

GZ: 2020-0.582.166 from February 12, 2021 (case number: DSB-D550.215)□

[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*** GmbH (FN: xxx)□

The A*** GmbH based in xxx has as the person responsible within the meaning of Art. 4 Z 7 of the Regulation (EU)□

2016/679 on the protection of natural persons with regard to the processing of personal data, for free□

data traffic and repealing Directive 95/46/EC (General Data Protection Regulation, im□

hereinafter: "GDPR"), OJ No. L 119 of 04.05.2016, p. 1, following administrative offence(s)□

committed:□

The accused has□

in any case□

in the period from 05/15/2019 to 11/19/2019□

in xxx as□

those responsible for data protection against their obligation to cooperate under Art. 31 GDPR□

with the data protection authority as the supervisory authority on request by being in violation during the period of the crime□

three separate complaints procedures before the data protection authority (GZ: DSB-D124.289; DSB-□

D124.286; DSB-D124.285) as the respondent and responsible for data protection□

was and despite urgency by the data protection authority not or only late in the procedure□

has involved.□

In two cases it did not present itself at all and in one case it was very late in presenting the□

respective complainant.□

It is thereby its obligation to cooperate with the supervisory authority on request in two□

cases not and in one case only insufficiently.□

This was made possible by the fact that the person appointed to represent the outside world during the period of the crime and

internally responsible for controlling and monitoring all data protection matters

Managing Director B**, born on xxx, by neglecting due diligence and due to

lack of control and monitoring, the administrative violation outlined above

is responsible for. In any case, the managing director failed to set up an effective internal

To implement a control system in the form of suitable measures for day-to-day operations.

As a result, the accused responded in two cases to the requests for

No statement from the data protection authority at all and in one case only after the deadline had expired

complied with and thereby violated their obligation to cooperate with supervisory authorities according to Art. 31

GDPR violated.

The unlawful and culpable behavior of the managing director named above will be

with regard to § 30 para. 1 and para. 2 Data Protection Act (hereinafter "DSG") of A** GmbH as

Accused legal person and responsible for data protection within the meaning of Art. 4 Z 7

GDPR attributed.

As a result, the accused violated the following legal provisions:

Article 31 in conjunction with Article 83 (4) (a) GDPR

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

fine of euros

according to

€ 3,000.00

Article 31 in conjunction with Article 83 (4) (a) GDPR

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

300.00

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 ☐

3,300.00 ☐

Euro ☐

Payment term: ☐

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

in this case within two weeks after the entry into force of law to the BAWAG P.S.K. account, ☐

Georg-Coch-Platz 2, 1018 Vienna, IBAN: AT460100000005490031, BIC: BAWAATWW, in the name of ☐

the data protection authority. The business number as well as ☐

the completion date must be specified. ☐

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

A flat-rate fee of five euros must be paid. However, nothing happens ☐

payment, the outstanding amount will be enforced and, if uncollectible, the same ☐

Amount corresponding substitute imprisonment carried out. ☐

Reason: ☐

The following facts relevant to the decision are based on the carried out ☐

evidentiary procedure: ☐

I ☐

About the procedure: ☐

1. ☐

Three employees of the accused (hereinafter: persons concerned) have against the ☐

Accused each of a complaint of violation of the right to secrecy after ☐

Art. 77 GDPR in conjunction with §§ 1 and 24 DSG introduced, since the accused has health data as well as ☐

other ☐

Data ☐

this ☐

affected ☐

persons□

in the□

connection□

With□

Reports of incapacity for work as part of a set up in the “WhatsApp” news service□

and shared with other employees by the group "A*** GmbH" operated by the accused□

should have. Those affected complained about the lack of a legal basis for the specific□

Processing and therefore requested a declaration of infringement□

in the right to□

Confidentiality.□

2.□

In the complaints procedure for GZ: DSB-D124.289, the data protection authority initially□

Procedural order from March 22nd, 2019 (GZ: DSB-D124.289/0002-DSB/2019 – delivery□

was done by means of an uncertified letter) and then with an urgent letter dated April 17, 2019□

(GZ. DSB-D124.289/0003-DSB/2019),□

under connection□

a copy□

the□

first□

Procedural order and provided with a reference to possible administrative penal law□

Consequences of a breach of Art. 31 GDPR, each subject to a two-week deadline□

the accused is asked to comment. The delivery of the procedural order of□

04/17/2019 on 04/30/2019 is documented (return receipt). The accused has□

initially made no comment. Only on November 20th, 2019 and November 22nd, 2019 did the□

