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Austria: Full Compliance with Information Obligations No Prerequisite for Lawfulness of Data Processing

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GDPR Art. 5, Art. 6, Art. 14, Art. 21

1. Full compliance with the obligation to provide information is not necessary for the lawfulness of data processing.

2. A credit agency is not necessarily obliged to inform a data subject about processing his payment experience data as long as the data subject already has information about the data processing.

3. Payment experience data does not have to be deleted when there is a legitimate interest in storing payment experience data of a data subject. ***(all offic.)***

Austrian Federal Administrative Court (BVwG), decision of 6 October 2023 – W176 2265088-1

Summary & Comment

▶ Facts

On 8 November 2022, the Austrian Data Protection Authority (Datenschutzbehörde – "DSB") issued a decision against an Austrian credit agency requiring it to delete negative payment records of an individual who had filed a complaint with the DSB alleging a violation of the right to erasure. Following an appeal by the credit agency, the Austrian Federal Administrative Court ("BVwG") overturned this decision.

The credit agency stores "payment history data" on the data subject and his former company. The data subject requested the credit agency to delete this data, which the credit agency refused. The data subject then filed a complaint with the DSB, arguing that the payments had already been made and therefore the data should be deleted. The DSB asked the credit agency to comment on the case and posed three questions. The most relevant question concerned the credit agency's obligation to provide information under Art. 13 or 14 GDPR, for which the DSB requested proof of compliance pursuant to Art. 5 para. 2 and Art. 24 para. 1 GDPR.

The credit agency replied that the relevant data originated from a debt collection agency that had warned the data subject several times and had also informed the data subject that the case and the data had been passed on to the credit agency as a result of the qualified default. In accordance with the principle of data accuracy, the credit agency stores payment history data for up to five years after the payment is made, which is in line with established case law, in order to provide its customers and potential creditors with relevant data on the payment history of debtors. Such processing is in the legitimate interest of the potential creditors in accordance with Art. 6 para. 1 lit. f GDPR. Some of the payments were outstanding for several months or even years, making it even more important to keep these records, according to the credit agency.

The DSB ruled against the credit agency and ordered it to delete the data subject's payment history data as requested, essentially finding that the credit agency's data processing did not comply with the principles of lawfulness, fairness and transparency (Art. 5 para. 1 lit. a GDPR) because the credit agency had failed to prove that it had complied with its duty to provide information. The credit agency appealed this decision of the DSB and asked the BVwG to reverse the decision in its favor, arguing that compliance with Art. 12 et seq. GDPR would not affect the lawfulness of the processing. Art. 5 GDPR would regulate the type of processing, while Art. 6 GDPR concerns the lawfulness, which should be strictly separated. The principle of "fair processing" would not result in an obligation to warn when payment history data is reported by a debt collection agency to a credit agency.

▶ Held

On 6 October 2023, the BVwG granted the appeal, overturned the decision of the DSB and ruled that the credit agency was allowed to collect and store the payment history data of the data subject because the processing was foreseeable and there was a legitimate interest in storing such data.

The BVwG held that the credit agency did not violate the principles of Art. 5 para. 1 lit. a GDPR. For the BVwG, Recital 47 GDPR shows that the standard of "*fairness*" in this context means that fair processing must be within the data subject's reasonable expectations in light of the legal system as a whole and must be consistent with the way the controller presents itself to the outside world.

In the GDPR, the principle of *transparency* is underpinned by Art. 13 and 14 on the obligation to provide certain information and Art. 12 on the relevant modalities. The content of the transparency principle can therefore be derived also from these provisions and from Recitals 39 and 58 GDPR. It must be clear to data subjects (1) that personal data are being processed, (2) what data are being processed, (3) for what purposes they are being processed, (4) by whom they are being processed and (5) to whom they may be disclosed. In addition, data subjects should be informed about the risks, rules, guarantees and rights associated with the processing and how to exercise these rights. The

importance of *transparency* in processing and, consequently, the obligation to provide information is therefore a necessary condition for the exercise of the rights of data subjects. If the data subject is neither aware that his or her data are being processed nor who is processing his or her data, then he or she cannot exercise his or her rights in this regard pursuant to Art. 15 to 21 GDPR.[1]

Since the data subject in question had received several letters from the debt collection agency, each of which provided sufficiently clear information about the transfer of data to the credit agency in the event of late payment, and since the data subject would have been able to obtain further information from the privacy policy of the credit agency, the BVwG stated that it could not see why the processing could not have been foreseeable. In the court's opinion, it is in line with general life experience that if multiple payment requests from creditors or debt collection agencies are ignored, such data will be sent to a credit agency.

Furthermore, the BVwG stated that full compliance with the obligation to provide information pursuant to Art. 14 para. 1 and 2 GDPR is not a prerequisite for the lawfulness of the processing under Art. 6 para. 1 GDPR.

