

REFERENCE NUMBER: D124.3816

Clerk:

2023-0.193.268

[REDACTED]  
zH NOYB

Data protection complaint (Art. 77 para. 1 DSGVO, Section 24 para. 1 DSG)

[REDACTED] CRIF GmbH

by e-mail: [REDACTED]

## CONTRIBUTI

## ON

The data protection authority shall decide on the data protection complaint of (comp [REDACTED]  
[REDACTED] represented by the association NOYB - European Centre for Digital  
Rights, of 18 March 2021 against CRIF GmbH (respondent), represented by Baker McKenzie  
Rechtsanwälte LLP & Co KG, concerning 1) the lawfulness of data processing,

2) Violation of the Principle of the earmarking and 3)  
Request on Imposition a data processing ban, as follows:

1. The complaint is upheld with regard to complaint point 1) and it is established that the respondent unlawfully collected the complainant's data (at least: name, address and date of birth) from AZ Direct Österreich GmbH contrary to the requirements of Art. 5 para. 1 lit. a in conjunction with Art. 6 para. 1 DSGVO and subsequently processed them for credit assessment purposes.
2. The appeal is dismissed with regard to appeal point 2).
3. The appeal is dismissed with regard to appeal point 3).

Legal basis: Art. 5 para. 1 lit. a and lit. b, Art. 6 para. 1, Art. 12 para. 2, Art. 13, Art. 14, Art. 51 Paragraph 1, Art. 57(1)(f) as well as Art. 77(1), Art. 58(1), (2) and (6) of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter: GDPR), OJ No. L 119, 4.5.2016 p. 1; §§ 1, 18(1) as well as 24(1), (2) and (5) of the Data Protection Act (DSG), Federal Law Gazette I No. 165/1999.

## C O N S I D U C A T I O N

### A. Arguments of the parties and course of proceedings

A.1. In his submission of 18 March 2021, the complainant alleged a violation of the principle of legality and purpose limitation. In essence, it was alleged that the complainant had learned, in the context of a request for information from AZ Direct Österreich GmbH, that the latter held his name, date of birth and addresses. It had also been apparent that various score values had been passed on to its customers as a result of creditworthiness queries. AZ Direct Österreich GmbH had been the sole source of the data. The complainant stated that he had no business relationship with AZ Direct Österreich GmbH and had not provided any data to it. He had never received any data collection information. The transfer was only permissible for direct marketing purposes. It was evident that the respondent had processed the complainant's data in connection with numerical credit scores. This data processing was unlawful. It was requested that a ban on data processing be imposed, as not only the complainant but also numerous other persons were affected by these violations. Several enclosures were submitted as part of the petition.

A.2. In its statement of 6 May 2021, the respondent submitted, in summary form, that it held business licences as a credit reference agency and for services in automatic data processing and information technology. The respondent and AZ Direct Österreich GmbH were each independent data controllers. Only specific data subject rights under Chapter III of the GDPR were amenable to a data protection complaint; the complaint was vague. AZ Direct Österreich GmbH had a business licence as an address publisher, and the purpose of the data processing had to be examined in the light of this standard. The data processing by the respondent was in accordance with the legal processing purpose of AZ Direct Österreich GmbH. The compatibility test according to Art. 6 (1) DSGVO was in favour of AZ Direct Österreich GmbH or the respondent. The data processing was justified by legitimate interests according to Art. 6(1)(f) DSGVO.

A.3. In his observations of 10 August 2021, the complainant argued, in essence, that the right of appeal under data protection law should be interpreted broadly. The

The respondent had to ensure that the data were stored separately according to the purpose of the processing. The argument concerning section 151(6) of the GewO 1994 could be left aside, as the purpose of assessing creditworthiness was not covered by it. Furthermore, the § Section 151 of the GewO 1994 does not derogate from the GDPR, and the said provision is also not a legal provision within the meaning of Art. 6(4) of the GDPR. The same was to be assumed for § 152 GewO 1994. In other respects, the previous arguments were essentially repeated.

A.4. In its statement of 1 December 2022, the respondent submitted, summarised in essence, that the Federal Ministry of Labour and Economic Affairs had stated that the activities of an address publisher included the area of "customer relationship management (CRM)". According to the aforementioned Federal Ministry, several activities were "encompassed by the scope of authority of address publishers", including the assessment of the creditworthiness of individual customers. Therefore, no change of purpose was to be assumed. In other respects, the previous arguments were essentially repeated. Several enclosures were submitted as part of the statement.

