, the legal basis underlying this provision refers to

Union law, the e-Privacy Directive, regarding the concept of "consent" 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 § 96 paragraph 3 TKG 2003 corresponds

therefore in a systematic interpretation the concept of consent according to Art. 4 Z 11 or

Art. 7 GDPR, as follows from Art. 94 Para. 2 GDPR.

c) On the voluntary nature of the consent in the present case

The complainant submits that consent to Variant 1 is not voluntary

according to Art. 7 Para. 4 DSGVO, since the provision of the service is carried out by the

consent to the processing of 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 group has already discussed the possibility of voluntariness

disabling disadvantages and came to the conclusion 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. 12; see also recital 42 GDPR).

In the present case, it should first be noted that the Respondent in

Variant 1 (consent to use the website) does not set any cookies until the

Visitors to the webpage made a conscious decision, i.e. consent

submitted whether he would like to take option 1. By linking in

window ("pop-up") to the data protection declaration and by listing the im

The Respondent corresponds to the cookies used ("Cookies Annex")

also the one required in Section 96 (3) TKG 2003 in conjunction with Article 5 (1) (a) GDPR

transparent information obligation and is also a clear and specific purpose

apparent, giving the data subject control over the processing

their data is secured.

If a data subject does not give consent, the first consequence is that

that they can take out an O** subscription. As stated, this O** subscription is free of

Advertising, free from data tracking and free from the setting of third-party cookies. The O**-

With a price of 6 euros per month from the second month, there is no subscription either

disproportionately expensive alternative.

The second consequence of not giving consent is that the

data subject does not use the Respondent's website and

resorts to an alternative range of information.

As a result, the consequences of not giving consent lie far behind

no significant disadvantage and is the affected person with no significant

face negative consequences.

According to the case law of the data protection authority, it must also be taken into account that a

voluntary consent can be given if a certain processing operation

also to the recognizable advantage of the person concerned (cf. instead of many DSK

of March 8, 2006, DSK 8.3.2006, K178.209/0006-DSK/2006; cf. also Kotschy in

Brodil (ed.), Data protection in labor law (2010) 3).

This is the case in the present case, since a visitor to the website after submitting a

consent full access to the website and to the services of

Respondent receives, whereby this access - as stated - also in no way

way is limited and in terms of content is equivalent to the conclusion of an O** subscription.

Since the consent, taking into account the requirements of Articles 4 and 7 GDPR,

was given voluntarily, it was no longer necessary to consider whether through a possible

involuntary consent is a violation of the right to secrecy

is justified.

It had to be decided in this regard.

The question of whether the (advertising) cookies to be accepted with regard to

their extent and scope correspond to the requirements of Art. 25 GDPR.

D. 2. Right to object

It should be noted that what was expressly asserted by the complainant

Right to object according to Art. 21 GDPR is missing insofar as the

Complainant has given consent in accordance with Section 96 (3) TKG 2003 and it

it is rather a matter of withdrawing consent.

In the present case, however, this question is superfluous, since the Respondent is still

before the process is completed, you have the option to revoke the cookie

"google_pub_config" has implemented as well as the

Possibility (in the form of a button in the data protection declaration, which can be accessed in the window or

"Pop-up" is pointed out) provides the consent in full

revoked (cf. § 24 para. 6 DSG).

In the context of Section 96 (3) TKG 2003, it should also be noted that a revocation

also at any time through appropriate settings in the browser or through deletion

of all or individual cookies in the browser settings.□

From the outset, the complainant had several technical options□

to revoke the consent.□

It was therefore also to be decided in accordance with the verdict.□