Accused submitted two opinions on the applicant's allegations. in the□

In the course of these two statements, the accused brought up further factual elements□

connection with the disclosure of the notification of incapacity for work as part of the Whatsapp group before. With regard to the legal assessment, the accused applied the lack of passive legitimation. In addition, the period according to § 73 para. 1 AVG has already expired and the Principle "ne bis in idem" (prohibition of double jeopardy) is here - with reference to the with Comparing completed labor court proceedings – also to be taken into account Evidence: Inspection of the file documents of the complaint procedure before the data protection authority to the GZ: DSB-D124.289, completed with the decision of the DSB of December 23, 2019

3. The object of the complaint proceedings regarding GZ: DSB-D124.286 was also the alleged

Violation of the right to secrecy by the accused due to the disclosure of

Health data and other data within the Whatsapp group "A*** GmbH", which is managed by

of the accused for the purpose of direct and efficient communication between them

employees of the accused. The Whatsapp group will also, among other things

for the transmission of service instructions, changes in daily working hours and shifts

used. In this procedure, the accused was arrested on April 1, 2019 per

Letter invited for comment but did not comment. The clearance and

the postal dispatch are documented. The accused was

Data protection authority with further execution from June 6, 2019 by RSb delivery to

Requested for comment but again did not comment. A corresponding

Confirmation of acceptance is attached to the respective act, which shows that the completion

personally taken over by the data protection authority on June 26, 2019.

Evidence: Inspection of the file documents of the complaint procedure before the data protection authority to the GZ: DSB-D124.286, completed with the decision of the DSB of 07.10.2019.

4.

The alleged infringement was also in the law in the complaints procedure to the GZ: DSB-D124.285

on confidentiality by the accused due to the disclosure of health data and

other data within the Whatsapp group "A*** GmbH" is the subject of the proceedings. In

of this procedure, the accused was dismissed by the data protection authority with completion of

April 1, 2019 letter requested comment, but did not comment. the

Dispatch and postal dispatch are documented. The accused was then

with further settlement of June 6, 2019 by RSb asked to comment, but gave

again no comment. A corresponding confirmation of acceptance lies with the respective

Act from which it is clear that the execution of the data protection authority on June 26, 2019

was taken personally.

Evidence: Inspection of the file documents of the complaint procedure before the data protection authority

to the GZ: DSB-D124.285, completed with the decision of the DSB of 07.10.2019.

5.

The data protection authority then initiated administrative penal proceedings against the accused

as well as in the further course by an additional request for justification also against

the natural persons who are authorized to represent externally at the time of the crime - shown in the company register

persons (managing directors: B**, C**, D**). The accused complied with all requests

in administrative penal proceedings in good time and has contributed to finding the truth.

6.

The accused, through the accused's representative, RA Dr. A** N**, born on xxx, im

represented during her interrogation on August 3rd, 2020 at 11:15 am.

On the organizational structure of the accused

7.

The accused has three managing directors who are listed in the company register, namely:

a. B**, born on xxx (representative since xxx)

b. C**, born on xxx (representative since xxx)

c. D**, born on xxx (representative since xxx)

All directors are based in xxx, Spain.

8th.

The manager B***

is

internally with the control and monitoring of all

entrusted with data protection matters and thus, among other things, also for

pending complaint procedures before the data protection authority. The operational

Day-to-day business of the suspects in Austria is managed by operations manager E***. This

carries out its activities in Styria in the logistics center O***, which is also managed by the

accused is operated. In addition, the operations manager also carries out his work in

Germany R***) and therefore always commutes between O***. and R***. At the company headquarters

Accused in xxx there is no employee of the accused. The daily mail on

Company headquarters will be remedied by the accused representative and her employees and immediately

(unopened) forwarded to the logistics center in O***. There are none in the logistics center

office space. The company headquarters therefore only served as a postal address at the time of the crime.

In any case, the accused does not run any operational business in xxx. The operations manager E*** was there

Reporting directly to the management in organizational terms at the time of the crime

at regular intervals to the management about the operational business in Austria and

Germany in English.

9.

Before data subjects lodge a complaint of alleged violation of the right to

brought confidentiality to the data protection authority, there were three separate ones

labor law proceedings (GZ: xxx) before the regional court for civil law matters Graz as

Labor and Social Court (hereinafter: LG Graz). The data subjects (represented by

xxx) sought - due to violation of their right to secrecy through disclosure

of the data in the Whatsapp group chat "A*** GmbH" used by the accused for the purpose of

direct and efficient communication between employees and the issuance of

Instructions to employees is operated - compensation, each in the amount of

EUR 3,000.00 and reimbursement of all procedural costs. The accused closed in this three procedures with the persons concerned from a settlement. The accused obliges agreed to pay each of the affected persons an amount of EUR 1,585.50 and to reimburse the pay half of the court costs. This amount has already been affected over xxx people paid.

