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Berlin DPA ref: 632.276, 521.11692, 591.616

Croatian DPA ref: 018-01/20-01/46, 041-02/19-07/16

Final Decision

Fine

in the data protection fine proceedings

against

[First and last name of the controller] – controller,

the Berlin Commissioner for Data Protection and Freedom of Information
decides:

I.

The controller is accused of having infringed first sentence of Article 6 (1) General Data Protection Regulation (GDPR) by publishing, as the owner of the sole proprietorship "[REDACTED]", the photos taken by him as an accredited and official photographer at the "[REDACTED]", an international water diving competition in Zadar, Croatia, a total of 16.392 photos of the participating children and youths from the age groups E to A (6 to 18 years) for sale on its website [REDACTED] under the web address [REDACTED] from at least 12 July 2018 until 7 September 2021 without the consent of the children and youths concerned or their legal guardians.

In the event of infringements of Article 6 (1) sentence 1 GDPR through the processing of personal data without one of the conditions in Article 6 (1) sentence 1 lit. a) to f) GDPR being fulfilled, fines of up to 20,000,000.00 euros or, in the case of a company, of up to 4% of its total worldwide annual turnover in the previous business year, whichever is higher, shall be imposed in accordance with Article 83 (5) lit. a) GDPR.

The first sentence of Article 6 (1) GDPR reads:

"Processing shall be lawful only if and to the extent that at least one of the following applies:

- a) *the data subject has given consent to the processing of his or her personal data for one or more specific purposes;*

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- b) *processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;*
- c) *processing is necessary for compliance with a legal obligation to which the controller is subject;*
- d) *processing is necessary in order to protect the vital interests of the data subject or of another natural person;*
- e) *processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;*
- f) *processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”*

Applied provisions on fines:

Art. 83 (5) (a) in conjunction with the first sentence of Art. 6 (1) GDPR, Section 19 para. 1 German Administrative Offences Act (OWiG).

II.

For the above-mentioned administrative offences, a fine of

1.000,00 Euro

(Written: One thousand Euro)

is set down. This fine is solely intended to punish the administrative offences.

III.

The controller has to bear the costs of the proceedings (fees and expenses) (section 105 (1) OWiG in conjunction with sections 464 (1), 464a (1), 465 (1) Code of Criminal Procedure (StPO)).

The fees according to section 107 (1) OWiG are as follows

50,00 Euro

(Written: Fifty Euro)

The expenses pursuant to section 107 (3) OWiG amount to a total of

3,50 Euro

(Written: Three Euro and fifty cents).

The controller is ordered to pay the fine and the costs (fees and expenses) no later than two weeks after this decision on the fine has become final (i.e. four weeks from the date of service), i.e. in total

1.053,50 Euro

(Written: One thousand and fifty-three Euro and fifty cents)

To the Landeshauptkasse Berlin.

In the event of inability to pay, the controller shall be requested to explain to the administrative authority within the time limit for payment, in writing or on record, stating the cash reference number, why it is unreasonable to expect him to pay within the time limit in view of his financial circumstances.

If the payment is not made and the controller does not show that he or she is unable to pay, the fine may be enforced against the controller by means of a detention order issued by the local court.

V.

Evidence

File on fines, in particular:

- a) Statement of the controller of 10 September 2021 (File no.: 591.616.6)
- b) Statement of the controller of 2 October 2019 (File no.: 591.616.1)
- c) Screenshots of the controller's Webseite (https://[REDACTED]) and the relevant sub-sites (File no.: 591.616.2)
- d) Screenshots of the controller's website as of 12 July 2018, under [REDACTED]

VI.

The controller denies the allegations in fact and in law, but has cooperated in the proceedings.

Reasoning

A. Facts

I. Background

- (1) The controller founded the project [REDACTED] in May 2007. He offers photo shoots as an official event photographer, especially in the field of youth sports. With his sole proprietorship [REDACTED], he runs a small business in accordance with § 19 of the Value Added Tax Act (UStG). According to his own statements, he has been receiving unemployment benefits for many years and therefore does not have any assets or chargeable income.
- (2) The controller stated that with [REDACTED] in 2018 he made losses of 1,605,00 Euro and 835,00 Euro in 2019. Due to the Corona pandemic, he expects an even higher loss for 2020. In the letter of 2 October 2019, the controller stated that his profits in

recent years had been significantly below 1,000.00 euros per financial year. The Berlin DPA does not know the specific turnover in 2020.