A.5. In its last statement of 1 February 2023, the respondent - after being requested to do so by the data protection authority - submitted in summary form that the decision directed against AZ Direct Österreich GmbH could not be used as a basis for the present proceedings. This was confirmed by a letter from the highest trade authority, the Federal Minister of Labour and Economic Affairs. The data protection authority also had no competence to determine the unlawfulness of the alleged violations. The respondent had collected the following categories of data on the complainant's person: Name, (historical) address data, date of birth and sex. Before collecting the data, the respondent had checked the existence of a corresponding business licence of AZ Direct Österreich GmbH. AZ Direct Österreich GmbH was subject to the supervision of the trade authority. The complainant's data had been used exclusively in the context of its activities as an information agency on credit relationships. In all other respects, the previous arguments were essentially repeated. Several enclosures were submitted as part of the statement.

A.6. In his final statement of 9 March 2023, the complainant argued, in essence, that the decision against AZ Direct Österreich GmbH had to form the basis of the present proceedings. Even if the change of purpose contrary to the GDPR was exclusively attributable to AZ Direct Österreich GmbH, the data processing was still unlawful. The letter from the supreme trade authority was irrelevant; the data protection authority was the only authority in Austria permitted to assess the permissibility of processing under data protection law. In other respects, the previous arguments were essentially repeated. Several enclosures were submitted as part of the statement.

## B. Subject of the complaint

B.1. On the basis of the complainant's submissions, the subject matter of the complaint is the question whether the respondent

A) violates the principle of legality pursuant to Art. 5 (1) lit. a DSGVO in conjunction with Art. 6 (1) and (2) DSGVO.

B) has violated the principle of purpose limitation pursuant to Art. 5 (1) lit. b DSGVO,

in that the respondent collected the complainant's data (at least: name, address and date of birth) from AZ Direct Österreich GmbH and subsequently processed it for credit assessment purposes.

In addition, 3) the complainant's request that the respondent be prohibited from processing data to the effect that

"personal data may not be transmitted to third parties if they know or must know that these third parties process the data for credit assessment purposes pursuant to section 152 GewO 1994".

## C. Findings of fact

C.1. According to the Gewerbeinformationssystem Austria, the respondent holds the following business licences: Credit bureau on credit relationships, address publisher and services in automatic data processing and information technology

According to the Gewerbeinformationssystem Austria, AZ Direct Österreich GmbH has a trade licence as an address publisher and direct marketing company.

*Evaluation of evidence regarding C.1: The findings result from the complainant's submission of 18 March 2021 as well as an official search in GISA regarding ZI. 25025248, 25025705, 25026177 (respondent) as well as ZI. 25213690.*

C.2. The complainant submitted a request for information to the respondent on 11 January 2021. The respondent provided the information in a letter dated 12 February 2021 and indicated the following information as the source of the data: "Address publishers and direct marketing companies in accordance with

§ 151 GewO 1994" (formatting not reproduced 1:1):

## 2. Quellen personenbezogener Daten

Ihre personenbezogenen Daten erheben wir von nachstehenden Quellen:

- Kunden der CRIF GmbH als (potentielle) Vertragspartner/Gläubiger der betroffenen Person;
- Partner der CRIF GmbH (insb. Inkassoinstitute und Rechtsanwälte);
- Dienstleister im Bereich Missbrauchsprävention, die Datenbanken mit Kennnummern von Endgeräten führen, sowie Dienstleister im Bereich der Identitätsprüfung;
- Adressverlage und Direktmarketingunternehmen gemäß § 151 Gewerbeordnung 1994;
- öffentlich zugängliche Quellen, wie insbesondere Melderegister, Firmenbuch, Vereinsregister, Ediktsdatei, Gewerberegister, Webseiten.

In Einzelfällen erheben wir Ihre personenbezogenen Daten direkt bei Ihnen selbst. Es besteht diesfalls keine

*Evaluation of evidence regarding C.2: The findings result from the complainant's submission of 18 March 2021, the attached request for information, the respondent's reply to the request for information as well as the attached e-mail correspondence between the complainant and the respondent.*

C.3. The respondent collected at least the following data of the complainant from AZ Direct Österreich GmbH: Name, address, date of birth.

In this context, an "Agreement on the Supply and Use of Address Data in December 2012", an associated "Sideletter" in October 2019 and an addendum in May 2018 were concluded between AZ Direct Österreich GmbH and the respondent (formerly "DELTAVISTA"). These agreements read in part as follows (formatting not reproduced 1:1):

[...]