With regard to the deletion request by the data subject, the BVwG conducted a balancing of interests pursuant to Art. 6 para. 1 lit. f GDPR, as personal data must be deleted upon request of a data subject if they are no longer necessary for the purpose for which they were collected, if they were processed unlawfully, or if the data subject objected to the processing pursuant to Art. 21 para. 1 GDPR. A request for deletion would therefore conflict with data processing that is necessary and lawful, and to which no effective objection has been raised. Another decision of the BVwG[2] dealt with the question of how long it can be lawful for a credit agency to store data on paid claims, also taking into account the processing principles according to Art. 5 GDPR, "*purpose limitation*," "*data minimization*," "*accuracy*," and "*storage limitation*." Initially, it was assumed that, in the absence of specific time limits under the GDPR or the Austrian Trade Act (GewO), the permissible storage period would depend on the individual case, but that such payment information would be less meaningful for future payment behavior the longer it dates back and the longer there were no further payment delays or defaults. The BVwG looked for observation and deletion periods in legal provisions designed to protect creditors as a guideline for the permissible storage period, and used Regulation (EU) 575/2013 ("Capital Requirements Regulation"), which requires credit institutions to evaluate their customers and assess various risks of their receivables. Credit institutions would have to use a historical observation period for natural persons for at least one data source of at least five years for credit and retail exposures. However, if credit institutions, as potential business partners of the data subject, are legally obliged to evaluate their claims on the basis of the default rates of at least the last five years, then – according to the findings – it is not a violation of the principles of *data minimization* and *storage limitation* if data on claims that have temporarily or completely defaulted within this period are processed by a credit agency.

The BVwG agreed with the credit agency and found that the processing of payment history data for a period of four and a half years was (still) necessary to protect potential creditors or contractual partners of the data subject and to assist credit institutions in complying with the provisions of the Capital Requirements Regulation.[3] The data subject's interest in not having his or her economic life impaired could not prevail at the time of the decision, so the processing was found to be lawful.

▶ Comments

In stating that there was no need to comply in full with the information obligation for the processing to be lawful pursuant to Art. 6 para. 1 GDPR, the BVwG basically followed case law of the VwGH[4] and the CJEU[5], but may have left out a major point.

Pursuant to Art. 5 para. 1 lit a GDPR, the data processor has to make sure that processing of personal data is *processed lawfully, fairly and in a transparent manner in relation to the data subject.* So, in order to be lawful, at least *one* of the conditions of Art. 6 para. 1 GDPR must be met, and the assessment of these preconditions on a case-by-case basis is of great importance. Art. 7 to 11 GDPR serve the purpose of specifying the principles of Art. 5 para. 1 lit a and Art. 6 para. 1 GDPR in more detail. But since omitted information about the processing of personal data affects a data subject's ability to assert its rights, data processing that depends on a data subject's consent (Art. 6 para. 1 lit a GDPR) can still affect lawfulness within the meaning of Art. 6 GDPR. Therefore, full compliance with the information obligations pursuant to Art. 13 and 14 para. 1 and 2 GDPR is not necessarily a prerequisite for the lawfulness of processing pursuant to Art. 6 para. 1 GDPR, *as long as* the data processing in question does not depend on the consent of a data subject, and there is at least one other reason for processing personal data pursuant to Art. 6 para. 1 lit b to f GDPR.[6]

As just pointed out, this only means that full compliance with the information obligation is crucial for the lawfulness of data processing when it depends on the consent of a data subject. The decision of the BVwG must therefore be put into perspective, as it could give the impression that non-compliance with Art. 13 or 14 GDPR never affected the lawfulness of data processing. However, this impression is valid only if the data subject cannot avoid the data processing in question.

Apart from that, the present case is a prime example of the limits of the data subject's rights under the GDPR. If the BVwG had followed the original decision of the DSB, it would have meant that credit agencies would never be able to process and store payment data, and that creditors or debt collection agencies would not be able to enforce a legitimate claim and thus put pressure on a debtor to pay. The GDPR is not there to prevent reasonable data processing, but to protect data subjects when data processing goes too far and affects personal rights.

In conclusion, the ruling of the BVwG is in line with Austrian and EU case law but must be put into perspective as it really depends on the case at hand, and it cannot be said in general, that full compliance with the information obligation does not affect the lawfulness of data processing pursuant to Art. 6 para. 1 GDPR and thus the principles of processing personal data.

Stephan Winklbauer

1 *Hötzendorfer/Tschohl/Kastelitz* in Knyrim, DatKomm Art. 5 GDPR, para. 13 et seqq.

2 BVwG, 30 October 2019 – W258 2216873-1.

3 Especially since one claim was only paid after around three years, despite several reminders.

4 Austrian Higher Administrative Court (VwGH) 9 May 2023 – Ro 2020/04/0037-8.

5 CJEU, 4 May 2023 – C-60/22, Federal Republic of Germany.

6 Austrian Higher Administrative Court (VwGH) 9 May 2023 – Ro 2020/04/0037-8.

Dr. Stephan Winklbauer, LL.M.

Attorney-at-law and partner at aringer herbst winklbauer attorneys at law in Vienna.

Outsourcing, Software and Data Privacy Law

winklbauer@ahwlaw.at

www.ahwlaw.at