

Ref: [REDACTED]
[REDACTED]

Case contact: [REDACTED]

Data protection complaint (Art. 5 and 6 GDPR)

[REDACTED] ([REDACTED])

DRAFT DECISION

VERDICT

The Austrian Data Protection Authority decides on the data protection complaint lodged by [REDACTED] (complainant) on 22 October 2024 against [REDACTED] (respondent) regarding an infringement of the lawfulness of the processing of personal data as follows:

1. The complaint is granted and it is found that the respondent processed personal data of the complainant contrary to Article 5(1)(a) and Article 6(1) of the GDPR by sending a newsletter to the complainant at its e-mail address [REDACTED].
2. The Austrian Data Protection Authority issues a reprimand to the respondent in accordance with Article 58(2)(d) of the GDPR with regard to the sending of the newsletter to the complainant as set out in point 1.

Legal bases: Article 4(1), Article 5(1)(a), Article 6(1), Article 51(1), Article 57(1)(f), Article 58(2)(d) and Article 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; Article 41 of the Charter of Fundamental Rights of the European Union (EU-FRC), OJ C 202, 7.6.2016, p. 389; §§ 18(1) and 24(1) and (5) of the Austrian Data Protection Act (DSG), BGBl. I No 165/1999 as amended.

REASONING

A. Arguments of the parties and course of proceedings

1. On 22 October 2024 the complainant lodged a complaint with the Bavarian State Office for Data Protection Supervision (Bayerisches Landesamt für Datenschutzaufsicht) against the respondent established in Austria, concerning an alleged infringement of the lawfulness of the processing of personal data. In summary, it was alleged that the complainant had applied for a position at the respondent. In the course of that application, the respondent came into possession of the complainant's e-mail address. Subsequently, the complainant received a newsletter from the respondent without having registered for it. The respondent threatened the complainant with legal consequences in response to its request for the basis on which the newsletter was sent.

2. The complaint was forwarded by the Bavarian State Office for Data Protection Supervision to the Data Protection Authority via the Internal Market Information System of the European Union on 3 March 2025 and the respondent was subsequently asked by the Austrian Data Protection Authority to comment on the complaint.

3. By letter of 15 April 2025, the respondent submitted a statement and, in summary, claimed that the sending of the newsletter to the complainant was based on a computer error. This error was caused by the fact that the email address of the complainant was not only included in the contact directory, but was also mistakenly included in the sending directory for newsletters. The error was rectified in the meantime and the respondent has not processed any personal data of the complainant in its system since then.

4. The Austrian Data Protection Authority transmitted the results of the investigation to the Bavarian State Office for Data Protection Supervision on 12 May 2025 and informed, upon request, that it intended to grant the complaint. Following a further exchange, the Bavarian State Office for Data Protection Supervision informed the Austrian Data Protection Authority that, due to the expected outcome of the proceedings, the complainant had not to be heard separately on the findings of the investigation.

B. Subject-matter of the complaint

The subject of the complaint is the question whether the respondent has unlawfully processed personal data of the complainant in the context of sending a newsletter.

C. Findings of the facts

1. The respondent is a company established in Austria in the advertising and consulting sector, which offers its services at least in the DACH (Germany, Austria and Switzerland) region. The complainant applied to the respondent for a position via its online portal [REDACTED]. In this

context, the respondent has become aware of the e-mail address of the complainant [REDACTED].

Evidence assessment: The findings are based on the uncontested submissions of the parties and on an official search by the Austrian Data Protection Authority under [REDACTED] (lastly consulted on 28 January 2026).

2. Due to a computer error, the e-mail address of the complainant was not only included in the contact directory of the complainant, but also in its directory for newsletters. As a result, the complainant received a newsletter from the respondent. No consent or approval of the complainant has been given in this regard.

Evidence assessment: The findings are based on the arguments put forward by the complainant and the presented correspondence with the respondent. The respondent did not dispute the arguments of the complainant and merely referred to a computer error in its system which was responsible for sending the newsletter.

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

D.1. Proceedings

The complaint at issue is indisputably a 'cross-border processing' within the meaning of Art. 4(23) GDPR. Pursuant to Article 56(1) of the GDPR, the supervisory authority of the main establishment or the sole establishment of the controller is, in accordance with the procedure laid down in Article 60 leg. cit., the competent lead supervisory authority for the cross-border processing carried out by that controller.

As the respondent is headquartered in Austria, the Austrian Data Protection Authority was the competent lead supervisory authority. The competence of the Austrian Data Protection Authority has not been contested by any of the parties throughout the proceedings.

After the present complaint was lodged with the Bavarian State Office for Data Protection Supervision, the latter assumed the role of a 'concerned supervisory authority' within the meaning of Art. 4(22)© GDPR. As part of the procedure carried out pursuant to Article 56 GDPR, no other supervisory authorities have declared themselves to be concerned authorities apart from the Bavarian State Office for Data Protection Supervision.