10. Managing Director B***, who is responsible for internal data protection matters, left assume that all decision-relevant information and documents are already in the course the complaint was submitted by the data subjects and that it no further statement by the accused is required. The requests of

In addition, the data protection authority could not be classified correctly and was den labor law proceedings before the LG Graz, which have already been concluded with a settlement were, assigned. The requests of the data protection authority were therefore considered considered irrelevant. Despite the urgency, there was no reaction to the requests for justification.

11. In its profit and loss account for the period from January 1st, 2019 to 31.12.2019 in 2019 an annual turnover of EUR 86n.nnn,nn and other operational Income amounting to EUR 7.nnn,nn. The operating result is EUR 34.nnn,nn quantified. In 2019, there was a balance sheet loss of EUR 79,nnn,nn.

II.

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

1.

The data protection authority submits the following papers/documents to its statements of facts underlying (evidence):

a.

The file content of the complaint procedure before the data protection authority

GZ: DSB-D124.289, completed with notification from the DSB of December 23, 2019,

b.□

the file content of the complaint procedure before the data protection authority□

GZ: DSB-D124.286, done with notification from the DSB of 07.10.2019,□

c.□

the file content of the complaint procedure before the data protection authority□

GZ: DSB-D124.285, completed with the decision of the DSB of 07.10.2019,□

i.e.□

the minutes of the interrogation of the representative of the accused from August 3rd, 2020□

in the present proceedings,□

e.□

Written statement by the accused in the present proceedings dated□

08/03/2020 (including attachments) to the alleged offense and in accordance with the□

Request for justification from February 18, 2020,□

f.□

Excerpt from the commercial register as of August 3rd, 2020 for FN xxx (A*** GmbH),□

G. Income statement of the accused for the period from January 1st, 2019 to□

12/31/2019,□

H.□

Written statement by the accused in the present proceedings dated□

09/10/2020 in accordance with the additional request to justify the□

Data Protection Authority from 04.08.2020,□

i.□

Settlement copy for the proceedings before the regional court for civil law matters in Graz□

as labor and social court (GZ: xxx),□

j.□

Settlement copy for the proceedings before the regional court for civil law matters in Graz□

as labor and social court (GZ: xxx),□

k.□

Settlement copy for the proceedings before the regional court for civil law matters in Graz□

as labor and social court (GZ: xxx).□

There are no justified doubts as to the authenticity of the documents.□

2.□

The findings on the lack of cooperation between the accused and the□

Data protection authority as supervisory authority or failure to comply with requests for□

Opinion in the three complaint procedures before the data protection authority are based on the□

conclusively documented content of the files for the respective procedures (see above evidence 1. a, b□

and c). In addition, the accused admits the non-compliance with the requests□

Opinion of the data protection authority in the course of its written justification of□

September 10, 2020 (see proof 1. h above). Also as part of the first written justification□

of the accused from August 3rd, 2020 (see evidence 1. e above), the accused admits the□

Non-compliance with the requests: "The data protection authority requested the accused to□

opinion on. The accused as respondent did not submit a statement.□

3.□

The statement on point I.7 (compilation of the management of the accused) results□

from the excerpt from the commercial register as of August 3rd, 2020 (see proof 1. f above). the□

Finding that all directors are resident in Spain is based on the opinion□

of the accused from August 3rd, 2020 (see evidence 1. e above).□

4.□

The findings on the organizational structure, the establishment and the administration of the□

day-to-day operations in Austria and the internal distribution of tasks (determination of□

Point I.8) are essentially based on the transcript of the questioning of the representative of□

accused from August 3rd, 2020 as well as on the written justifications of the accused□

from 08/03/2020 and 09/10/2020 (see evidence 1. d, e and h above).□

5.□

The statement on point I.10 (last sentence) with regard to the fact that the requests for□

Statement of the data protection authority could not be correctly assigned and□

it was wrongly assumed that these letters were related to the□

already completed labor law proceedings before the LG Graz, results from the□

own statements of the representative of the accused in the course of her interrogation on□

08/03/2020 (see proof 1. d above). The representative stated the following: “Furthermore□

the requests of the data protection authority were not factually classified correctly. This□

Letters were corrected in Vienna by my office staff and sent directly (unopened) to□

forwarded to the logistics center in O***. Subsequently, these letters were□

Data protection authority in O*** considered irrelevant by the operations manager, since the□

labor disputes were deemed closed”.□

6.□

Any findings relating to the events prior to the complaint being made by the□

Those affected (background of the complaints = disclosure of health data and other□

Data in the Whatsapp group chat of the accused) and the course of the proceedings before□

LG Graz as a labor and social court are based on those submitted by the accused□

Comparative copies of the respective procedures with those affected (see evidence above□

1. i, j and k), the written justification of the accused from August 3rd, 2020 (see above□

