

CJ: [REDACTED]
[REDACTED]

Sachbearbeiter: [REDACTED]

«Anrede»
«Titel»«Vorname» «Nachname» «Nachgestellter_Titel»
«Name»
«ZH»

«Straße» «ON»
«Postleitzahl» «Ort»
«Land»

Data protection complaint

[REDACTED] (IMI-Nr.: A56ID 141969, 161674, A61VMA 172470)

FINAL – DECISION

SPELL

The Data Protection Authority decides on the data protection complaint of [REDACTED] (complaining party) of 1 April 2020 against [REDACTED] (controller) for a violation of the principles of data processing of personal data pursuant to Article 5 GDPR and in the right to information pursuant to Article 13 GDPR as follows:

- The complaint is upheld and it is found that the controller has thereby violated the complaining party in the principles of data processing of personal data pursuant to Article 5 GDPR and in the right to information pursuant to Article 13 GDPR by setting cookies when accessing the respondent's website, without a cookie banner being implemented or a data protection declaration being available.

Legal bases: Articles 4, 5, 6, 13, 51(1), 57(1)(f) and 77(1) of Regulation (EU) 2016/679 (General Data Protection Regulation; 'the General Data Protection Regulation'): GDPR), OJ L 119, 4.5.2016, p. 1; Sections 18(1) and 24(1) and (5) of the Data Protection Act (DSG), BGBl. I No 165/1999 as amended.

JUSTIFICATION

A. Arguments of the parties and course of proceedings

1. In the initiating submission of 1 April 2020, submitted by the German (North Rhine-Westphalian) supervisory authority, the complaining party (as a result: bP) that the website, available at the URL < [REDACTED] >, of the Respondent (hereinafter: BG) and 14 cookies were set without having had the opportunity to reject them.

By setting the cookies, the data of bP were processed by BG and these were violated in the right to information and in the lawfulness of the processing.

2. By resolution of [REDACTED] of 6 November 2020, sent on 11 November 2020, the Austrian Data Protection Authority invited the respondent to submit its observations and sent the complaint of bP to the respondent in the annex.

3. By opinion of 6. On 1 December 2020, [REDACTED] summarised for BG ([REDACTED]) that it had decided at the end of March 2020, in the course of the first Covid-19 outbreak, to offer mouth and nose masks and protective masks to the general population as quickly and barrier-free as possible. Due to the lack of masks of all kinds at the time, extreme urgency was required in this regard. BG had previously not offered business-to-consumer shops and, due to the lack of direct sales and the closure of brick-and-mortar shops, online sales were the best option in the circumstances. The online shop was created within a few days and went online at the end of March (28 March 2020). In the meantime, [REDACTED] has taken over the business unit, and thus also the online shop [REDACTED].

At the time of the alleged infringement (1 April 2020), the online shop had not yet fulfilled all the technical requirements. It is correct that at this time no cookie pop-up has informed users of the use of their data. However, that circumstance has now been remedied.

4. The Austrian Data Protection Authority issued the BG's opinion on the Internal Market System to the German (North Rhine-Westphalian) supervisory authority on 23 April 2017. On 29 December 2020 and 29 August 2022, it was forwarded with a request to make the documents available to bP in the context of the hearing of the parties. During the ongoing investigation, the bP did not issue any further comments.

B. Subject-matter of the complaint

On the basis of the arguments of the bP, it can be seen that the subject matter of the complaint is the question whether this has been violated by the BG in the lawfulness of data processing pursuant to Article 6 GDPR and in the right to information pursuant to Article 13 GDPR, because no cookie banner had been implemented when the BG website was accessed and yet 14 cookies were set.

C. Factual findings

1. The BG is a legal entity in the form of a limited liability company (GmbH) with the company register number < [REDACTED] > and the business address < [REDACTED] >. The object of BG's business is the production, distribution and trade of textiles of all kinds.

Evidence assessment: These findings are based on the official extract from the commercial register of 24 November 2025, which is annexed to Procedural Act [REDACTED].

2. The BG decided - according to its own information - at the end of March 2020 in the course of the first Covid-19 outbreak to offer mouth and nose masks and protective masks to the general population.