On the basis of the statements made by the complainant in its complaint and the statement of the respondent, the facts at issue had been sufficiently clarified and, moreover, only legal questions had to be solved.

The Austrian Data Protection Authority does not overlook that the complainant has not been separately

heard on the investigation results. However, this does not constitute a procedural defect in the present case, since the complaint is ultimately granted and the complainant is not adversely affected by the present decision. Article 41(2)(a) of the EU-FRC also (just) provides that every person has the right to be heard before an individual measure adversely affecting him or her is taken. The European Data Protection Board also assumes that the right to be heard of the complainant must be respected in particular where a complaint is rejected or dismissed under the applicable national law (see *EDPB Guidelines* 02/2022 on the application of Article 60 GDPR, version 1.1, paragraph 105).

D.2. On the merits

D.2.1. To verdict 1

As established, the respondent processed the email address of the complainant and sent a newsletter to the latter.

The e-mail address [REDACTED] constitutes undoubtedly personal data of the complainant within the sense of Article 4(1) of the GDPR, since it contains the full name of the complainant and thus identifies it.

Pursuant to Article 5(1) of the GDPR, personal data must be processed lawfully, in good faith and in a manner that is comprehensible to the data subject. Pursuant to Article 5(2) of the GDPR, controllers are responsible for compliance with the principles of the processing referred to in paragraph 1 and must be able to demonstrate compliance with them, which is to be understood as a rule on the burden of proof (cf. CJEU 04.07.2023, C-252/21 [*Bundeskartellamt*], para 95).

Pursuant to Article 6(1) of the GDPR, processing is lawful only if at least one of the conditions set out therein is met. In the present case, the respondent has indicated that the newsletter was sent due to a technical error. Neither has the respondent relied on a legal basis referred to in Article 6(1) GDPR nor is it apparent to the Austrian Data Protection Authority that the sending of the newsletter was based on a legal basis within the meaning of Article 6(1) GDPR.

For the sake of completeness, it should be noted that, unlike administrative criminal proceedings, the degree of fault on the part of the respondent does not matter in the context of an administrative procedure. On the contrary, the sending of the newsletter at issue proved to be already as objectively unfounded, which is why the complaint had to be granted and an infringement of Article 5(1)(a) and Article 6(1) of the GDPR had to be found.

D.2.2. To verdict 2

Under Article 58(2) of the GDPR, supervisory authorities have different corrective powers to bring situations, in which the GDPR is infringed, back into compliance with EU law (cf. CJEU 14.03.2024, C-46/23 [*Nemzeti Adatvédelmi és Információszabadság Hatóság*], para 40).

Supervisory authorities are obliged to carry out their task of ensuring full compliance with the GDPR with all due care and must choose appropriate and necessary means, taking into account all the circumstances of the processing of personal data in question (cf. CJEU, 16.06.2020, C-311/18 [*Schrems II*], para 112).

Since the respondent has indicated that it has corrected the technical error and no longer processes the respondent's e-mail address for the purpose of sending newsletters, there is no room for an order to the respondent according to Article 58(2)(d) of the GDPR to bring processing operations into compliance with the GDPR.

However, a supervisory authority may issue a reprimand to a controller pursuant to Article 58(2)(b) of the GDPR if it has infringed this GDPR with its processing operations. This condition is met in the present case, as the sending of the newsletter – as explained above – took place without a legal basis and thus in breach of the GDPR.

Although the infringement found does not reach a particularly detrimental level for the complainant, it also does not constitute such an insignificant minor infringement regarding which the supervisory authority might refrain from exercising a corrective power (cf. CJEU 26.09.2024, C-768/21 [TR], paragraph 43).

The Austrian Data Protection Authority has in particular taken into account that the respondent is a company active in the advertising and consulting sector, which can be expected to handle personal data accordingly. In the light of the infringement established, a reprimand under Article 58(2) of the GDPR is therefore appropriate and proportionate.

It was therefore to be decided in accordance with the verdict.

INFORMATION ON LEGAL REMEDIES

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

- the name of the contested decision (Ref.-No., subject)
- the name of the respondent authority;
- the grounds on which the allegation of illegality is based;
- the desired outcome and
- the information necessary to assess whether the complaint has been lodged in a timely manner;

The Austrian Data Protection Authority has the possibility to amend its decision within two months either by a preliminary decision on the complaint or to 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 a corresponding entry including supplements is **50 Euros**. 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 printout of the payment order issued. If the fee is not paid or not paid in full, a report is sent to the competent tax office.

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

30 April 2026

For the Head of the Austrian Data Protection Authority:

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