Evidence 1. e) and the contents of the files on the respective complaints procedures before the□

Data Protection Authority (see evidence 1. a, b and c above).□

7.□

The findings on annual sales, other operating income and□

Operating result (item I.11) results from the profit and loss account of□

Accused for the year 2019 (see evidence 1 g above)□

III. Legally it follows:□

1.□

Art. 83 (4) lit□

and the processor according to Art. 8, 11, 25 to 39, 42 and 43 GDPR fines of□

up to 10 million euros or, in the case of a company, up to 2% of its total□

annual turnover achieved worldwide in the previous financial year□

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

Jurisdiction to impose fines on natural and legal□

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

To the saying□

To fulfill the objective facts□

2.□

The accused brought in terms of the legal assessment of the subject matter□

Facts essentially that neither Art. 31 GDPR nor the AVG lead to a□

Obligation to submit an opinion in an adversarial procedure can be derived. Of the□

Data Protection Authority would be all the necessary documents and□

information□

for one□

Decision made, the Chamber of Labor already had all the data protection authority□

relevant information transmitted. In any case, the accused would have nothing left to do□

procedures can contribute. From a legal point of view, this view cannot and is not to be followed□

counter the following:□

3.□

First of all, it should be noted that the accused, based on the findings in□

the case in question and based on the findings in the respective complaints proceedings□

undoubtedly as the operator and thus responsible within the meaning of Art. 4 Z 7 DSGVO for the□

processing□

the□

personal□

Data□

and□

health data□

(Notifications of incapacity to work) within the Whatsapp group "A*** GmbH".□

is. The role as operator of the Whatsapp group and its purpose (immediate and□

efficient communication between the accused's employees and for transmission□

of service instructions, changes in daily working hours and shifts) are□

not disputed by the accused in the present case. The accused even admits this□

Role and its purpose in its justification of August 3rd, 2020 (see page 2, point I. third□

dash). Subject of the respective complaint procedures at the data protection authority□

was the question of whether the accused violated the persons concerned in their right to secrecy according to § 1□

DSG violated by providing health data and other data in this Whatsapp group□

disclosed to other employees. The accused was thus in her capacity as□

responsible for data protection within the meaning of Art. 4 Z 7 DSGVO and thus as□

Respondent involved in the respective complaint proceedings according to § 24 para. 2 no. 2 DSG.□

4.□

As the person responsible, the accused is - on request - pursuant to Art. 31 GDPR□

obliged to cooperate with a supervisory authority in the performance of their duties.□

The data protection authority is the supervisory authority within the meaning of Article 51 GDPR (see also Article 18□

Paragraph 1 DSG). The tasks of a supervisory authority are defined in Art. 57 GDPR. To□

Art. 57 (1) lit. f GDPR, each supervisory authority in its respective sovereign territory must□

with complaints from a data subject or complaints from a body or organization□

or an association pursuant to Art. 80 GDPR, the object of the complaint in□

reasonable extent investigate and the complainant□

within one□

inform you within a reasonable period of time about the progress and the result of the investigation,□

especially when further investigation or coordination with another□

supervisory authority is required. There is an obligation to treat incoming complaints□

within the scope of Article 57 (1) (f) GDPR. The supervisory authority must make such a complaint□

with all due care (see the judgment of the ECJ of July 16, 2020,□

C-311/18, margin no. 109). The powers of a supervisory authority are regulated in Article 58 GDPR.□

According to Article 58 (1) (a) GDPR, a supervisory authority has the power to□

the processor and, where applicable, the representative of the controller or the□

To instruct the processor to provide all information necessary for the fulfillment□

of their duties are required. From this provision□

is already one□

Obligation to cooperate of the norm addressees can be derived (cf. Bogendorfer□

in knyrim,□

DatKomm Art 31 DSGVO margin no. 4). According to § 22 Para. 1 DSG, the data protection authority from□

Those responsible or processors of the checked data processing in particular□

require the necessary clarifications and inspection□

into data processing and□

request relevant documents. In addition, an authority according to § 37 AVG□

in the□

investigative procedures to investigate the relevant facts (material truth) and□

must take the necessary investigative measures according to § 39 AVG ex officio. Of the□

Principle of substantive truth states that the real facts of the authority□

must investigate ex officio and not to the submissions of the parties in one□

adversarial procedure.□

5.□

It can thus be stated as an interim result that the□

Requests for statements to the accused in the respective complaint procedures□

in any case by the powers in Union law and the requirements of national law□

are covered and that the proper investigation of the subject matter of the complaint is a - im□

List of tasks of Art. 58 GDPR - under Union law□

specified obligation of□

data protection authority as a supervisory authority. In addition, according to §§ 37 and 39□

