

GZ: 2020-0.743.659 from November 19, 2020 (case number: DSB-D124.3093)□

[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.]□

NOTICE□

S P R U C H□

The data protection authority decides on the data protection complaint of Dr. Uwe A***□

(complainant) of October 5, 2020 against X*** Gaststätten GmbH (respondent),□

represented by dr. Wilfried Q*** LL.M., lawyer in 1**0 Vienna, because of alleged infringement in□

Right to confidentiality as follows:□

1. The appeal is upheld and it is established that the Respondent□

violated the complainant's right to secrecy by□

their personal data, namely first name, last name and telephone number□

processed for contact tracing purposes.□

2. Otherwise the complaint is dismissed as unfounded.□

Legal basis: Article 5 paragraph 1 letters a to f, Article 6 paragraph 1 letter c, Article 51 paragraph 1, Article 57 paragraph 1 letter

Article 77 paragraph 1 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter:□

GDPR), OJ No. L 119 of 4.5.2016 p. 1; Sections 18 (1) and 24 (1) and (5) of the□

Data Protection Act□

(DSG), Federal Law Gazette I No. 165/1999□

idgF; Sections 5 (3) and Section 40 of the□

Epidemics Act 1950 (EpiG), Federal Law Gazette No. 186/1950 as amended; §§ 1 to 3 of the Ordinance of the Magistrate□

of the City of Vienna regarding the provision of information□

for contact tracing□

in connection with□

Suspected cases of COVID-19 (Vienna Contact Tracing Ordinance), OJ No. 41/2020.□

REASON□

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

1. With the procedural submission dated October 5, 2020, the complainant submitted that□

Respondent raises about their processor when entering their business premises in 1 ** 0□

Vienna, Y***straße *, iSd Wiener Contact-Tracing regulation the personal data first name,□

Last name, phone, email (optional) and table number.□

In addition, the Respondent informs that they use this data to protect "from□

Life and health of our employees and our guests in connection with the occurrence□

of the coronavirus□

or.□

of the COVID-19 epidemic"□

such as□

to the□

"Support□

the□

District administrative authority when identifying contact persons in the event of an infection"□

raise In the reply to the information, on the other hand, the respondent supported the processing□

the Vienna Contact Tracing Ordinance, which probably means processing in accordance with Article 6 Paragraph 1 lit. c□

GDPR is meant. The Respondent concludes the contract from the provision of the□

dependent on personal data.□

As a result, the complainant sees himself in his fundamental right to data protection in accordance with Section 1 (1).□

DSG infringed because the Respondent received the above-mentioned personal data□

unlawful because without a legal basis within the meaning of Art. 6 GDPR.□

The complaint was accompanied by a request for information and the information provided by the respondent in□

copy enclosed.□

2. With completion of October 14, 2020, GZ: 2020-0.647.953, the data protection authority requested the

Respondent to comment.

3. With a submission dated October 27, 2020, the Respondent replied and argued that the

On October 2, 2020, the complainant found the restaurant operated by the respondent

in Y***strasse *, 1**0 Vienna. According to the legal requirements of the Wiener Contact

The Respondent offers the tracing regulation in said restaurant for its guests

possibility of registration. Registration is possible offline (paper form) or online. the

The online registration used by the complainant is carried out using a QR code, which is

the mobile phone is scanned. You will then be redirected to the registration mask.

Below this registration mask you will find the data protection declaration in accordance with Art. 13 GDPR.

The data protection declaration is also confirmed accordingly by the user before sending his data.

As already stated in the data protection declaration itself, guests are not obliged to keep their

provide contact details. For the sake of completeness and in accordance with general house rules

it is also made clear that if you refuse to provide your contact details, you will be denied access to the

Restaurant can be refused. As the information provided by the Respondent of October 5, 2020

it can be inferred that the complainant registered on October 2, 2020 at 12:39:17 p.m

and the following data announced, namely name: Uwe A*** and telephone: 066**7**3*. As before

stated in the information of October 5, 2020, the Respondent collects from the guests

voluntarily disclosed data based on the Vienna Contact Tracing Ordinance

for the

intended period of 4 weeks in which they are kept safe and then deleted

would. Processing of the data for purposes other than fulfilling the legal obligation

according to the Vienna Contact Tracing Ordinance expressly does not take place.