2. DELTAVISTA hat hinsichtlich dieser von AZ Direct übermittelten Adressdaten ein beschränktes Nutzungsrecht für eigene Zwecke zum Datenabgleich, Adressidentifikation, Adresssuche, Adresskorrektur und Adressergänzung auf ihren eigenen Systemen und ihren eigenen Internetapplikationen, sei es in-house oder out-house. Die Verwendung dieser Daten zu anderen Tätigkeiten, sowie die entgeltliche oder

unentgeltliche Übermittlung oder Überlassung dieser Adressdaten an Dritte ist unzulässig. DELTAVISTA ist berechtigt, Adressen als Ergebnis von Einzelabfragen im Rahmen einer konkreten Bonitäts- oder Identitätsabfrage zu übermitteln. Falls es zu solch einer Übermittlung kommt, stellt DELTAVISTA vertraglich sicher, dass der Übermittlungsempfänger diese Adressen weder an Dritte weitergeben noch selbst zu Marketingzwecken verwenden darf.

[...]

[...]

4. DELTAVISTA haftet aber insbesondere dafür, dass sie

1. die Daten nur für die ihr nach dem DSGVO 2018, TKG 2003 oder der GewO 1994 erlaubten Zwecke verwendet bzw. verarbeitet, die von AZ DIRECT übermittelten Daten weder verändert noch ändert sowie dafür, dass sie Updates unverzüglich einspielt, und weiters,
2. keine Daten an Dritte (bspw. Dienstleister, Mitarbeitern) unberechtigt übermittelt, weitergibt oder sonst wie zugänglich macht (bspw. da diese die Voraussetzungen nach dem DSGVO 2018 (insbesondere Datengeheimnis) oder den diesbezüglichen Empfehlungen und Auflagen der Datenschutzkommission nicht erfüllen) oder zu anderen als in dieser Vereinbarung vorgesehenen Zwecke verwendet.
3. Im Falle einer Verletzung einer dieser Zusagen stehen der jeweils anderen Vertragspartei sämtliche Gewährleistungsbefehle sowie das Recht auf Schadenersatz zu.

[...]

**Nachtrag**  
zur Vereinbarung vom Dezember 2012

Zwischen CRIF GmbH FN 200570g Dielenbachgasse 35 1150 Wien in Folge „CRIF“	und AZ Direct Österreich GmbH FN201931h Andromeda Tower, Donau-City Straße 6 1220 Wien, in Folge „AZ Direct“
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**1 Einleitung**

Die Vertragsparteien arbeiten derzeit auf Basis der „Vereinbarung über die Lieferung und die Nutzung von Adressdaten“ vom Dezember 2012 zusammen. Diese Vereinbarung wird in Folge als „Hauptvertrag“ bezeichnet, wobei die AZ Direct den Hauptvertrag noch unter der Firma „ARVATO-AZ Direct GmbH“ und CRIF unter „Deltavista GmbH“ geschlossen hat.

Im Lichte der Gültigkeit der DSGVO seit 25.05.2018 vereinbaren die Vertragsparteien wie folgt:  
Es herrscht das gemeinsame Verständnis, dass zwischen CRIF und AZ Direct kein Auftragsverhältnis vorliegt, sondern beide Vertragsparteien als eigenständige datenschutzrechtliche Verantwortliche zu qualifizieren sind.

**2 Vertragsgegenstand**

**2.1 Gegenstand der Verarbeitung im Rahmen des Hauptvertrages**

Zurverfügungstellung einer eingeschränkten Nutzung von bestimmten Datenmerkmalen bestimmter Personen für eine bestimmte Dauer von Ihrer Datenbank „A-Plus Consumer“ durch AZ Direct zu folgenden Zwecken:

1. Marketingzwecken von CRIF für eigene Marketingmaßnahmen und Marketingmaßnahmen, die CRIF für Dritte durchführt oder vorbereitet,
2. Referenzierungs- und Validierungszwecken, das sind solche der Feststellung der besseren Erreichbarkeit und Zustellbarkeit, zum Zwecke der Korrektur und/oder Ergänzung der Datenbestände von CRIF oder deren Kunden samt Verwertung zur Verbesserung von analysierten Datensätzen von CRIF.
3. Sonstige Zwecke, zu welchen AZ Direct und/oder CRIF aufgrund gesetzlicher Bestimmungen berechtigt ist, die Daten zu verarbeiten.

AZ Direct führt keine eigenen Tätigkeiten für CRIF durch und ist nur zur Wartung und Datenpflege ihrer Datenbank Aplus samt Einspielen und Übermittlung von Updates verpflichtet.

**3 Gültigkeit dieser Vereinbarung**

Diese Vereinbarung tritt am 25.05.2018 in Kraft und teilt das rechtliche Schicksal des Hauptvertrages.

Das Recht beider Vertragsparteien zur außerordentlichen Kündigung bleibt hiervon unberührt.