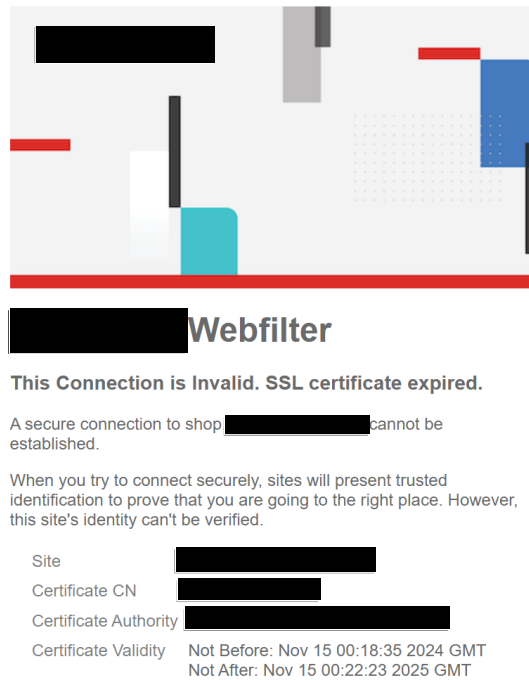
2.1. Within a few days, it created an online shop, which in any case was available from 28 March 2020 to 1 April 2020 at the URL < [REDACTED] > - and made it publicly available to its customers. At least on 1 April 2020, there was no data protection declaration on the website, which was publicly available to users.

2.2. bP visited BG's online shop on 1 April 2020 and at that time no cookie banner was implemented, but at the same time 14 cookies were set.

2.3. Cookies can be used to collect information generated by a website and stored via an Internet user's browser. It is a small file or textual information (usually smaller than a Kbyte) placed by a website on the hard drive of its computer or mobile device via an Internet user's browser. Websites use cookies to identify users, remember their customers' preferences, and allow users to complete tasks without having to re-enter information when switching to another page or revisiting the site later. Cookies can also be used to collect information for targeted advertising and marketing based on online behaviour. For example, companies use software to track user behaviour and create personal profiles that allow users to display advertisements tailored to their previous searches.

2.4. The website with the URL < [REDACTED] > is at the time of writing the notice (reference date: 24 November 2025) is no longer available.

Screenshot of the official retrieval of the homepage with the URL < [REDACTED] > (formatting not shown 1:1.):



Evidence assessment for points 2 to 2.4.: These findings are based on the introductory submission of 1 April 2020 by bP, in which it stated that no cookie banner had been implemented on the homepage, available at the URL <[redacted]> and that 14 cookies had been set at the same time. This finding was made by the BG in its opinion of 6. It was not disputed in December 2020, but it confirmed that it did not implement a cookie banner at that time and that the homepage had technical defects, which were only corrected at a later date.

The statement that the data protection declaration was not available to the users results from the opinion of the BG of 6. December 2020, which shows that although a data protection declaration has been created, it has not been publicly available to users during the first days of the existence of the online shop.

The general findings under point 2.3., on cookies and how they work, are set out in the Opinion of Advocate General Maciej Szpunar in Case C-673/17, Planet49 GmbH, paragraphs 36 et seq.

The finding that the homepage of the BG is no longer available results from the official call of 24 November 2025 of the URL <[redacted]>.

D. From a legal point of view, it follows that:

D.1. General

Pursuant to Article 77(1) of the GDPR or Article 24(1) of the GDPR, every data subject has the right to lodge a complaint with the data protection authority if he or she considers that the processing of personal data concerning him or her infringes the GDPR or Article 1 of the first main section of the GDPR.

According to Article 4(1) of the GDPR, 'personal data' is any information relating to an identified or identifiable natural person. A natural person is considered identifiable if, inter alia, it can be identified directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier. According to the CJEU, the concept of 'personal data' is to be understood extremely broadly (cf. CJEU 20.12.2017, C-434/16 – still on the Data Protection Directive, but the case-law can be applied to the GDPR: see in this regard CJEU, 7 March 2024, C-604/22, paragraph 33).