The processing purposes are stated in the data protection declaration made available to the guests

"Protection of the life and health of our employees and our guests in connection with the

Occurrence of the coronavirus or the COVID-19 epidemic"

such as□

"Support of□

District administrative authority in tracing contact persons in the event of an□

case of infection".□

In the information provided by the Respondent to the Complainant on October 5, 2020□

It was stated that the guest data collected was based on Wiener Contact-Tracing□

regulation are processed.□

In addition, the complainant alleges that the respondent makes the conclusion of the contract□

dependent on the provision of the personal data and that the data processing without□

Legal basis according to Art. 6 DSGVO and would therefore be unlawful.□

For whatever reason, the complaint leaves many facts and circumstances unmentioned,□

based on a legally incorrect assessment and was not justified. The processing of□

voluntarily stated by the guests and subsequently by the Respondent□

Responsible processed data takes place lawfully on the basis of Art. 6 Para. 1 lit. c DSGVO,□

namely to fulfill their legal obligations under the Vienna Contact Tracing Ordinance.□

The data processing purposes stated in the data protection declaration are obvious□

merely a description of the purposes of the Vienna Contact Tracing Ordinance. Already in § 1□

Paragraph 1 of the Vienna Contact Tracing Ordinance is made clear why, in the opinion of the□

legislature of such a (for restaurateurs associated with a considerable effort)□

Regulation required: "To prevent the spread of COVID-19, in the event that it occurs□

a suspected case of COVID-19 from the following information at the request of□

district administrative authority: [...]".□

In addition, it is already made clear in the data protection declaration under point 3 that the□

Data are processed on the basis of the Vienna Contact Tracing Ordinance. Neither give it to him□

Complainant before the transmission of his data announced privacy policy, nor the□

The information given to him gives reason to process the personal data for other purposes□

than those required to meet the requirements of the Vienna Contract Tracing Ordinance. Out□

what is the motivation for the complainant to disregard all of this in his complaint,□

stay open.□

Likewise, it is not comprehensible on what factual or legal basis□

Complainant claim the conclusion of the contract□

(meaning probably the purchase of□

Food/drinks at the Respondent) would depend on the provision of the personal□

Data dependent: Already in the data protection declaration itself, under point 2, last sentence,□

clarified that the disclosure of any data is voluntary. The Respondent is neither□

legally obliged to make access dependent on the disclosure of any data□

they otherwise have an interest in it. It is also significant that the complainant himself is only a part□

provided the data provided in the (online) form, but apparently neither allowed him access□

nor the "conclusion of the contract" had been denied. The complaint therefore turns out to be□

unfounded.□

3. With completion of November 3, 2020, GZ: 2020-0.701.142, the data protection authority admitted that□

Complainant heard a party.□

4. The applicant stated in his hearing of the parties on November 10, 2020 that□

his complaint, unlike that of the respondent in its statement of□

27 October 2020, neither against a violation of the information obligation within the meaning of Art. 13 DSGVO□

judge, nor does the complainant base a complaint on the fact of the conditionality of□

Data collection and conclusion of contract.□

As stated unequivocally in the complaint of October 5, 2020, the□

Complainant violated his basic right to data protection according to § 1 Para. 1 DSG,□

that the Respondent unlawfully used the data categories first name, last name and telephone□

process.□

In its statement, the Respondent submitted several times that the Complainant□

I have voluntarily provided the data categories that are the subject of the proceedings. I have this as proof
a bundle of photos enclosed, from which it should apparently be possible to conclude that no registration
is necessary in order to be able to consume food in the restaurant. In fact, of course, there is
a forced situation to provide the data categories that are the subject of the proceedings. This on the one hand
due to the graphic preparation of a display, which is primarily aimed at - by the broad public
Reporting - generally recognized as mandatory "COVID-19 guest registration"
refer. Furthermore, the arguments of the Respondent should be countered that already through
a passage in the data protection information submitted by the respondent as an attachment, where
it says: "[...] the refusal to make it available cannot grant access to the restaurant
become", there can be no question of a voluntary nature.

Furthermore, the Respondent stated in this very point of the statement that these as
responsible for data protection law the data categories that are the subject of the procedure
would be processed because the processing is to fulfill a legal obligation (Art. 6 para. 1 lit. c
GDPR) to which the Respondent is subject would be required. This legal
Obligation would arise (not determined in detail by the Respondent) from the Wiener
Derive contact tracing regulation.

In fact, however, the said regulation does not oblige the respondent to
systematic collection of the data categories that are the subject of the proceedings. Specifically it means
with regard to catering establishments that these - based on § 5 Para. 3 EpiG - "in the event
the occurrence of a suspected case [...] at the request of the district administrative authority" first name,
"To transmit" the name, phone number, email address and table number of customers
to have. Alone the reference to § 5 para. 3 EpiG, which is merely an obligation to provide information
regulate, but also the clear wording of the regulation text, made it clear that the
Respondent under the regulation no legal obligation to collect the
meet the data categories that are the subject of the proceedings.