AVG will investigate the relevant facts ex officio and is a party to the proceedings□

also obliged to participate in the determination of the relevant facts (cf□

the decision of the Administrative Court of May 27, 2019, Ra 2019/14/0153). For this reason alone□

comes to the objection of the accused that they were not obliged to comment□

to submit, no authorization to.□

6.□

But even if one wanted to assume that no obligation to cooperate in a□

adversarial proceedings and any omission at the expense of not□

involved party, the objection of the accused has no justification:□

7.□

The norm addressees of Art. 31 GDPR have namely at the request of the supervisory authority□

to work with her. You therefore do not have to act on your own initiative, unless the□

GDPR specifically provides for this in a provision (e.g. in Art. 33 and 36 GDPR). the□

The content of the request from the supervisory authority must be sufficiently specific that the□

The addressee of the norm can understand what is required of him, which is why at least the□

The subject of the request and the purpose will be specified□

(cf. Kastelitz□

in□

Gantschacher/Jelinek/Schmidl/Spanberger□

[Ed.], GDPR Art. 31 Note 3; Bogendorfer□

in□

Knyrim, DatKomm Art. 31 GDPR margin no. 14).□

8th.□

the□

representational□

prompts□

to the□

opinion□

in□

the□

respective□

Complaint procedures were sufficiently defined in terms of content and the accused could□

at least understand what is being asked of her. They were also necessary to□

determine the relevant facts and in particular the accused to those raised□

Hear allegations and give her the opportunity to present her own point of view. That□

The outcome of adversarial proceedings depends by its very nature on whether□

the explanations of the parties to the proceedings are justified or not, because ultimately it is only□

there can be a winning party. The statements of the accused in the course of the□

Hearing of August 3rd, 2020 and the written justifications of August 3rd, 2020 and□

September 10th, 2020 it can be seen that the accused clearly understood the object and purpose of the□

was able to understand requests for comment. However, she felt that her□

Opinion is no longer required, since the data protection authority all relevant□

information. For this reason, no statement - despite the urge - was submitted. the□

Requests for comments are therefore in any case to be regarded as proper "requests from a□

supervisory authority”. □

9. □

As a result, it can therefore be stated that already based on the wording of □

Art. 31 GDPR the accused the objective factual side of the administrative offense of Art. 83 □

Para. 4 lit. a GDPR by being responsible for the multiple □

did not respond to requests for comment in the respective complaints procedures and □

has thereby failed to fulfill its obligation to cooperate with the data protection authority. □

The obligation to cooperate can also be derived from the fact that a supervisory authority is not □

can be assumed from the outset to make senseless inquiries that have no connection □

stand with their enforcement activities. □

10. The allegation of the accused that she therefore did not submit any more statements, □

since she could not have contributed anything more to the procedure, since the data protection authority anyway □

already had all the relevant information, the following must also be countered: □

11. The accused contradicts her own argument with this assertion, since she □

one of the three complaint procedures (to GZ: D124.289) - albeit clearly after the □

given deadline, but before the decision is issued - two statements in a row □

submitted on November 20, 2019 and November 22, 2019. In the course of these statements, the □

Accused, as established in the facts, further factual elements in connection □

with the disclosure of the notification of incapacity to work within the Whatsapp group and □

put forward some arguments with regard to the legal assessment of the facts (e.g. □

the lack of passive legitimacy). From this alone it follows that the data protection authority does not □

has received all relevant information submitted by the complainants. the □

Although comments were clearly delayed, no decision had been received by then □

enacted, which is why the statements of the accused □

anyway □

in the □

Investigative proceedings were taken up and subsequently also addressed in the decision.□

The statements of the accused have thus to determine the authoritative□

facts contributed. Thus, the view of the accused cannot be followed at all□

that she was no longer able to contribute to the proceedings (cf. again that already□

cited decision of the Administrative Court of May 27, 2019).□

12. On the illegal and culpable behavior of the management and attribution of the□

behavior to the legal person□

In the course of her written justification dated September 10, 2020, the accused raised□

the fault of the managing director B *** summarized, that in any case no□

fault on the part of the managing director. Should the data protection authority nevertheless□

assume fault, there is only fault of a "minor degree". The only□

Misconduct that the manager could be accused of is the fact that he□

has failed to find out about the further course of the procedure with the data protection authority□

to inform. This is due to the suspect's residence in xxx, Spain.□

From a legal point of view, this view of the accused cannot be followed and is explained below□

explained in more detail:□

13. According to § 30 paragraph 2 DSG, legal persons can be prosecuted for violations of the provisions of the□

GDPR and § 1 or Article 2 1st main part of the DSG be held responsible if□

Lack of supervision or control by a person named in Section 30 (1) DSG□

commission of these violations by a person working for the legal entity.□

The decisive question here is whether an effective internal control system is in place at the□