  
Geschäftsführer  
CRIF GmbH

\_\_\_\_\_  
Geschäftsführer  
CRIF GmbH

  
AZ Direct

\_\_\_\_\_  
AZ Direct Österreich GmbH



*Evaluation of evidence regarding C.3.: The finding results from the complainant's submission dated 18 March 2021 by submitting the information letter in which these three data sets were indicated in the information response. The cited contracts between AZ Direct Österreich GmbH and the respondent were attached to the respondent's statement of 6 May 2021.*

C.4. The respondent used the data collected by AZ Direct Österreich GmbH (at least: name, address, date of birth) to carry out an assessment of the complainant's creditworthiness.

*Evaluation of evidence regarding C.4: This finding results from the information provided by the respondent (submission by the complainant of 18 March 2021, Annex .105). In this submission, the respondent itself stated that it had processed the complainant's data for the purpose of assessing his creditworthiness.*

C.5. The complainant was not informed individually that AZ Direct Österreich GmbH was processing his data, nor that it had been transferred to the respondent. The complainant was also not informed by the respondent that the latter now stores his data in order to carry out an assessment of his creditworthiness in case of enquiries.

*Evaluation of evidence regarding C.5: The findings result from the complainant's submission of 18 March 2021 and his statement of 10 August 2021. The respondent did not dispute the complainant's submission.*

C.6. The respondent's privacy policy is freely accessible at <https://www.crif.at/datenschutz/>. This read (in the version of 15 March 2021) in part as follows:

### **1. Zwecke der Datenverarbeitung**

Wir verarbeiten die unter Punkt 3 genannten Kategorien Ihrer personenbezogenen Daten zu folgenden Zwecken:

- Ausübung des Gewerbes der Auskunft über Kreditverhältnisse gemäß § 152 Gewerbeordnung 1994 sowie des Adressverlags gemäß § 151 Gewerbeordnung 1994;
- unabhängig von der gewerberechtl. Einordnung die Erteilung von Auskünften an Kunden zum Zweck der Identitätsfeststellung, Altersverifikation, Kreditwürdigkeitsprüfung, Anschriftenermittlung, Seriositätsprüfung, des Risikomanagements (insbesondere Berechnung einer zukünftigen Zahlungsausfallwahrscheinlichkeit), der Missbrauchsprävention, der Erfüllung von Prüfpflichten der Kunden (insbesondere iZm der Bekämpfung von Geldwäsche, Terrorismusfinanzierung und Korruption sowie iZm Verbraucherkrediten und dem Spielerschutz), der Tarifierung (z.B. tarifmäßige Einordnung durch den Kunden), Konditionierung (z.B. von Kunden angebotene Zahlungskonditionen) und Endkundenbetreuung;
- Prüfung der Identität von Kunden, potentiellen Kunden und Interessenten unserer Kunden;
- Geltendmachung, Ausübung oder Verteidigung von Rechtsansprüchen;
- allgemeine Geschäftssteuerung und Weiterentwicklung von Dienstleistungen und Produkten;
- Gewährleistung des reibungslosen IT-Betriebs und der IT-Sicherheit;
- Erfüllung unserer gesetzlichen Verpflichtungen, wie insb. die Beantwortung und Umsetzung von datenschutzrechtlichen Betroffenenanfragen.

[...]

### 3. Verarbeitete Datenkategorien

Zu den unter Punkt 1 genannten Zwecken verarbeiten wir folgende Kategorien personenbezogener Daten:

