

GZ: 2020-0.605.768 from September 28, 2020 (case number: DSB-D198.001)□

[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 the application of A*** GmbH (registered on□

FN *5*1*91r□

in the company register of the Vienna Commercial Court, applicant), with registered office□

(head office)□

in□

****, from December 16, 2019 on accreditation as□

Monitoring body according to Art. 41 Para. 1 GDPR as follows:□

1. The application is partially followed and the applicant as□

Monitoring body for the "Privacy Code of Conduct of the Association S*** - S***□

CoC", approved with the decision of November 5, 2019, GZ: DSB-D196.006/0005-□

DSB/2019, as amended, a c r e d i t i e r t.□

2. For the rest, the application is rejected.□

3. According to § 78 of the General Administrative Procedures Act 1991 (AVG), BGBl.□

No. 51/1991 as amended, in conjunction with Sections 1, 3, Paragraph 1 and TP 1 of the Federal Administrative Tax Ordinance

1983, Federal Law Gazette No. 24 as amended (BVwAbgV), the applicant has an administrative fee in□

Height of□

to pay.□

6.50 euros□

Legal basis: Art. 40, Art. 41, Art. 51 (1), Art. 57 (1) lit. p and lit. q of

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

May 4, 2016, p. 1; Section 18 (1) of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended; § 2

Para. 1 and Para. 2 and §§ 3 to 6 of the Ordinance of the Data Protection Authority on the

Requirements for a body responsible for monitoring compliance with codes of conduct

(ÜStAkk-V), Federal Law Gazette II No. 264/2019; Section 78 of the General Administrative Procedures Act

1991

(AVG), Federal Law Gazette No. 51/1991

idgF

in conjunction with §§ 1, 3 para. 1 and TP 1 of

Federal Administrative Tax Ordinance 1983 (BVwAbgV), Federal Law Gazette No. 24/1983 as amended.

I) Submissions of the applicant and course of the procedure

REASON

1. With submission of December 16, 2019, received by the data protection authority on

December 19, 2019, the applicant applied for a total of three codes of conduct,

which have been approved by the data protection authority in accordance with Art. 40 Para. 5 GDPR, as

to be accredited. The applicant has as enclosures

to the application or

in the further course of the procedure at the request of the

Documents corresponding to the data protection authority (evidence according to § 2 to 6 ÜStAkk-

V) submitted.

2.

These are the following rules of conduct (in the current version):

A) "Privacy Code of Conduct of Association S*** - S*** CoC", approved with

Notice of November 5, 2019, GZ: DSB-D196.006/0005-DSB/2019

(short

Code of Conduct S***), Holder of the permit: Association S*** ("S****" for short).□

B) "Rules of conduct for ****", approved by decision of May 13, 2019, GZ: DSB-□

D196.003/0001-DSB/2019 (short: code of conduct M***), holder of the permit:□

1st association J***, 2nd association K***;□

C) "Privacy Code of Conduct for U****", approved by notice dated August 6th□

2019, GZ: DSB-D196.001/0004-DSB/2019 (short: Code of Conduct U***), owner of□

Approval: 1st Association T***, 2nd Austrian V*** Association;□

3.□

The data protection authority requested the applicant with a procedural order dated□

January 9, 2020, GZ: DSB-D198.001/0001-DSB/2019, to submit documents□

showing that the applicant has been informed by the holders of the permits□

regarding the three designated rules of conduct, each with the task of one□

monitoring body has been entrusted.□

4. By letter dated February 9, 2020, the applicant submitted that such a□

Evidence is not provided for either in the ÜStAkk-V or in the GDPR. Moreover be□

the relevant rules of conduct, in the absence of a previous designation of one□

Monitoring body, only approved suspensively and not yet applicable.□

Irrespective of this interpretation of the law, however, the owners of the respective□

Permissions requested to provide appropriate confirmations to the data protection authority□

to transfer.□

5.□

The data protection authority then requested all holders of the authorizations for the□

Rules of conduct A) to C) with procedural order (request) dated February 19, 2020,□

GZ: 2020-0.095.999, for a statement on the following issues:□

1.□

Do the holders of the permit expressly authorize the applicant to□

monitoring station□

ordered for the code of conduct and with□

her one□

corresponding agreement reached?□

2.□

Speak for or against accreditation of the applicant in the above□

sense out?□

6.□

Of those asked, with letters dated February 10 and April 29, 2020, only□

the S*** expressly for accreditation of the applicant as a monitoring body□

pronounced for the rules of conduct A). The holders of the permit for the□

Rules of conduct C) were expressly stated in the statement of May 12, 2020□

against accreditation of the applicant as a monitoring body for□

their□

rules of conduct stated. the□

holder of the permit□

for the□

have rules of conduct B),□

despite repeated requests, none□

content□

opinion given. However, on August 24, 2020 at the data protection authority□

the application by J*** Service GmbH for accreditation as a monitoring body for the□

Rules of conduct B) received by both permit holders expressly□

is supported in writing and which is currently being examined for procedure number DSB-D198.006□

will.□

II) Findings of Facts□

7.□

The submissions under point I), the documents submitted by the applicant and□
the declarations of the holders of the rules of conduct A), B) and C) are the□
Findings of fact are taken as a basis.□

8th.□

Evidence assessment: The undisputed facts are based on the under point I)□
enumerated process results. The determination that the holders of the□
Rules of conduct B) and C) not expressly for or against the accreditation of□
Applicant have spoken out for the respective rules of conduct, was also□
not disputed by the applicant after being heard by the parties, disputed□
was merely the question of the need for a□
appropriate consensus.□

III) From a legal point of view it follows:□

Competence of the Data Protection Authority□

9.□

The Data Protection Authority is responsible for handling requests for accreditation from□