Anticipatory obedience by the Respondent - equivalent to data retention -

In any case, it is not possible to indiscriminately collect personal data from your customers□

based on Article 6 (1) (c) GDPR.□

B. Subject of Complaint□

Based on the submissions of the complainant, it follows that the subject of the complaint is the□

The question is whether the Respondent violated his right to secrecy by□

the personal data recorded electronically on October 2, 2020 using a QR code scanner□

of the complainant, namely first name, last name, telephone number, e-mail address and□

Table number processed for contact tracing purposes at least until October 30, 2020.□

C. Findings of Facts□

1. The respondent is recorded in the company register for FN *35**8v at the regional court G** and□
operates a hospitality business in the coffee restaurant mode.□

Evidence assessment: The findings made are based on a commercial register query dated□

November 12, 2020 on FN *35**8v and a GISA query of November 12, 2020 on the GISA number:□

78***120.□

2. On October 2, 2020 at 12:39 p.m., the complainant submitted the business premises of□

Respondent visited at the address Y***straße, 1**0 Vienna. Upon entering the□

Business premises at the address mentioned were personal data, namely name: Uwe A***□

and telephone number: 0664*7**3*, recorded by the complainant using a QR code scanner. It can□

it cannot be established that the complainant's data was also processed.□

Evidence assessment: The findings made are based on the consistent and□

credible information provided by the parties to the proceedings. The determinations regarding collected data incl□

Time of collection based in particular on the submitted by the complainant, by the□

Respondent provided information on October 5, 2020. The accuracy of the information was not verified□

denied. In the absence of corresponding evidence, however, it cannot be determined that more than□

This data includes other data of the complainant, such as e-mail address or□

Table number processed by Respondent.□

3. The complainant submitted a request for information by letter dated October 2, 2020 □

Art. 15 GDPR to the Respondent, whom the latter wrote in a letter dated October 5, 2020 as follows □

answered (formatting not reproduced 1:1): □

Subject: Information in accordance with Article 15 GDPR □

Dear Doctor. A**, □

Thank you for visiting our restaurant and for your request for information from October 2nd, 2020, □

13:48, which we hereby comply accordingly: □

The data collected as a result of the Vienna Contact Tracing VO is subject to strict technical regulations □

and organizational measures (e.g. in the case of handwritten registration after days □

separately and sealed) for the period of 4 weeks provided for in the Ordinance □

and then deleted. These data are only opened or viewed under the statutory conditions □

envisaged prerequisites and consideration of internal measures. □

As you will know from your visit to our restaurant, there is the possibility that □

Registration according to the Vienna Contact Tracing VO either electronically (QR code) or □

handwritten by filling out an attached form. □

On October 2nd, 2020 at 12:39:17 p.m. you registered electronically in our restaurant Y***straße *, □

1**0 Vienna registered using the QR code and provided the following data: □

~ Name: Uwe A** □

~ Telephone: 0664*7**3* □

In the case of electronic registration, the data you provide will be transmitted □

to the IT company commissioned by us and based within the EU or the EEA □

(Processor within the meaning of Art. 28 GDPR). □

This is for the technical support of the electronic ones you use □

Registration platform responsible. A transfer to third countries does not take place. Likewise find □

neither automated decision-making nor profiling takes place. □

Your rights under applicable law include the following (if the relevant requirements of the □

applicable law are met and not our legal obligations in particular

contrary to the storage obligations of the Wiener Contact Tracing VO):

~ rectification or erasure of personal data concerning you;

~ restriction of processing of your personal data;

~ object to the processing of your personal data;

~ lodge a complaint with the data protection authority (www.dsb.gv.at).

Best regards

Otto M*** | Managing Director, Franchise Partner

X***Gaststätten GmbH | Administration V*** Straße 5* 1 A-1**0 Vienna

U*** | *P*** | N*** | S*** Gaststätten GmbH

Phone: +43/1/*57** 12*9-3*; Fax: +43/1/*57****-*4 Mobile: +43 66*/*39 6* *3;

ATU*12**252 otto.m***@gaststaetten*betriebe.co.at |

www.gaststaetten*betriebe.at More about the X*** Gaststätten GmbH

3. The Respondent processes the data provided by its customers during a visit to its

data given at the place of business

for at least four weeks from their collection. the

Complainant lodged the complaint in question on October 5, 2020.

Evidence: As last.

4. The Respondent's privacy policy is as follows (formatting not 1:1

reproduced):

1. Purposes of data processing

We will use the categories described below

personal data of guests to the following

Process purpose:

-

-

Protection of life and health of our

employees and our guests

connection with the occurrence of

Coronavirus or the COVID-19 epidemic.

Support of the district administrative authority

in tracing contacts

occurrence of an infection.

2. Description of the data application

We meet our legal obligations

Maintaining a guest list by collecting

Contact details (first and last name, telephone number, e-

mail address) of our guests before entering a

restaurants*operations. The guest scans too

his smartphone before entering the restaurant*

the provided QR code

and fill out the contact form.