II. Accused Actions

- (3) The controller, acting as the owner of the sole proprietorship [REDACTED], has offered knowingly and intentionally to every person, without registration, by providing preview pictures for every photo, the photos taken by him as an accredited and official photographer at the "[REDACTED] 2018", an international water diving competition in Zadar, Croatia. The bespoke photos are a total of 16.392 and picture the participating children and adolescents from the age groups E to A (6 to 18 years). The bespoke photos were for sale on its website [www.\[REDACTED\].com](http://www.[REDACTED].com) under the web address [https://\[REDACTED\]](https://[REDACTED]) from at least 12 July 2018 until 7 September 2021. In the photos, the children and adolescents are mostly only dressed in swimming costumes during their jumps, jump preparation, the breaks between the jumps and the award ceremonies in the swimming hall.
- (4) The photos can be categorised on the controller's website using the categories "general photos", "award ceremonies" (with the subcategories „Boys A“, „Boys B“, „Boys C“, „Boys D“, „Boys E“, „Girls A“, „Girls B“, „Girls C“, „Girls D“ und „Girls E“) and "participants" (with the subcategories of the participating countries and of these with the subcategories of the participants).
- (5) The fotos can be bought individually by any person without registration either for private use, starting from 1,89 Euro or for editorial use starting at 15,00 Euro in different high resolution sizes. It is also possible to purchase a photo set with all photos of a participant from this competition as a digital download, CD or on a USB stick for 59.00 Euros. For this purpose, the following participating children and youths listed in the category "Participants" can be selected:
- [Name, gender and age group redacted]
- 5 participants from France
 - 3 participants from Georgia
 - 50 participants from Croatia
 - 12 participants from Austria
 - 8 participants from Poland
 - 2 participants from Russia
 - 14 participants from Serbia
 - 6 participants from Turkey
 - 16 participants from Hungary
- (6) The children and adolescents depicted in the photos and their legal guardians have not consented to the publication and sale of the photos by the controller.

B.

Legal assessment

- (7) The conduct described infringes the first sentence of Art. 6 (1) in conjunction with Art. 83 (5) (a) GDPR.

I.

- (8) The publication of photos of children and adolescents without their consent or the consent of their legal guardians infringes the first sentence of Article 6 (1) GDPR.
- (9) Pursuant to the first sentence of Article 6 (1) GDPR, the processing of personal data is only permitted if one of the conditions in the first sentence of Art. 6 (1) (a) to (f) GDPR is met.

a) Applicability of the first sentence of Article 6 (1) GDPR against the background of the Act on Copyright in Works of Fine Arts and Photography (KUG)

- (10) The provision of the first sentence of Art. 6 (1) GDPR is applicable in the present case despite the provisions for image publications in Sections 22, 23 KUG in conjunction with Art. 85 (2) GDPR.
- (11) Pursuant to Article 85 (2) GDPR, Member States shall provide for derogations or exemptions from Chapter 2 GDPR, which includes Article 6 GDPR, for processing operations carried out for journalistic purposes where this is necessary to reconcile the right to the protection of personal data with the freedom of expression and information. Although, in view of the importance of freedom of expression in any democratic society, the related concepts, including journalism, must be interpreted broadly, it cannot be assumed that any information published on the internet which relates to personal data falls within the notion of journalistic purposes (see ECJ, Judgment of. 14 February 2019 - C-345/17, NJW 2019, 2451 para. 51, 58 - Sergejs Buivids/Datu valsts inspekcija). Accordingly, publications in the online world can only be classified as journalism if they have a minimum journalistic-editorial content. A sufficiently journalistic-editorial level exists if the opinion-forming effect for the general public is a defining component of the offer and not merely an ornamental accessory.
- (12) The application of the provisions of Sections 22, 23 KUG is limited to the scope of application of Article 85(2) GDPR, which is precisely not applicable in the present case. The publication of the photos is not to be classified as data processing for journalistic purposes because the photos have not been edited and no restriction on their further use for journalistic purposes is apparent. The fact that some of the children and adolescents might be competitive athletes who take part in championships that are covered by the press every year is irrelevant, as the controller does not deal with the content of the photos, but merely offers them for sale to anyone. In the present case, the clear focus of the offer by [REDACTED] is on the commercial exploitation of the photographs of the sporting event with a view to selling them to the legal guardians of the children and adolescents.

b) Applicability of the first sentence of Art. 6 (1) GDPR against the background of press privilege

(13) The press privilege in the first sentence of Section 19 (1) of the Berlin Data Protection Act (BlnDSG) does not exclude the applicability of the first sentence of Article 6 (1) GDPR in the present case, because this also requires processing for journalistic purposes, which is not the case here (cf. above).

c) No consent

(14) There was no legally valid consent of the children and adolescents for the publication of the photos according to the first sentence of Art. 6 (1) (a) GDPR.