- Identitätsdaten (insbesondere Vor- und Nachname(n), Geburts- und Sterbedatum, Geschlecht, Titel, akademischer Grad, Status (errechnet aus Geburts- und Sterbedatum), Staatsbürgerschaft), Zeitstempel der Identitätsprüfung (Datum, Uhrzeit der Nutzung unserer Dienstleister)
- Daten und Unterlagen zu Personaldokumenten (soweit vom Betroffenen bereitgestellt)
- Kontaktdaten (insbesondere Adresse, Firmensitz, Telefonnummer, Fax, E-Mail, Website)
- Gebäudedaten (Daten zum einer Anschrift zugeordneten Gebäude)
- Unternehmensbezogene Daten (insbesondere Firmenbuchdaten, UID-, LEI-, ÖNB-Nummern, Unternehmensgegenstand, Unternehmensgröße/Mitarbeiterzahl, Fuhrpark, Bilanzdaten, ÖNACE-Code, unternehmerische Funktionen inklusive Vertretungsbefugnisse und Organisation, Datum des Eintritts/Au- bzw. der Änderung der Funktion im Unternehmen, Aufenthaltsdauer bei ausländischen Staatsangehörige Beteiligungsanteil und Haftungsbetrag, Informationen über Vorbeschäftigungen und Nebenbeschäftigung Immobilienbesitz (privat oder Firmenbesitz))
- Gewerbebezogene Daten (Daten zu Gewerbeberechtigungen, andere Gewerberegisterdaten, Tätigkeitsbeschreibung, Branche)
- Vereinsregisterdaten
- Grundbuchsdaten
- Daten zu gerichtlichen Publikationen (Insolvenzdaten und Daten über gerichtliche Versteigerungen)
- Spernvermerk nach Robinsonliste
- Daten zur Bankverbindung (IBAN und BIC bzw. BLZ; ausschließlich zu Zwecken der Missbrauchsbekäm
- Zahlungserfahrungsdaten (Daten über die Einhaltung von Zahlungszielen und zu unbestrittenen, nach Ei der Fälligkeit unbezahlten und mehrfach gemahnten Forderungen, inklusive Leasingeinzüge, Mietzinsal und Delogierungen) einschließlich Saldo und Dauer deren Aushaftung und Einmahnungen
- Medienbeobachtungen und Recherchedaten (zu Unternehmern)
- Ausweis-Bild (ausschließlich zum Zweck der Identifikation und Authentifikation auf Anfrage von Betroffenen)
- Bezahldaten (ausschließlich zur Durchführung von Online-Zahlungen)
- Daten zur Bonität (inkl. aggregierte Bonitätskriterien und Score-Wert)
- Daten zu Hard- und Software (inkl. verwendeter Browser, Endgeräteerkennung), Geolokations-Daten (auf Grundlage der Anschriften errechnet) und Lichtbilder aus Google Maps zur Analyse potentieller missbräuchlicher Auffälligkeiten (soweit vom Kunden mit Einwilligung des Betroffenen erhoben und dann CRIF GmbH übermittelt)
- Hinweise auf missbräuchliches oder sonstiges potenziell missbräuchliches Verhalten wie Identitäts-, Anschriften- oder Bonitätstäuschungsversuche in Zusammenhang mit Verträgen über Telekommunikationsleistungen oder Verträgen mit Kreditinstituten oder Finanzdienstleistern (Kredit- oder Anlageverträge, Girokonten) oder im (Internet-)Handel
- Einschätzung hinsichtlich der Zustellbarkeit bei Adressen
- Daten im Zuge der Abfrage durch Kunden der CRIF GmbH in der CRIF-Datenbank („Abfragedaten“, inkl. allenfalls darin enthaltene Bestelldaten)
- Logdaten in Bezug auf die Datenbank (inkl. Bestätigung der Adressdaten)
- Risikoeinschätzung
- Quelle der Daten und Klassifizierung der Quelle sowie Details zur entsprechenden Datenerhebung
- Daten zu Bestellverhalten der betroffenen Person (Antragszähler, Antragswiederholungen)
- Finanzierungsvolumen
- Indikatoren eines Missbrauchsrisikos (ausgedrückt in "Fraud- Risiko-Skala")

[...]

*Evaluation of evidence regarding C.6.: The findings result from the complainant's submission of 18 March 2021 (Annex .I06) as well as from an official search by the data protection authority at <https://www.crif.at/konsumenten/datenschutzerklaerung-auskunftei-und-adressverlag/>.*

C.7. The following decision was made in a non-appealable decision dated 22 July 2022, reference number: D124.3817, 2021-0.584.299 (excerpt, formatting not reproduced 1:1):

"B E C A U S E S

P R U C H

The data protection authority shall decide on the data protection complaint of (compl [REDACTED] represented by noyb - European Centre for Digital Rights, of 18 March 2021 against AZ Direct Österreich GmbH (respondent), represented by [REDACTED]



██████ for 1) violation of the purpose limitation principle, 2) lawfulness of the data processing and 3) request for the imposition of a data processing ban as follows:

1. the complaint is upheld and it is found that the respondent has

a) has violated the principle of purpose limitation pursuant to Art. 5(1)(b) of the GDPR and has therefore

a) unlawfully processed the complainant's data in breach of Art. 6 (1) in conjunction with (4) DSGVO,

in that the respondent transmitted at least the name, address and date of birth of the complainant, which it had originally collected for the purposes of address publishing and direct marketing, to CRIF GmbH, which subsequently processed these data for credit assessment purposes under section 152 of the GewO 1994. [...]"