When leaving the restaurant, the guest may be over

Smartphone 'check out', otherwise he will

automatically checked out after 45 minutes.

Guests are not required to provide their contact information

specify, however, in the event of refusal

Provision of no access to the restaurant

be granted.

3. Legal Bases of Data Use

The processing of your personal data

is based on the following legal basis

General Data Protection Regulation ('GDPR'):

-

Necessity of data processing for

Fulfillment of a legal obligation (Art. 6

Paragraph 1 lit. c DSGVO in conjunction with § 1 Z 2 lit. e regulation

of the Vienna City Administration

Provision of information for contact tracing in

connection with suspected cases of COVID-

19).

4. Transmission of your personal data

Your data will only be used if a

case of infection within four weeks

Provision and after appropriate

Request to the responsible

Submitted to district administrative authority.

5. Duration of storage

Your data will be kept for a period of four weeks

secured and locked away and thereafter

irretrievably destroyed.

6. Your rights related to

personal data

According to current law, those of the above

described data processing affected guests

entitled to do so (if the respective conditions

of the applicable law are met),

request information, including a

Confirmation as to whether and which of their

personal data we process and

to receive copies of this data,

the authorization or deletion of their

to request personal data,

to require us to stop processing your

restrict personal data, and

lodge a complaint with the supervisory authority

raise.

7. Our contact details

Our contact details are:

X***Gaststätten GmbH

A-1**0 Vienna, V*** Street 5*

otto.m***@at.com

If you have any questions or concerns about the processing of your

personal data, you are welcome to contact

contact us:

otto.m***@at.com

Evidence assessment: This results from the email sent by the Respondent on October 27, 2020

provided screenshots.

D. In legal terms it follows that:

Regarding point 1:□

Section 5 EpiG reads in excerpts including the heading (emphasis added by the data protection authority):□

Surveys on the occurrence of a disease.□

§ 5. (1) About every notification as well as about every suspicion of the occurrence of a reportable□

The competent authorities are sick because of the doctors available to them□

immediately the surveys necessary to determine the disease and the source of infection and□

initiate investigations. are sick, suspected of being ill and suspected of being infected□

obliged to provide the competent authorities with the necessary information and to comply with the□

necessary medical examinations and the removal of examination material□

undergo. For the purpose of identifying germs, if possible□

make use of professional research institutes.□

[...]□

(3) At the request of the district administrative authority, all persons, such as□

treating physicians, laboratories, employers, family members and staff□

Community bodies that could contribute to the surveys□

obligation to provide information.□

[...]□

Section 40 EpiG reads in part (emphasis added by the data protection authority):□

§ 40. Who by acts or omissions□

a) the bids contained in the provisions of Sections 5, 8, 12, 13, 21 and 44 (2) and□

Other Violations.□

Forbidden [...],□

violated [...],□

commits an administrative offence, provided the offense is not subject to a judicial penalty□

guilty and is subject to a fine of up to 1,450 euros, or a prison sentence of up to□

punished for four weeks.□

The Vienna Contact Tracing Ordinance reads in part: ☐

On the basis of Section 5 (3) Epidemics Act 1950, Federal Law Gazette No. 186/1950 as amended in Federal Law Gazette I No. 122/2017, the following information is prescribed: ☐

§ 1. To prevent the spread of COVID-19 in the event of the occurrence of a ☐

Suspected case of COVID-19 from the following information at the request of ☐

to submit to the District Administrative Authority: ☐

[...] ☐

2. Business premises: ☐

[...] ☐

e) for catering establishments, customers: ☐

aa) first name ☐

bb) name ☐

cc) telephone number ☐

dd) email address ☐

ee) table number ☐

§ 2. The data according to § 1 may only be used by the bodies named in § 1 for the purpose of ☐

Tracking of contacts stored in the event of a suspected case of COVID-19 and ☐

are processed. These data are to be deleted 4 weeks after their recording. ☐

§ 3. This regulation comes into force on September 28, 2020 and at the end of December 31, 2020 ☐

inoperative. ☐

1. General information on the right to confidentiality ☐

The basic right to data protection enshrined in § 1 DSG, according to the first paragraph of which everyone, ☐

particularly with regard to respect for his private and family life ☐

Confidentiality of the personal data concerning him, insofar as this is a matter worthy of protection ☐

interest exists, includes the protection of the data subject from the unlawful determination of his ☐

data and the transfer of the data determined about him. ☐

The application of Section 1 (1) DSG presupposes, among other things, that personal data is involved in acts.

According to § 1 paragraph 2 DSG restrictions of the secrecy claim by a

Responsible only permitted if the use of personal data

in the

vital interest of the person concerned or with his consent, in the case of overriding

legitimate interests of another or in the presence of a qualified statutory

Basis.