accused was implemented, here in particular for the day-to-day operations in□

to monitor Austria from Spain.□

14□

As part of the legal assessment of whether□

in the present case an effective one□

control system was set up, are the following considerations from the judicature of the VwGH□

in any case, to take into account:□

15. An effective control system requires that possible violations are systematically monitored□

is investigated, these violations are documented and addressed accordingly□

Consequences (e.g. to improve instructions or training,□

possibly also lead to disciplinary measures), so in the end with good reason□

it can be expected that compliance with regulations is guaranteed (cf. VwGH□

07.03.2016, Ra 2016/02/0030, mwH).□

16. In demonstrating an effective control system, it is necessary to do so, among other things□

to show which measures in detail the immediate superior within the framework of the□

control system was obliged to enforce that everyone in this□

Employees involved in the control system actually comply with the relevant regulations□

corresponds to and what measures are taken at the top of the corporate hierarchy□

standing ordering officer has provided for the functioning of a control system□

to ensure overall, i.e. in particular to enforce or ensure that the□

orders (instructions) issued by the respective higher level to comply with the□

Regulations as well as the relevant training courses also to the respective subordinate, i.e. last□

reach the lowest hierarchical level and are actually followed there (cf. from□

settled case law□

such as Administrative Court□

June 9, 2017, Ra 2017/02/0068;□

7.3.2016,□

Ra 2016/03/0030).□

17□

In the context of the implementation of the existing for employees□

Control duties must not be disregarded that straight□

in the case□

unauthorized actions by employees, there is a corresponding control system□

cannot be fully relied on, that instructed, ongoing□

trained and properly equipped employees in any case□

comply with the legal provisions (cf. VwGH 03/20/2018, Ra 2017/03/0092). A□

effective control system required□

but not constant supervision□

each□

worker, but the taking of measures that are among the foreseeable□

Circumstances that there is good reason to expect compliance with the statutory provisions (cf. □

VwGH 9.2.2015, Ra 2015/02/0014). It is also not the task of the data protection authority□

To provide guidance on how to have a working control system in one□

company or operation is to be designed specifically, but to check whether it is on the ground□

the explanations of the party concerned a control system in the sense mentioned□

is in place or whether the control system shown has been adequately observed in order to□

to make a lack of fault credible (cf. VwGH 12.2.2020, Ra 2020/02/0005;□

March 7th, 2016, Ra 2016/02/0030, with further references).□

18. Transferred to the facts in question can therefore, taking into account the□

consistent case law of the VwGH on the effective control system in connection with□

the fault of the responsible person, the following is recorded:□

19. The□

internally with the control and monitoring of all data protection regulations□

Matters entrusted to managing director B *** and the accused could not result in□

effective control system for the operation of day-to-day operations in Austria,□

in particular for dealing with authorities and recognizing relevant documents.□

Only□

appointed manager. There are no employees at the suspect's headquarters in xxx. Of the
Company headquarters or the business address of the suspect functioned during the crime period, as
determined or specified by the accused, only as a pure postal address. at the seat itself
however, no day-to-day operations were conducted. The post office (in the present case the
prompts
for justification
the data protection authority).
from
the

Accused representative received and immediately (unopened) to the manager
at the location in O*** (logistics center of the accused in Austria). Of the
However, operations manager was not only responsible for the logistics center in O***, but also for
that in Germany (R***) and therefore always commuted between R*** and O***. At location in
O*** there is also no office space.

20. The operations manager in Austria is - from an organizational point of view - the management of the
directly subordinated to the accused and reports regularly in English to the
Management about the day-to-day operations in Austria and thus also about the
Status of

ongoing judicial and official proceedings,
however, he has
actual requests for the opinion of the data protection authority wrongly
not treated properly by considering them irrelevant since the labor law
proceedings have already been concluded with a settlement. This is among other things on it
attributed to the fact that the operations manager has a wide range of tasks, since he is responsible for the entire
day-to-day operations in Austria and Germany (logistics center in R***)
and also has to commute regularly between the logistics centers in O*** and R***. Of the

The operations manager is therefore not exclusively responsible for the monitoring or ongoing control of the

pending

judicial

such as

official

procedure

responsible.