(15) According to Art. 4 (11) GDPR, consent of the data subject is any freely given specific, informed and unambiguous indication of his or her wishes in the form of a statement or other unambiguous affirmative act by which the data subject signifies his or her agreement to personal data relating to him or her being processed. Consent may be given in writing, electronically or orally, first sentence of Recital 32 GDPR. According to the second sentence of Recital 32 GDPR, consent may be given, for example, by ticking a box when visiting a website, by selecting technical settings for information society services or by any other statement or conduct by which the data subject unambiguously indicates his or her agreement to the intended processing of his or her personal data in the relevant context. Silence, already ticked boxes or inactivity on the part of the data subject, on the other hand, does not constitute consent, cf. third sentence of Recital 32 GDPR. It must be a matter of active consent (ECJ, judgment of. 11 November 2020 - C-61/19, para. 36 - Orange România SA/ANSPDCP; CJEU, Judgment of. 1 October 2019 - C-637/17, NJW 2019, 3433 marginal no. 62 - Verbraucherzentrale Bundesverband e.V./Planet49 GmbH). The failure to protest against the processing can therefore not be equated with a declaration of consent. Signs are also irrelevant for consent with regard to photo publications. In any case, the controller must be able to prove the lawfulness of the consent pursuant to Article 7 (1) GDPR and Article 5 (2) GDPR at any time (see ECJ, Judgment of. 11 November 2020 - C-61/19, para. 42 - Orange România SA/ANSPDCP).

(16) These requirements were not met by the controller in this case. The controller did not provide the Berlin DPA with any documented consent from the children and adolescents or their legal guardians.

(17) On the contrary, the controller told us that every club had been informed of the photo service at the time of registration several months before the event and had the opportunity to object, but this had not happened. The announcement would have been prominently displayed in the hall by all participants at all times during the event. Participants always had the opportunity to object, but this did not happen either. He was always clearly recognisable and approachable as a photographer at the events. On the basis of the information provided by the associations, the controller had assumed that all participants had given their permission to be photographed. According to the controller, written consent had

already been obtained from about one third of the participants of the event. There were personal verbal statements from other participants that their parents had given permission for them to be photographed. In addition, it was common for participants (or their parents or guardians) to give their permission to be photographed when they register for the event.

- (18) The controller fails to realise that it is his task as a controller to document the consent of all children and adolescents depicted or of their legal guardians. Promises made by clubs or the organiser are irrelevant, because the controller must be able to prove that they have given their consent. Mere acquiescence to the taking of photographs by the children and adolescents concerned is not sufficient. Mere assertions to the supervisory authority are also not sufficient proof. The fact that allegedly one third of the participants had already given their written consent, the Berlin DPA regard as a protective claim, as the controller has not yet provided the Berlin DPA with any documents in this regard. Furthermore, the controller speaks of a "permission to photograph", but the present fine proceedings are about the publication of the pictures for sales purposes and not about the taking of the photos. Publication requires verifiable consent, without which the data subject cannot invoke the first sentence of Art. 6 (1) (a) GDPR.

d) No processing based on contractual relationships

- (19) The first sentence of Article 6 (1) (b) GDPR cannot be invoked, as the taking of the photos of the children and adolescents participating in the [REDACTED] was not the subject of a contract between the photographer and the data subjects or their legal guardians. A contractual relationship in the form of an assignment existed only between the controller and the organiser of the [REDACTED].

e) No processing based on legitimate interests

- (20) Finally, the publication of the photos on the homepage of the data subject for sales purposes cannot be based on the first sentence of Article 6 (1) (f) GDPR.
- (21) According to the first sentence of Article 6(1) (f) GDPR, the processing of personal data is lawful if the processing is necessary for the purposes of the legitimate interests of the controller or of a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.
- (22) The interests of the children and adolescents depicted in the photos published on the website of the controller outweigh the legitimate interests of the controller in the sale of the photos.
- (23) The sale of the photos by the controller in the field of sports and event photography is subject to the freedom of profession pursuant to Article 15 of the Charter of Fundamental Rights of the European Union (CFR) and basically constitutes a legitimate interest. Due to the official invitation or accreditation at the sporting event, the organiser of the [REDACTED] and the participating clubs also

have an interest in documenting the competition and thus a legitimate interest of a third party within the meaning of the first sentence of Art. 6 (1) (f) GDPR can be assumed.

(24) When weighing up the interests, fundamental rights and freedoms of the photographed children and adolescents, their reasonable expectations in particular must be taken into account in accordance with the first sentence of recital 47 GDPR. The GDPR assumes that children under the age of 16 are in greater need of protection, and their interests therefore generally outweigh the first sentence of Article 6 (1) f) GDPR. In the present case, the publication of the photos affects the children's and adolescents' right to respect for private and family life under Article 7 CFR and their right to protection of personal data under Article 8 CFR. The controller made photos of them freely available to anyone on the internet for purchase, which show them in high resolution, scantily clad in swimming costumes. This worldwide accessibility and purchasability of the photos is also a circumstance that is generally not to be expected in the case of mere participation in a sporting event, especially not by children. In this regard, it must also be taken into account that not only the legal guardians of the children and adolescents concerned can purchase the images via the website of the controller, but in principle any person without registering on the website or stating a reason for the purchase. The pictures are not stored in an internal or closed portal, but are freely accessible worldwide. The publication of the photos thus primarily serves the commercial interest of the controller and not only the interests of the children and adolescents in a presentation of their performance or sport. Even if the sporting event is a public event with international significance in the field of competitive sport, the chosen marketing of photos of the children and adolescents is not compatible with their personal rights.

f) No other legal basis apparent

(25) Another legal basis for the publication of the photos for sales purposes is not apparent and was not submitted by the controller.