Restrictions of Section 1 Paragraph 1 DSG result from Paragraph 2 leg. cit., but not from Art. 6 Paragraph 1

GDPR. However, the GDPR and in particular the principles enshrined in it are after

In any case, the opinion of the data protection authority on the interpretation of the right to secrecy

should be taken into account and used accordingly (cf. the notification of October 31, 2018,

GZ: DSB--D123.076/0003-DSB/2018).

2. In the matter

2.1. On the qualification of the complainant's personal data and the legal basis

the data processing in the present case

Art. 9 para. 1 GDPR finally defines special categories of personal data

("sensitive data"). Insofar as this is relevant in the present case, this also includes health data. the

Processing of these data categories is exclusively based on Art. 9 Para. 2 GDPR

concluding reasons for exception are permitted.

According to Art. 4 Z 15 GDPR, health data is "personal data relating to the

physical or mental health of a natural person, including the provision of

Health services, obtain and from which information about their health status

emerge."

In the light of Art. 9 Para. 1 GDPR, health data is undoubtedly special

data worthy of protection, whereby the term in the sense of Rsp. of the ECJ is to be interpreted broadly (cf. on Art. 8

Paragraph 1 of Directive 95/46, the judgment of the ECJ of November 6, 2003, C-101/01, margin no. 50). are recorded

according to Art. 4 Z 15 GDPR in combination with recital 35 second sentence GDPR also numbers,

Symbols or marks assigned to a natural person to identify that person

clearly identify health purposes.

In its established case law, the Data Protection Authority maintains that from health data

In any case, information about the past, present and future physical or mental

state of health of the person concerned. Taking this into account

Consideration are indicators iSv ErwGr. 35 second sentence GDPR not per se as a health data

to qualify, but also with regard to such indicators, a certain reference to

information

over

the state of health

exist

(see.

in relation

on

the

social security number

about

the

notice

from the

9th April

2019,

GZ: DSB-D123.526/0001-DSB/2019).

In the case of the complainant's data processed by the respondent (first and

surname, telephone number) is undoubtedly his personal data.□

It is questionable whether they are also - under the circumstances of the present case - to□

health data.□

According to the case law of the data protection authorities, they are assigned to a person□

Identification numbers (such as the social security number) do not represent a health date if they□

used as a mere identifier and independent of a health context (cf.□

most recently the notification of November 5, 2020, GZ: 2020-0.714.215 [Editor's note: im□

Original text of the notification due to an editorial error GZ: 2021-0.041.702]).□

The object of the complaint was the data of the complainant - as well as the□

Respondent expressly emphasizes - exclusively for the purpose of "protecting life and□

Health of [the] employees and [the] guests [of the Respondent] in connection with the□

Occurrence of the coronavirus or the COVID-19 epidemic" and for the purpose of "supporting the□

District administrative authority in tracing contact persons in the event of an□

case of infection".□

It is clear from this that the data collection was carried out in a purely health context and that the□

collected data should also be used exclusively in such a way, namely, on the one hand, to□

to protect others and, on the other hand, to provide this data to the district administrative authority in case of need□

as a health authority according to the EpiG.□

Consequently, the data processed about the complainant, namely his first and last name□

as well as his telephone number, which, detached from the present context, does not contain any data within the meaning of Art

Para. 1 GDPR would represent, in the case at issue as health data and□

to qualify as a special category of personal data.□

The lawfulness of the processing is therefore based on Article 9 (2) GDPR.□

2.2. On the lawfulness of data processing□

a) To be voluntary□

i) The Respondent bases its submissions on, among other things, those of the Complainant□

given voluntary consent to data processing.□

The processing of health data is permitted according to Art. 9 Para. 2 lit. a GDPR if the□

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

The complainant countered that with regard to the provision of his□

Data cannot be said to be voluntary, since when collecting his data in□

would have been in a forced situation. On the one hand because of the entrance area of the business premises□

situated reference to the COVID-19 guest registration and in the data protection declaration of the□

passage contained by the Respondent, according to which, if the data is refused,□

access to the restaurant can be denied.□

ii) In the opinion of the Data Protection Authority, the arguments of the Respondent are already working□

not because, according to the case law of the ECJ, consent is an active and□

requires an unmistakable ("without any doubt") act of will on the part of the person concerned (cf.□

most recently the judgment of November 11, 2020, C-61/19 with further references). This applies all the more to the processing

Health data, because Art. 9 (2) (a) GDPR - unlike Art. 6 (1) (a) - an express□

consent required.□

The Respondent was not able to prove such a thing, although she had the duty□

(see Art. 5 Para. 1 lit. a and Para. 2 in conjunction with Art. 7 and 9 Para. 1 lit. a GDPR).□