One

person responsible under administrative criminal law within the meaning of Section 9 of the VStG will, in view of the

operational work-sharing fulfillment of tasks regularly to fulfill their legal

Obligations also of subordinate auxiliary persons who are subject to their authority to issue orders

serve. In order to ensure compliance with the obligations to which they are subject, it is up to the

person responsible under administrative criminal law within the meaning of § 9 VStG, for the implementation of their opposite

existing control obligations for their employees

Set up a control system to ensure compliance with relevant regulations

can be ensured at any time (cf. VwGH 8.11.2016, Ra 2016/11/0144; 20.03.2018,

Ra 2017/03/0092). In any case, the managing director would at least have the right-wing attitude

Representation of the accused (in the present case the accused representative) more strongly in the

Involve the ongoing control of pending proceedings and at least you too

have to grant a control function, so that the operations manager - alongside his others

Tasks – not only has to monitor the procedures. Above all was the

Accused representative also the legal representation of the accused within the framework of the respective

labor law proceedings before the LG Graz and therefore knew the facts and would be her

As a legally qualified party representatives certainly noticed that the proceedings before

the data protection authority for separate, unrelated to the labor law

procedure.

21. An effective accompanying control system includes one of the administrative penal

responsible persons to be observed objective standard of care, whose

In any case, non-observance indicates a negligent procedure. The necessary

Compliance with this standard of care includes, on the one hand, the establishment of an effective

control system, on the other hand the observance of this control system

in individual cases.

In

In the absence of relevant express regulations, the extent to which to be observed

objective diligence in particular according to what is evident from one of his obligations towards the

People who are aware of the environment and belong to the perpetrator's circle of traffic, reasonably

can be demanded (cf. VwGH 20.03.2018, Ra 2017/03/0092). Starting from the permanent

Jurisdiction of the VwGH (cf. VwGH 16.02.2011, Ra 2011/08/0004) it is up to the

Managing Director - who is appointed to represent a GmbH externally and for the

Compliance with the administrative regulations has to be ensured - an effective control system

set up if he is responsible for taking care of individual matters (such as

for example here the control of pending proceedings or the management of the operational one

day-to-day business) to other people (cf. also VwGH 12.10.2017, Ra 2015/08/0082).

The mere issuing of instructions is not enough to derive from an effective control system

to be able to go out. Decisive

is whether effective control of the

Instructions given to those responsible were carried out, which under the foreseeable circumstances

Compliance with the legal regulation could be expected with good reason (cf. VwGH 16.12.2015,

Ra 2013/10/0236).

22. It is true that the statements of the accused follow that the monitoring of the daily

day-to-day operations by a management based in Spain is not easy

Task constitutes, however, taking into account the above circumstances, in relation

to the accused's control system in question□

to hold that the□

However, the managing director objectively acted in a negligent manner by failing to take effective action□

internal control system in the sense of the judicature of the VwGH for the daily operative□

implemented day-to-day business in Austria. At least the manager would have□

Legal representation of the accused in connection with the control of the pending□

procedures in Austria must be more involved. In addition, the other facility or□

Conception of the accused's internal control system for day-to-day operations□

Austria has a significant error susceptibility (headquarters in xxx is purely a postal address,□

no employees employed there; the mail is sent to O*** to the operations manager, this one□

however, is not always present as it oscillates between O*** and R***; located in O***□

no office space that would facilitate the administration of such matters, etc.).□

Especially from a managing director who is not resident in Austria, not the national language□

is powerful and "runs the business from afar" can be expected to for one□

Establishment in another Member State appoints persons capable of dealing with authorities□

to communicate upon request. Otherwise, a company - like the accused□

– consistently evade effective legal prosecution.□

23rd result□

As a result, it can therefore be summarized that the managing director of□

Accused B*** for compliance with the data protection provisions of the GDPR and□

of the DSG by the accused legal person - in the sense of administrative penal law -□

was responsible and that he had several in the context of day-to-day operations in Austria□

Leave matters to another person (the operations manager E***) on his own responsibility□

Has. Accordingly, the managing director had to have an effective control system for the control of the□

implement or set up day-to-day operations in Austria. The one shown here□

Control system proved to be ineffective or inadequate to ensure compliance□

ensure compliance with the relevant regulations or the day-to-day operations in Austria□

(particularly the pending proceedings). The managing director has in any case - in□

Within the scope of his function - acted objectively carelessly and there is fault in form□

of negligence. The unlawful and culpable behavior of the managing director□

attributed to the accused as a legal entity in accordance with § 30 para. and 2 DSG.□

24. To exclude the criminal liability of the accused's management□

According to § 30 paragraph 3 DSG, the data protection authority has the right to punish a person responsible□

according to § 9 of the Administrative Penal Act 1991 - VStG, Federal Law Gazette No. 52/1991, if for□

an administrative fine has already been imposed on the legal entity for the same violation.□

The personal administrative criminal prosecution and punishment of the managing director of□