II.

(26) Reasons that exclude the unlawfulness or guilt of the controller are not evident.

III.

(27) In favour of the controller, all unlawful data processing was considered as a single act pursuant to section 19 (1) OWiG, as they all served the purpose of finding buyers for the photos by publishing them on the website.

C.

Imposition of the fine

- (28) Pursuant to Article 83(5)(a) in conjunction with the first sentence of Article 6 (1) GDPR, the administrative offence is punishable by a fine of up to EUR 20,000,000.00 or, in the case of an undertaking, up to 4% of its total annual worldwide turnover in the preceding business year, whichever is the greater.
- (29) In the absence of a statement on the turnover, the Berlin DPA has estimated the worldwide annual turnover of the previous business year of the controller at 10,000.00 euros. The upper limit of the fine was therefore set at 20,000,000.00 euros, as this amount exceeds four percent of the annual turnover estimated by the Berlin DPA.
- (30) Pursuant to Article 83 (1) GDPR, each supervisory authority shall ensure " that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive". The criteria for fines are derived from Article 83 (2) GDPR.
- (31) In the present case, a fine of 1,000.00 euros was determined. This decision is based on the following considerations, which are oriented on Article 83 (2) (a) to (k) GDPR:
- (32) The fact that the publication of photos of children and adolescents dressed only in swimwear on the Internet is a serious infringement was taken into account as an aggravating factor for the imposition of a fine pursuant to the second sentence of Article 83 (2) (a) GDPR. The severity of the infringement was also taken into account in order to increase the fine, since the publication of 16,392 photos involves a large number of data processing operations and affected children and adolescents, and the purpose of the publication, i.e. the sale of the photos to an unlimited number of people worldwide, is to be classified as reprehensible. In this respect, the fact that the photos had been published on the website of the controller for more than three years was also taken into account.
- (33) Pursuant to the second sentence of Article 83 (2) (b) GDPR, the fact that the controller acted intentionally in the sense of *dolus directus* in the second degree was taken into account to increase the fine. Although the controller does not show any awareness of wrongdoing in his statements, it must have been recognisable to him, even by way of parallel evaluation in the layperson's sphere, that his publications infringed the first sentence of Article 6 (1) GDPR, without the need for a correct legal subsumption.
- (34) Pursuant to the second sentence of Article 83 (2) (c) GDPR, the fact that the controller apparently removed the publication from its website on its own initiative in response to our hearing in the fine proceedings of 1 September 2021 was taken into account to reduce the fine.
- (35) The fact that the controller did not restrict access to the photos to the legal guardians of the children and adolescents was taken into account as an aggravating factor for the fine pursuant to the second sentence of Article 83 (2) (d) GDPR.

- (36) The fact that the Berlin DPA is not aware of any relevant previous infringements by the controller was taken into account to reduce the fine in accordance with the second sentence of Article 83 (2) (e) GDPR.
- (37) In accordance with the second sentence of Article 83 (2) (f) GDPR, the fact that the data subject had cooperated well with the Berlin DPA was taken into account to reduce the fine.
- (38) Pursuant to the second sentence of Article 83 (2) (g) GDPR, the fact that photos of lightly clad children and adolescents are personal data requiring special protection was taken into account in order to increase the fine.
- (39) The finding of infringement was based on a complaint pursuant to Article 77 GDPR, so that the criterion of the second sentence of Article 83 (2) (h) GDPR did not apply in the present case.
- (40) Previous measures ordered against the controller under Article 58 (2) GDPR in relation to the same subject matter do not exist, nor do approved codes of conduct under Article 40 GDPR or approved certification procedures under Article 42 GDPR, so that the second sentence of Article 83 (2) (i) and (j) GDPR did not apply in the assessment.
- (41) Pursuant to the second sentence of Art. 83 (2) (k) GDPR, the data subject's poor financial situation was taken into account to reduce the fine.
- (42) For the above reasons, it was necessary to set a fine of 1,000.00 euros, which is in the lower range of the total possible fine, in consideration of all aspects.
- (43) However, this fine should be sufficient to encourage the data subject to comply with the law in the future (cf. recital 148 GDPR).

[Information on right to appeal not translated]