In addition, a strict standard must be applied to consent. So one has□

Consent to be given voluntarily and must not be linked to the performance of a contract, although□

consent is not required to fulfill this contract. Consent is involuntary□

if a disadvantage is to be expected if consent is not given (cf. the decision of□

April 16, 2019, GZ: DSB-D213.679/0003-DSB/2018, and again the judgment of the ECJ of□

11/11/2020).□

After the refusal to make it available, as stated by the Respondent itself□

submitted, access to the business premises - with reference to the domiciliary rights - be refused□

can and this fact is pointed out in the data protection declaration, is from the point of view of one□

objective average customers can clearly expect a disadvantage if they do not give their consent□

been.□

Voluntariness also requires that in the event of non-consent to data processing□

a reasonable alternative is available to the person concerned (cf. the decision of□

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

This is also to be denied in the present case, because other establishments in the catering trade in□

Municipal area of Vienna are also covered by the Vienna Contact Tracing Ordinance and by□

these – presumably – equally personal data of the complainant were collected□

would.□

The data processing can therefore not be based on Article 9 (2) (a) GDPR.□

b) The existence of a legal obligation to collect or process data□

customer data□

i) The Respondent relies on the fact that permission is granted – which is not relevant here alone□

of Article 6(1)(c) GDPR and argues that, pursuant to Section 5(3) EpiG in conjunction with Section 1(2)(e) of the□

Vienna Contact Tracing Ordinance on the processing and storage of the data of the□

Complainant legally obliged for 4 weeks.□

The complainant denied the existence of a legal obligation and argued that□

from § 5 para. 3 EpiG and the Vienna Contact Tracing Ordinance only the obligation of□

Respondent to provide information to the district administrative authority can be deduced,□

but not for the collection of customer data.□

ii) The processing of special categories of personal data on the basis of a statutory□

Obligation is - as far as relevant for the present case - according to Art. 9 Para. 2 lit.□

then permissible if the processing is for reasons of public interest in the area of□

public health, such as protection against serious transboundary□

Health hazards, based on Union law or the law of a Member State, the□

appropriate and specific measures to safeguard the rights and freedoms of those affected□

person provides is required.□

It should therefore be noted that the (mandatory) processing of personal data for the purpose□

of contact tracing is covered by the GDPR, provided a sufficiently precise and□

The legal basis in Austria corresponds to the requirements of Article 9 (2) (i) GDPR□

right is present. In this context, the ministerial draft for an amendment to the EpiG□

(41/ME XXVII. GP) to point out where a□

(voluntary) data collection□

for purposes of□

Contact tracing was provided for (Art. 1 Z 4 of the draft), but ultimately by the legislature□

was not decided:□

"4. The following paragraph 6 is added to Article 5 paragraph 5:□

(6) Businesses, event organizers and associations are - without prejudice to other legal bases□

existing collection and storage obligations - obligated to personal contact data□

from guests, visitors, customers and employees, in whose processing expressly consented□

for the purpose of fulfilling the obligation to cooperate in the context of collecting contact persons□

to be kept for a period of 28 days in the case of environmental investigations. A processing of□

Data for other purposes is not permitted. After the retention period has expired, the data□

immediately□

appropriate□

companies,□

to take data security measures."□

organizer□

Clear.□

societies□

to have□

and□

to

As already explained, however, mandatory data collection could also be covered by the GDPR

Find

(See the statement issued by the Ministerial Draft on this

data protection authority,

available

under

https://www.parlament.gv.at/PAKT/VHG/XXVII/SNME/SNME_00951/imfname_816332.pdf).

However, it is questionable whether § 5 para. 3 EpiG in conjunction with the Vienna Contact Tracing Ordinance as

Legal basis within the meaning of Article 9 (2) (i) GDPR can be used.

From the wording of Section 5 (3) EpiG, it follows that at their request all persons

which could contribute to the surveys on the occurrence of a disease, to

are obliged to provide information to the district administrative authority.

The Vienna Contact Tracing Ordinance issued on the basis of Section 5 (3) EpiG specifies this

Obligation and stipulates in § 1 that to prevent the spread of COVID-19 [...] for the

In the event of a suspected case of COVID-19 from the following authorities

Information to be provided upon request of the district administrative authority".

The standard text of § 1 Z 1 and Z 2 of the Vienna Contact Tracing Ordinance contains an enumeration

of the bodies obliged to provide information and thus specifies who among "all persons who belong to the

surveys could make a contribution" is to be understood within the meaning of Section 5 (3) EpiG. Likewise, in § 1

Z 1 and Z 2 of the Vienna Contact Tracing Ordinance the mandatory content of such information

determined. Accordingly, gastronomy establishments are in the event of the occurrence of a

suspected case of COVID-19 at the request of the district administrative authorities, information

about the first name, surname, telephone number, e-mail address and telephone number of their customers

to grant customers.