*Evaluation of evidence regarding C.7.: The findings result from the aforementioned decision of 22 July 2022, reference number: D124.3817, 2021-0.584.299. The content of the aforementioned decision of 22 July 2022 is known to all parties. Furthermore, all parties had the opportunity to submit comments on the said decision of 22 July 2022. As can be seen from the legal assessment, the decision of the said decision of 22 July 2022 is also of decisive importance for the outcome of the present decision.*

D. In legal terms, it follows:

D.1. Re point 1 (infringement of the principle of legality)

a) On Art. 5(1)(a) in conjunction with Art. 6(4) of the GDPR as a subjective right

Based on the previous ruling practice of the data protection authority, it should be noted that the lawfulness of data processing pursuant to Art. 5(1)(a) in conjunction with Art. 6(1) of the GDPR can be asserted as a subjective right in the context of a complaint pursuant to Art. 77(1) of the GDPR:

According to the data protection authority, the decisive factor is whether a data subject is adversely affected in an individual legal position by an alleged infringement and therefore has a subjective right to contest the alleged infringement. The alleged infringement must therefore have a negative impact on the person concerned. This can be assumed without doubt in the case of the requirements for the lawfulness of data processing.

The wording of Article 77(1) of the GDPR (and, incidentally, the national provision of Section 24(1) of the GDPR) also only requires that "[...] the processing of personal data relating to them infringes this Regulation" in order to exercise the right of appeal.

In this sense, the ECJ stated in its judgment of 16 July 2020 that the finding that "[...] the law and practice of a country do not ensure an adequate level of protection [...]" as well as

*"[...] the compatibility of this (adequacy) decision with the protection of privacy, as well as of the freedoms and fundamental rights of individuals [...]"* may be invoked as a subjective right in the context of a complaint under Article 77(1) of the GDPR (see the ECJ judgment of 16 July 2020, C-311/18 para 158).

While it should be noted that the question referred in the above-mentioned proceedings did not concern the "scope of the right of appeal under Article 77(1) of the GDPR", the ECJ obviously considered the fact that a breach of provisions of Chapter V of the GDPR can also be asserted in the context of a complaint under Article 77(1) of the GDPR as a necessary condition. Otherwise, the ECJ would have stated that the question of the validity of an adequacy decision cannot be clarified in the context of a complaint procedure.

Finally, also according to the national case law of the Administrative Court, it is to be assumed in case of doubt that norms which prescribe an official procedure also and especially in the interest of the person concerned grant him a subjective right, i.e. a right which can be enforced by way of appeal (cf. e.g. VwSlg. 9151 A/1976, 10.129 A/1980, 13.411 A/1991, 13.985 A/1994).

Thus, a violation of Art. 44 GDPR can be asserted in the context of a complaint to the data protection authority.

However, the prerequisite for filing a complaint is and remains that the alleged violation has a direct impact on the legal position of the person concerned. There must therefore be a direct link between the alleged infringement and the legal position of the data subject. Objective violations of the GDPR that have no relation whatsoever to the legal position of a data subject, on the other hand, are not amenable to a complaint.

#### b) On the declaratory competence of the data protection authority

As can be seen from the subject matter of the complaint (see point B.1), a declaration of a violation of the law, which lies in the past, was requested.

According to the case law of the VwGH and the BVwG, the data protection authority has the competence to make findings with regard to violations of the right to secrecy in appeal proceedings (thus explicitly the ruling of the BVwG of 20 May 2021, ZI. W214 222 6349-1/12E; implicitly the decision of the Administrative Court of 23 February 2021, Ra 2019/04/0054, in which it dealt with the determination of a past violation of the obligation to maintain secrecy without addressing the lack of competence of the authority against which the complaint was lodged).

There are no factual reasons for not exercising the declaratory competence pursuant to Art. 58 para. 6 DSGVO in conjunction with Art. 58 para. 6 DSGVO.

§ Article 24(2)(5) of the GDPR and Article 24(5) of the GDPR cannot also be used to determine whether the principle of legality has been violated, since in this case, too, the complaint concerns a past violation of the law and the right of appeal under Article 24(1) of the GDPR - like Article 77(1) of the GDPR - is generally linked to a violation of the GDPR.

It should be noted that a violation of the principle of lawfulness of data processing also results in a violation of the right to confidentiality (Article 1(1) in conjunction with Article 4(1) of the Data Protection Act), which is in any case amenable to a declaratory judgement (Article 24 of the Data Protection Act).

If the decision in an appeal procedure could only contain instructions pursuant to Article 58(2) of the GDPR, there would be no room for Article 24(2)(5) and Article 24(5) of the GDPR.

Thus, the data protection authority has the competence to make a determination in the present complaint procedure.