Accused was due to the exclusion standard of § 30 para. 3 DSG thus - from legal□

reasons - not allowed.□

IV. The following must be noted for sentencing:□

1. Pursuant to Art. 83 Para. 1 GDPR, the data protection authority must ensure that the□

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

is proportionate and dissuasive. In more detail, paragraph 2 leg. cit□

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

The following should be given due consideration:□

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 data processed□

affected persons 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 violations□

of the person responsible□

or□

of□

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 breach became known to the supervisory authority, in particular whether□

and, if applicable, to what extent the controller or the processor□

notified the breach;□

i)□

j)□

[...]□

[...]□

k)□

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

financial benefits obtained or avoided, directly or indirectly, as a result of the violation□

Losses.□

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

Mitigation grounds, insofar as they do not already determine the threat of punishment, against each other□

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

Sections 32 to 35 of the□

apply the Criminal Code mutatis mutandis. Income and assets and□

any duties of care on the part of the accused are included in the assessment of fines□

take into account (this naturally only applies to natural persons, but is analogous to□

to transfer legal persons); this, however, only to the extent that the directly□

applicable provisions of the GDPR are the provisions of the VStG□

supersede and to the extent permitted by Art. 83 (8) GDPR and recital 148□

is ordered with regard to the procedural guarantees to be guaranteed.□

3. With Art. 83 Para. 3 GDPR, in deviation from the standard with § 22 Para. 2 VStG□

Accumulation principle arranged that□

in cases of the same or related ones□

Processing operations that intentionally or negligently violate several provisions of the□

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. Pursuant to Article 83, paragraph 4, in the event of violations referred to therein, in accordance with paragraph 2,□

Fines of up to EUR 10 000 000 or in the case of a company up to 2% of its□

total worldwide annual sales of the previous financial year imposed, depending□

depending on which of the amounts is higher. The term turnover within the meaning of Art. 83 para. 4 and 5□

GDPR is to be understood in the sense of the net sales of Directive 2013/34/EU. Thereafter□

net sales are the amounts resulting from the sale of products and the provision of services□

of services after deduction of sales deductions and value added tax as well as□

other taxes directly related to the turnover (Art. 2 Z 5 RL 2013/34/EU).□

5.□

Revenues are presented as part of the income statement for the year 2019 as□

noted, estimated at EUR 86n.nnn,nn.□

6.□

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

considered aggravating:□

a.□

Nature, severity, scope and duration of the violation:□

The accused was□

in the context of several complaint procedures several times□

Opinion requested by the data protection authority. The accused has - despite□

Urgency and notification by RSb – repeatedly not responding to the calls, though□

it had to be clear to her at the latest with the urgent letter that her participation in□

procedure was required. There was only a limited response within the scope of one□

of three complaint procedures. It would be□

in any case been possible□

to inform the data protection authority that no opinion will be submitted,□

because, in the opinion of the accused, all the information from the authorities is already available. One□

However, the complete lack of or the delayed reaction led to a clear one□

Delay the process and has the authority in the performance of its duties□

with special needs.□

7.□

Based on the facts at hand, the following was mitigating in the sentencing□

taken into account:□

a.□

Since the data protection authority in relation to the violations of the□

Obligation to cooperate with supervisory authorities not from intentional, but from□

negligent inspection, this was in relation to the possible maximum penalty□

significantly mitigating the penalty;□

b. The data protection authority has no previous relevant records against the accused□

Violations of the GDPR, this was also taken into account as a mitigating penalty;□

c.□

In addition, the accused intends to□

worked very cooperatively with the data protection authority and thus made a significant contribution□

contributed to finding the truth;□

i.e.□

The accused is according to the recommendation of the EU Commission 2003/61□

(European Commission SME definition) is a small business□

(the□

Personnel expenses as part of the income statement for the year 2019□

a number of employees of more than 9 employees, but in any case less than 49 and□

the turnover does not exceed the limit of EUR 10,000,000). This will likewise mainly□

considered as significantly mitigating in the sense of proportionality;□

e.□

The fact that the accused, according to the profit and loss account for the year□

2019 achieved an accumulated loss of EUR 79,nnn,nn.□

f.□

With regard to the□

financial situation of the accused□

-□

in the sense of the□

proportionality□

- also the current COVID-19 pandemic as mitigating□

taken into account.□

8th.□

The concrete penalty imposed in the amount of EUR 3,000.00 therefore appears with regard to the□

realized value of the offence, measured against the available range of penalties of Art. 83 Para. 4□

GDPR□

appropriate to the crime and to blame and is based on the present□

Mitigating grounds at the lowest end of the available penalty range. the□

In any case, imposition is necessary in the general preventive sense in order to protect those responsible and□

processors regarding their obligation to cooperate with the data protection authority□

Sensitize the supervisory authority to the effect that the requests to participate□

Proceedings before the data protection authority□

will be met in a timely manner in order to□

to avoid delays. The specific penalty imposed is therefore for the subject□

Case effective, proportionate and dissuasive within the meaning of Art. 83 (1) GDPR.□