According to the established case law of the Administrative Court, the interpretation of laws is the interpretation of the word

in conjunction with grammatical and systematic interpretation□

and extreme reluctance to use so-called□

"corrective□

methods of interpretation".□

(cf. VwGH 3.10.2018, Ro 2018/12/0014; 22.3.2019,□

Ra 2018/04/0089).□

According to the wording of the legal provisions in question (§ 5 Para. 3 EpiG in conjunction with § 1 Z 2□

lit. e Vienna Contact Tracing Ordinance) is an obligation to process personal data□

However, this does not include data from customers who visit the premises of a catering establishment□

intended. The provisions obviously standardize an obligation to provide information□

to the district administration authority and these provisions also determine what content□

(Data) has to contain such information, but according to the unambiguous and clear wording therein□

no obligation to collect and process this data.□

Also from the wording of § 2 of the Vienna Contact Tracing Ordinance, according to which data iSd § 1 of□

in § 1 leg. cit. mentioned bodies may be processed and stored is not a legal one□

obligation to process, but merely to derive a legal ability. It is not□

to assume that the legislator subconsciously speaks of may, but is of it□

to assume that if he had wanted to standardize a legal obligation, he would□

expressly made clear.□

Against such an interpretation, however, could be objected that it holders of□

gastronomy establishments would be practically impossible without prior data collection□

to comply with the obligation to provide information stipulated in the regulation and a violation of § 5 EpiG□

§ 40 lit. a EpiG establishes an administrative offense punishable by up to 1,450 euros□

punish is.□

However, there can be no legal obligation to perform the factually impossible,□

which is why the obligation to provide information can only relate to data that the owner of a□

Business premises of the gastronomy are available without any special investigative effort.□

It is therefore evident that there is a legal obligation to process the data□

of the complainant - as submitted by the respondent - by no means clearly from the□

Wording of Section 5 (3) EpiG in conjunction with the Vienna Contact Tracing Ordinance. Nor can it□

the obligation to provide information to the district administrative authority without further ado□

a legal obligation of the Respondent to collect and process certain□

personal data will be closed. The obligation to provide information can be□

The wording of the legal provisions apply only to personal data provided to the holder□

are known to a catering establishment.□

iii) For this reason alone, an appeal by the Respondent to one of her legal claims fails□

imposed obligation to process personal data of the complainant.□

iv) But even in the event that Section 5 (3) EpiG in conjunction with the Vienna Contact Tracing Ordinance□

derive an obligation to process personal data within the meaning of Article 9 (2) (i) GDPR□

wanted, data processing could not be based on:□

c) Requirements for legal bases□

i) According to the settled case law of the ECJ, regulations that are part of the rights under Art. 7□

(Respect for private and family life) or Art. 8 (Protection of personal data) EU-GRC□

intervene, provide for clear and precise rules on the scope and application of this measure□

and establish minimum requirements so that the individuals whose personal data are affected□

have sufficient guarantees that effectively protect their data from misuse□

as well as against any unauthorized access to this data and any unauthorized use,□

enable. The need for such guarantees is all the more significant when the personal□

Data are processed automatically and there is a significant risk of unauthorized access□

consists of them (cf. ECJ of October 6, 2015, C-362-14, para. 91 with further references).□

These guarantees are all the more important when data is processed automatically and when□

it is sensitive data (cf. ECJ of October 6, 2020, related cases C-511/18, C-512/18 and□

C-520/18, margin no. 132).□

For those to be processed on the basis of Section 5 (3) EpiG in conjunction with the Vienna Contact Tracing Ordinance□

Data is - as explained in more detail above - health data according to Art. 4 Z 15 DSGVO.□

Also the consistent jurisprudence of the Constitutional Court on the quality of an overriding norm in□

Within the meaning of Section 1 (2) DSG, it can be inferred that this must meet certain requirements (cf.□

more recently the findings of December 11, 2019, G 72/2019 and others, and of December 12, 2019,□

G 164/2019 and others).□

However, the data protection authority expressly makes it clear that it is neither their task - nor of it□

their competence is not covered - to finally determine whether the subject of the proceedings□

Provisions are contrary to § 1 Para. 2 DSG or Art. 8 EU-GRC.□

However, the data protection authority is obliged to comply with national regulations that are in a□

manifest contradiction with Union law, should be left unapplied in the event of a conflict.□

The principle of the primacy of Union law over national law applies□

(Application priority). This is of particular importance where directly applicable□

Union law - such as the GDPR - meets conflicting national law. the□

Precedence of application means that in the event of a conflict, the rule of the (directly applicable)□