The use of the expression 'all information' in the definition of the concept of 'personal data' in that provision reflects the EU legislature's objective of giving that concept a 'wide meaning', potentially encompassing all types of information, both objective and subjective, in the form of opinions or assessments, provided that it is information 'about' the person in question (see CJEU 07.03.2024, C-604/22, paragraph 36 et seq.).

Processing means any operation or set of operations performed on personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction (see Article 4(2) of the GDPR).

The controller pursuant to Art. 4 No. 7 GDPR is the natural or legal person, authority, institution or other body that alone or jointly with others decides on the purposes and means of the processing of personal data. The decisive criterion is therefore the decision-making power over the purpose and means of the processing. The role of the controller therefore stems primarily from the fact that a particular entity has decided to process personal data for its own purposes.

The BG is indisputably the controller for the data processing subject to the complaint, because at the time of the complaint (1 April 2020) it determined the purposes and means for the website and not the subsidiary company < subsidiary [REDACTED] >, which only later took over the business unit and the homepage.

In addition, it is undisputed from the investigation that bP accessed the homepage of BG by means of a terminal device on 1 April 2020 and, in any case, its IP address was processed with the cookies set on the homepage. The applicability of the GDPR must therefore be affirmed in the present case.

According to the established case-law of the Court of Justice of the European Union, data processing must at all times, in order to be lawful within the meaning of the GDPR, comply with all the principles set out in Article 5(1) of the GDPR and, in addition, must be capable of being based at least on a factual basis under Article 6(1) of the GDPR (see the judgment of the Court of Justice of the European Union). December 2019 C-708/17 and judgment of 4 May 2023, C-60/22, paragraphs 56 and 57). The controller bears the burden of proof in accordance with Article 5(2) of the GDPR (ibid. paragraphs 53 and 54).

D.2. In the matter

As already stated under D.1. of the legal assessment, according to the settled case-law of the CJEU, the general principles laid down in Article 5 GDPR for the processing of personal data must apply legally binding rules which are specifically effective and must be taken into account when assessing the lawfulness of data processing pursuant to Article 6 GDPR.

Any data processing of personal data must, on the one hand, comply with the principles for the processing of data laid down in Article 5 of the GDPR and, on the other hand, comply with the principles relating to the lawfulness of the processing set out in Article 6 of the GDPR (see CJEU of 22 June 2021 on C-439/19, paragraph 96; CJEU of 4 May 2023, C-60/22, paragraphs 56 and 57).

In the present case, the Data Protection Authority does not disregard the fact that the BG announced that the homepage was created at short notice in 2020 and that it did not meet all the technical requirements for a short period of time, including on 1 April 2020 (access to the homepage by the bP). Subsequently, a system change took place, whereby on the one hand a cookie banner was implemented and a data protection declaration for all users was put online. Nevertheless, the BG, as data protection controller pursuant to Article 4(7) of the GDPR, has not complied with its statutory obligation to comply with the principles of data processing pursuant to Article 5(1) of the GDPR.

On 1 April 2020, the bP called up the homepage of the controller for this at the time in accordance with Article 4(7) of the GDPR.

This had no implemented cookie banner at that time and, in addition, the privacy policy was not publicly available to the users – including the bP – at that time. Specifically, 14 cookies have been set when calling up the homepage, which have contained a unique user identification ("Unique ID") by linking the IP address of the bP and which are subsequently used for certain purposes (e.g. User recognition, advertising purposes, marketing purposes, creation of the digital shopping cart) have been processed. There has been undisputed data processing with the personal data of bP.