#### c) Verification of the lawfulness of data processing

According to the case law of the ECJ, any processing of personal data must, on the one hand, comply with the principles for the processing of data set out in Art. 5 GDPR and, on the other hand, comply with one of the principles listed in Art. 6 of the GDPR with regard to the lawfulness of the processing (cf. the ECJ judgment of 22 June 2021, C-439/19 para. 96).

Consent according to Art. 6 para. 1 lit. a DSGVO is indisputably not given.

Furthermore, the provisions of the GewO 1994 cited by the respondent cannot be used as a basis within the meaning of Art. 6(1)(c) and (e) of the GDPR, since the aforementioned provisions of the GDPR do not apply to purely economic activities (cf. also the comments in the Opinion of Advocate General *Pikamäe* of 16 March 2023, C-634/21, paras. 73 to 78).

Moreover, no opening clause is provided for in the GDPR for the data processing in question - as an address publisher (AZ Direct Österreich GmbH) and as a credit information agency (respondent).

Apart from that, such provisions would have to contain, inter alia, specific provisions on the application of the GDPR according to Art. 6(3) GDPR; such provisions are not found in § 152 GewO 1994 - even if a very generous standard is applied in favour of the respondent.

The Federal Administrative Court (BVwG) has already stated that Section 151 of the GewO 1994 cannot be considered as an element of authorisation for the processing of personal data for marketing purposes (cf. the decision of the Federal Administrative Court of 26 November 2020, GZ: W258 2217446-1).

d) Weighing up interests

On the merits, Art. 6 (1) lit. f DSGVO comes into consideration as an element of permission:

On the one hand, Advocate General *Pikamäe* already points out in his already mentioned opinion of 16 March 2023 pointed out that Art. 6(1)(f) does not provide for an opening clause that would allow Member States to unilaterally weigh interests through legislative measures (*ibid.*, para. 82 f).

Secondly, as can be seen from the findings of fact (C.7.), the data protection authority in the parallel proceedings directed against AZ Direct Österreich GmbH found, among other things, a violation of the lawfulness of the data processing (not legally binding). This infringement has a direct impact on the permissibility criterion pursuant to Art. 6 (1) f DSGVO:

In the present case, a balancing of interests cannot be in favour of the respondent. As an (overly) weighty factor in the weighing of interests, it must be taken into account that AZ Direct Österreich GmbH was not authorised to disclose (or sell) this data to the respondent for credit assessment purposes; cf. on the interaction between the data protection principles *Zavadill/Rohner*, ZD 2022, 312, Legitimate interests as salvation for an invalid declaration of consent?; cf. furthermore EDSA, Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service [Art. 65 GDPR] para 220).

According to the case law of the Administrative Court, the unlawful collection of personal data by a controller renders unlawful a subsequent transfer by the same controller (ruling of 23 February 2021, Ra 2019/04/0054, para 41 ff).

This unlawfulness of the original data collection generally entails the unlawfulness of the data processing by the recipient (Art. 17(1)(d) GDPR).

Although there may be situations in which data is originally collected unlawfully by one controller, it is lawfully processed by another controller (according to Art. 17(3)(e) GDPR, e.g. if a video recording is made by a controller, the video recording is processed by a third controller), there may be situations in which the data is processed unlawfully by another controller (according to Art. 17(3)(e) GDPR).

was made unlawfully, but is submitted by another responsible person for compelling interests worthy of protection in the context of legal proceedings).

However, in the monetisation of the complainant's data, it cannot be assumed that the respondent's interests are necessarily worthy of protection.

After explicit enquiry by the data protection authority, the respondent was also unable to convincingly demonstrate that it had carried out a careful review of the selection of its contractual partner - i.e. AZ Direct Österreich GmbH - before collecting the data (cf. the ECJ judgment of 27 October 2022, C-129/21, para. 81, according to which the controller must provide evidence of compliance with all data protection principles).

A reference to a valid trade licence of AZ Direct Österreich GmbH as well as the fact that AZ Direct Österreich GmbH is subject to the supervision of the trade authority cannot fulfil the standard set by the ECJ in relation to Article 5 (2) of the GDPR, especially since - as already explained above - the lawfulness of the data processing cannot be inferred from the fact of a trade licence.

#### e) Result

The respondent's data processing in this case is not covered by any of the permissive elements of Article 6(1) of the GDPR, which is why it was unlawful.

The decision was therefore in accordance with the ruling.

#### D.2. Re point 2 (infringement of the purpose limitation principle)

Unlike AZ Direct Österreich GmbH, the respondent collected the complainant's data for credit assessment purposes from the beginning.