Union law, not that of Austrian law (cf. VfSlg. 15.448/1999,□

19.661/2012 with reference; Mayer/Kucsko-Stadlmayer/Stöger, Federal Constitutional Law11 [2015] Rz 246/9).□

This principle must be observed by all Austrian authorities, they have national law□

should therefore not be applied in such cases. On the rank of Austrian law comes□

It does not matter, Union law also takes precedence over national constitutional law in the event of a conflict (cf. VfSlg.□

15.427/1999; 17.347/2003; Mayer/Kucsko-Stadlmayer/Stöger, Federal Constitutional Law11□

[2015]□

Margin no. 246/9).□

The scope of an intervention must be clear from the text of the standard itself. But if to□

Determination of meaning Subtle knowledge of data protection law, qualified legal qualifications and□

Experience and almost archival diligence - above all through intensive study of legal materials□

and other aids - is necessary (cf. mutatis mutandis VfSlg. 12.420/1990), cannot be said□

be that the effects of legally stipulated data processing are simple□

to understand.□

However, the (simple) traceability is in turn a prerequisite for those affected to understand the scope□

to become aware of an interference and to be able to claim their rights. This will already□

set out in Art. 5 Para. 1 lit. a GDPR (principle of lawfulness, processing in good faith□

faith, transparency).□

According to the case law of the ECJ, it is not sufficient if data processing is based on one of the□

Art. 6 GDPR - or as here: Art. 9 Para. 2 - conclusively mentioned legality□

can be supported; there must also be all the principles governing the processing of personal data□

Data according to Art. 5 DSGVO are complied with (cf. the legal situation according to Directive 95/46/EC das□

Judgment of December 11, 2019, C-708/18, margin no. 36).□

ii) Applied to the present case, this means the following:□

The standard in Section 5 (3) EpiG in conjunction with Section 1 (2) (e) of the Vienna Contact Tracing Ordinance□

Data processing for owners of catering establishments contains - as can be seen from the above□

statements results in - neither clear nor precise rules for the scope and application of these□

Measure. In particular, for those affected, the circumstances when there is an intervention in the in § 1□

DSG or Art. 8 EU-GRC constitutionally or primary law guarantees the right to data protection□

and whether this data must be disclosed (see the explanations above),□

not clearly evident.□

In the light of the case law of the ECJ, which – especially when it comes to sensitive processing□

Data goes - to regulations that fall into the rights under Art. 7 (respect for private and family life)□

or Art. 8 (Protection of personal data) EU-GRC, clear and precise requirements□

standardized for the scope and application of this measure, the provisions of § 5□

Para. 3 EpiG in conjunction with the Vienna Contact Tracing Ordinance due to the primacy of Union law□

subject to remain unapplied, leaving an obligation to process□

personal data cannot be based on it.□

The complaint therefore proves to be justified from this point of view as well.□

d) Violation of the principle of "good faith"□

i) However, the complaint also proves to be justified based on the following considerations:□

The Respondent submits that the Complainant provided his data voluntarily□

placed. As can be seen in the statements in their privacy policy, they link the survey□

of their customers' data, however, with access to their business premises or states that□

a customer who refuses to provide their data will be denied access□

can. In addition, in its data protection declaration, it refers to the legal basis for the□

Processing based on Art. 6 (1) (c) GDPR in conjunction with Section 1 (2) (e) of the Vienna Contact Tracing Ordinance.□

ii) As already stated, it is not sufficient that data processing is based on a permit□

can be supported, but must also comply with all principles of Art. 5 GDPR□

respectively. According to Art. 5 Para. 1 lit. a DSGVO data must be in good faith in a for the□

Data subjects are processed in a comprehensible manner.□

As a result, the practice of the complainant turns out to be based on a□

– insufficient – legal obligation to invoke the processing, the collection however□

at the same time dependent on the voluntary information provided by your customers as misleading. Then□

in this way, the impression is given to the person concerned that they are in control of the processing□

to be able to exercise.□

In this respect, the Respondent has violated the principle of Art. 5 (1) lit□

Faith") violated and thereby the Complainant in his right to secrecy□

§ 1 DSG violated□

(cf. above; notification DSB of October 31, 2018,□

GZ: DSB-D123.076/0003-DSB/2018).□

4. Result□

The complaint therefore proves to the extent that a violation in the right to secrecy is alleged□

because the Respondent's first and last name as well as the telephone number of the complainant□

determined without a legal basis as justified, which is why the decision had to be taken in accordance with the verdict.□

Regarding point 2:□

Insofar as the complaint is against the processing of data other than that specified in the information□

of the complainant, it turns out to be unfounded in the absence of actual processing.□

It was therefore to be decided accordingly.□