Monitoring bodies within the meaning of Art. 41 Para. 1 DSGVO responsible, which according to Art. 57 Para. 1□
lit. q GDPR in conjunction with Section 2 (2) ÜStAkk-V.□

Re point 1 (partial accreditation)□

10. The activity of the applicant based on the submitted (and the□

Factual findings underlying) documents to be made.□

11. The applicant has to provide the proof required according to §§ 2 to 6 ÜStAkk-V□
satisfaction of the data protection authority.□

12. The further justification does not apply according to § 58 para. 2 AVG, because the point of view of□
applicant is met.□

Regarding point 2 (summary rejection of the remaining parts of the accreditation application)□

Interpretation of Art. 41 GDPR□

13. Art. 41 GDPR makes no express statement as to whether only a single□

Monitoring body – this is what the wording of the first sentence of Article 41 (1) indicates□

GDPR (“from a body”; no underlining□

in the original; others too□

Language versions – such as English, French, Spanish or Italian□

- coincide in this regard with the German) - with the monitoring of a□

Set of rules may be entrusted, or whether Council and Parliament as legislators of□

European Union also a kind of competition between monitoring bodies□

wanted to make possible.□

14□

In the second case, the additional question arises as to whether accreditation of (further)□

Surveillance bodies also without consent, and under certain circumstances even against the□

the will of the owner of the code of conduct to be monitored (hereinafter□

in short: non-consensus accreditation). The latter seems□

in terms of□

Rules of conduct B) and C) the view of the applicant and accreditation applicant□

to be, since in both cases they submitted their application even after the lack of consensus□

(rules of conduct B)) or the express objection (rules of conduct C)) of□

respective license holder has not restricted accordingly.□

15. The European Data Protection Board (short: EDPB) has□

in exercise of his□

Powers according to Art. 70 Para. 1□

lit n) GDPR the guidelines 1/2019□

Rules of conduct and monitoring bodies in accordance with Regulation (EU) 2016/679,□

Version 2.0, approved and published on June 4, 2019.□

16. In it, the EDPB does not make any clear and unequivocal view, but shows a clear preference for the possibility to accredit several monitoring bodies for one set of rules. In particular, in Margin no. 60 mentions that “at least one monitoring body” should be included in the code of conduct. (emphasis not in the original) with accreditation from the supervisory authority have to be.

17. The data protection authority therefore sets Art. 41 GDPR in accordance with the EDPB so out that an accreditation of several monitoring bodies for one and the same set of rules is possible (also Strohmaier in Knyrim, DatKomm Art 41 GDPR (as of 1.12.2018, rdb.at), margin no. 17 mwN). However, this is only to be understood that such Multiple accreditation is not excluded according to the current legal situation.

18. The data protection authority concludes from the logical-systematic context of Art. 40 and 41 GDPR, in particular from Article 40 (4) in conjunction with Article 41 (2) (c) GDPR, namely further that a monitoring body with the permit holder, the according to Art. 40 Para. 2 GDPR a representative industry or professional association of controllers or processors, who must therefore be responsible for its members – those to be monitored – speaks, has to work together. This only appears then possible if the associations concerned support the accreditation applicant.

According to the EDPB Guidelines 1/2019 cited above (margin no. 15 f), it is therefore a matter for the or the permit holder, a monitoring body that appears suitable select and name. Multiple nominations are permitted.

The decision as to whether multiple accreditation should be possible is therefore up to you with code of conduct approval holders.

19. As already mentioned, this also speaks in favor of consensual accreditation Interplay between Art. 40 (4) and Art. 41 (2) lit. c GDPR, since these Rules of procedure must be coordinated with one another if they cease to have any effect

should.□

20. The accreditation of a monitoring body, the permit holder expressly□

rejecting it is just as impossible as accreditation□

a competing monitoring body if the permit holders already□

expressly expresses their support for another accreditation applicant□

to have.□

21. Such a non-consensual accreditation as the applicant regarding the□

rules of conduct B) and C) would lead to the foreseeable future□

Permission holders refuse to cooperate in the case described, and the□

Surveillance activity for which accreditation has been granted, actually not□

can be exercised. Likewise, in this case, an effective interaction of□

respective procedural regulations cannot be guaranteed. It can□

Union legislators are not, however, assumed to have made a regulation□

have, with the□

officials that go nowhere and are therefore dysfunctional□

permits are to be granted.□

For this matter it follows that:□

22. The□

Applicant, as stated above (margin nos. 1 and 7), those specified in the ÜStAkk-V□

Evidence provided.□

23. However, as above under margin no. 6 noted, the license holders of the□

Rules of conduct C) expressly against accreditation of the applicant□

pronounced. However, the approval holders of the code of conduct B) have□

their support of the accreditation application to the data protection authority□

expressed elsewhere.□

24. With regard to both codes of conduct, the preliminary investigation has thus shown that□

no basis for the necessary cooperation between the applicant and the

four permit holders concerned. There are no procedures for this

nor structures within the meaning of Article 40 (4) and Article 41 (2) (c) GDPR in order to

to be able to carry out the activity of a monitoring body successfully. the

Accreditation requirements are not met.

25. The application was therefore otherwise dismissed as in point 2).

Regarding point 3 (costs)

26. The cost of the award (administrative fee) is based on the quoted

provisions. The application for approval of a code of conduct is not a submission

according to § 24 DSG and therefore not from the fee and tax exemption clause of the

Section 69 (6) DSG includes.

27. This sum is to be paid into the account of BAWAG P.S.K., Georg-Coch-Platz 2, 1018 Vienna,

IBAN: AT460100000005490031, BIC: BAWAATWW,

ringing

on

the

data protection authority,

to deposit As purpose may the

Business number and the completion date are given.

28. Thus, the decision had to be taken in accordance with the verdict.

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