In addition to the two principles of processing the personal data of the data subject lawfully and in accordance with the principle of good faith, Article 5(1)(a) also provides that the processing must be transparent. In the case of the principle of transparency of processing under data protection law, the data subject must be able to understand the processing of personal data concerning him or her in order to exercise his or her rights vis-à-vis the controller and to request fair processing in accordance with his or her reasonable expectations. Article 5(1)(a) of the GDPR emphasises that obligation, which is already based on the principle of good faith, that personal data must be processed in a manner that is comprehensible to the data subject, with an independent principle for the processing of personal data as a fundamental condition for control over the use of his or her personal data and a condition for the effective protection of those data. The content requirements for the comprehensibility of data processing are based on the information of the data subject about which and for what purpose and scope personal data concerning him or her is processed and what risks, rights and guarantees are associated with it (see *Heberlein in Ehmann/Selmayr*, Commentary on the GDPR, 3rd edition, Art. 5 GDPR, para. 17 and para. 18). Transparency is intended to ensure data protection, but also to enable the data subject to decide against data protection if necessary. The principle of transparency, visibility and visibility forms part of many other provisions of the General Data Protection Regulation and is significant for its interpretation and application (Frenzel in *Paal/Pauly* in the commentary on the GDPR, Art. 5, para. 22 and *Wolff in Schantz/Wolff* DatenschutzR, para. 394). This includes the specific behavioural requirements for the controller pursuant to Art. 12 GDPR as well as the information obligations (Art. 13 f.).

Due to the temporary, defective technical design of the homepage at that time - specifically no implementation of a cookie banner and no publicly accessible data protection declaration - the BG has not transparently informed any user about the cookies set (technically necessary or not technically necessary).

As a result, there is a breach of the principle of transparency pursuant to Article 5(1)(a) of the GDPR and of the information obligations pursuant to Article 13 of the GDPR, especially since the data processing linked to the cookies set by the BG at the time was neither made transparent for bP nor was it made transparent to its information obligations pursuant to Article 12 in conjunction with Article 13 of the GDPR. Art. 13 GDPR vis-à-vis the bP in an appropriate manner (e.g. Cookie banner or privacy policy has been complied with.

A further examination of the facts at issue, whether the bP has been violated in the lawfulness of the processing pursuant to Article 6 GDPR, has become unnecessary in the present case, because the data processing has already violated the principles of data processing and as a result the data processing was not lawful for the period at issue.

In the individual case at issue, the data protection authority refrains from a service order pursuant to Article 58(2) GDPR due to the changeover that took place shortly thereafter and the fact that the homepage is no longer available (and therefore no longer data processing takes place).

It was therefore appropriate to decide.

INSTRUCTIONS ON APPEAL

This decision may be appealed in writing to the Federal Administrative Court within **four weeks** of service. The complaint **must be submitted to the Data Protection Authority and** must:

- the name of the contested decision (CJ, subject)
 - the name of the respondent authority;
 - the grounds on which the allegation of illegality is based;
 - Desire and
 - the information necessary to assess whether the complaint has been lodged in a timely manner;
- included.

The data protection authority may, within two months, either amend its decision by **means of a preliminary decision on the complaint** or **submit the complaint with the files of the proceedings to the Federal Administrative Court.**

The complaint against this decision is **subject to a fee**. The fixed fee for such an entry, including supplements, shall be **EUR 50**. The fee must be paid to the account of the Austrian Tax Office, stating the intended purpose.

In principle, the fee must be paid electronically using the 'Finance Office payment' function. The recipient must be the Austrian Tax Office - Service for Special Responsibilities (IBAN: AT83 0100 0000 0550 4109, BIC: BUNDATWW). In addition, the tax number/tax account number 10 999/9102, the tax type 'EEA-complaint fee', the date of the decision must be indicated as the period and the amount.

If the e-banking system of your credit institution does not have the function 'Finance Office payment', the eps procedure can be used in FinanzOnline. An electronic transfer can only be excluded if no e-banking system has been used so far (even if the taxpayer has an internet connection). Then the payment must be made by means of a payment order, paying attention to the correct allocation. Further information can be obtained from the tax office and from the manual '*Electronic payment and notification of payment of self-assessment levies*'.

The payment **of the fee** must be **proved** when the complaint is lodged **with the data protection authority** by means of a proof of payment to be attached to the submission or a print-out of the payment

order issued. If the fee is not paid or not paid in full, a **report shall be sent to the competent tax office.**

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

*****Genehmigungsdatum*****

Für den Leiter der Datenschutzbehörde:

*****Genehmiger(in)*****