From the perspective of the data protection authority, the connecting factor in determining the purpose is the contract concluded between the respondent and AZ Direct Österreich GmbH (cf. statement of facts C.3.). Despite extensive investigative proceedings, there are no indications that the respondent had any influence on the purposes and means of the data collection by AZ Direct Österreich GmbH - in its activities as an address publisher and direct marketing company.

The violation of the purpose limitation principle by AZ Direct Österreich GmbH established by the data protection authority in its non-appealable decision of 22 July 2022, ref. no.: D124.3817, 2021-0.584.299 (see statement of facts C.7.) cannot be attributed to the respondent from the perspective of data protection law.



Since, according to the case law of the ECJ, all of the principles set out in Art. 5 GDPR must be complied with for data processing to be permissible (cf. again the ECJ judgment of 22 June 2021, loc. cit.), the data processing in question nevertheless proves to be impermissible.

### D.3. Re point 3 (imposition of a processing ban)

Finally, the complainant's request to impose a processing ban pursuant to Article 58(2)(f) of the GDPR must be decided.

It cannot be deduced from the wording of Art. 58(2)(f) GDPR that a data subject has a subjective right to have a supervisory authority impose a very specific processing ban.

This cannot be derived from the case law of the ECJ either. The ECJ has stated that a supervisory authority is obliged to take appropriate remedial measures in the event of an identified infringement. However, the specific selection of remedial powers is the responsibility of the supervisory authority (cf. the ECJ judgment of 16 July 2020, C-311/18 para. 112).

However, if according to the ECJ the selection of remedial powers is a matter for the supervisory authority, then conversely there can be no subjective legal claim to the exercise of a very specific remedial power.

The Federal Administrative Court has already ruled that the data protection authority can also make use of its powers under Art. 58(2) of the GDPR in appeal proceedings (cf. the ruling of 16 November 2022, no. W274 2237056-1/8E).

In the present case, however, it seems more appropriate to enforce this within the framework of a procedure under Art. 58(1)(b) of the GDPR, especially since the fundamental legal problem of data collection from address publishers and the subsequent processing for credit assessment purposes by the respondent arises.

Overall, the decision was therefore in accordance with the ruling.

## R E C O R D I N G M E A S U R E S

An appeal against this decision may be filed in writing with the Federal Administrative Court within **four weeks** after service. The appeal **must be lodged with the data protection authority** and must

- the designation of the contested decision (GZ, subject)
- the designation of the authority against which proceedings have been brought,
- the grounds on which the allegation of illegality is based,
- the request and

- contain the information necessary to assess whether the complaint has been filed in time.

The data protection authority has the option of either amending its decision within two months by means of a **preliminary appeal decision** or **submitting** the appeal with the files of the proceedings to **the Federal Administrative Court**.

The appeal against this decision is **subject to a fee**. The fixed fee for a corresponding submission including enclosures is **30 euros**. The fee is to be paid to the account of the Tax Office Austria, stating the purpose of use.

The fee must always be transferred electronically using the function "Finanzamtszahlung". The Austrian Tax Office - Special Responsibilities Department is to be indicated or selected as the recipient (IBAN: AT83 0100 0000 0550 4109, BIC: BUNDATWW). Furthermore, the tax number/levy account number 10 999/9102, the levy type "EEE complaint fee", the date of the notice as the period and the amount are to be indicated.

If the e-banking system of your credit institution does not have the "tax office payment" function, the eps procedure in FinanzOnline can be used. An electronic transfer can only be dispensed with if no e-banking system has been used so far (even if the taxpayer has an internet connection). In this case, the payment must be made by payment order, whereby care must be taken to ensure the correct allocation. Further information is available from the tax office and in the manual "*Electronic payment and notification for payment of self-assessment levies*".

The payment of **the fee** shall be **proven to the data protection authority upon** submission of the complaint by means of a payment voucher to be attached to the submission or a printout showing that a payment order has been issued. If the fee is not paid or not paid in full, the **competent tax office** shall be **notified**.

A timely and admissible appeal to the Federal Administrative Court has a **suspensive effect**. The suspensive effect may have been excluded in the ruling of the decision or may be excluded by a separate decision.

24 March 2023

For the head of the data protection authority:

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Signatory	serialNumber=1831845058,CN=Data Protection Authority,C=AT
Date/Time	2023-03-24T10:21:33+01:00
Test information	Information on the verification of the electronic seal or electronic signature can be found at: <a href="https://www.signaturpruefung.gv.at">https://www.signaturpruefung.gv.at</a> Information on how to check the printout can be found at: <a href="https://www.dsb.gv.at/-/amtssignatur">https://www.dsb.gv.at/-/amtssignatur</a>
Note	This document has been officially signed.