



Summary of the Final Decision

Vaduz, 31 January 2024

Ref: 103.1.2/2022-15446

IMI Case A60FD 601671.1

Decision of the Data Protection Authority of the Principality of Liechtenstein (DPA) dated 15 December 2023

Lead Supervisory Authority: Data Protection Authority Liechtenstein, Städtle 38, FL-9490 Vaduz

Concerned Supervisory Authority: Commissioner for Data Protection of Berlin, Alt-Moabit 59–61, DE-10555 Berlin

Complainant: ■ Berlin («Complainant»)

Controller: ■ ■ («Controller»)

DECISION

The Data Protection Authority Liechtenstein finds

that the controller infringed Art. 6, 15 and 17 GDPR. The controller according to Art. 58 para. 2 letter c GDPR was ordered to transmit to the Data Protection Authority Liechtenstein the information pursuant to Art. 15 GDPR which it should have sent to the complainant and also was ordered to delete the personal data of the complainant resp. to take care of the deletion. For the execution of the orders a deadline of one month of the date of legal effect of the decision was set.

1. Background to the case

On 3 May 2022 the complainant lodged a complaint against the controller for infringement of Art. 6, 15 and 17 GDPR with the Commissioner for Data Protection of Berlin.

In his complaint of 3 May 2022 the complainant submitted that he had unsubscribed from the ■ newsletter on 7 March 2021. Nevertheless, despite having

unsubscribed the complainant received further emails from [REDACTED] on 4 April 2022, 22 April 2022 and 3 May 2022. On 4 April 2022 the complainant sent an email to the controller requesting the information pursuant to Art. 15 GDPR. He did not receive a reply.

As a cross-border case, the complaint was dealt with in accordance with Article 60 GDPR. For the controller having its place of domicile in Liechtenstein the DPA Liechtenstein was the lead supervisory authority in accordance with Article 56 (1) GDPR.

By letter of 31 August 2022 the controller was requested to reply to the allegations brought forward by the complainant. In particular the controller was asked to provide information on the following:

- a. information on his role in sending the newsletters
- b. information on the legal basis for processing the personal data of the complainant
- c. his role in replying to the information request of 4 April 2022
- d. his role in the deregistration from the newsletters.

The controller informed the DPA Liechtenstein to the points a. to d. above in summary as follows:

- a. The controller informed the DPA Liechtenstein that it was a licensee for the trademark [REDACTED] and in this function was responsible for the organization and realization of events under this trademark in Germany. The controller further informed the DPA Liechtenstein that as a licensee it was responsible for the promotion of events under this trademark in Germany. The controller confirmed that it had sent the newsletters of 22 April 2022 and 3 May 2022 to the complainant and informed to newsletters in general that these were directed to persons who had bought tickets for events in 2020 which failed to realize because of the COVID-19 pandemic and as a result thereof had received vouchers for later events.
- b. The controller informed the DPA Liechtenstein that the legal basis for processing the personal data of the complainant was a licence contract with [REDACTED]. The controller informed the DPA Liechtenstein that it exclusively processed the data upon strict instruction of the licensor.
- c. The controller confirmed that it was responsible for information requests pursuant to Art. 15 GDPR in general but in the present case it did not receive the demand thereto by the complainant. The controller argued that the complainant had used the wrong email-address when making his information request.
- d. As to the deregistration from newsletters the controller informed that deregistrations are executed in an automated way in the customer relation management system (CRM) when a person wishing to do so makes such a demand. The controller further

informed that the technical set-up was made by the licensor and is under the control of the latter.

As to the demand for deregistration from newsletters made by the complainant on 7 March 2021 the controller informed that it was not able to check whether such a deregistration demand was received at that date. The controller informed that failure to be able to check this was due to a change of systems used for the management of subscribers to newsletters. The controller argued that it would need to have access to the old system which it did not have. Checking the new system now used the controller confirms to find an entry of deregistration there on 23 April 2022.

2. Complaint:

On the basis of the submissions of the complainant, the legal question was whether the controller had a legal basis for processing the data of the complainant under Art. 6 para. 1 GDPR. Further, there was the legal question whether the rights of the complainant based on Art. 15 and 17 GDPR were infringed and whether such infringements were attributable to the controller.

3. Legal framework:

a) Competence of the lead supervisory authority

██████████ is a company domiciled in Liechtenstein, registered in the Liechtenstein Trade Register under number ██████████ for which the GDPR is applicable. According to Art. 55 GDPR, the DPA Liechtenstein was the competent national data protection supervisory authority.

According to Art. 2 para. 1 GDPR, the GDPR applies to the full or partial automated processing of personal data. According to the definition in Art. 4 point 1 GDPR "personal data" are all information relating to an identified or identifiable natural person, such as name, location data, online identification and other personal data as stated in Art. 4 point 1 GDPR. For the present complaint the email address of the complainant was processed when sending him the newsletters. These data are personal data of natural persons in accordance with the legal definition of Art. 4 (1) GDPR. According to Art. 2 para. 1 GDPR, the present complaint falls within the material scope of the GDPR.

b) Infringement of Art. 6 GDPR

With a view to determine the role of ██████████ the DPA Liechtenstein based its analysis on 1. statements made by the aforesaid company in general, 2. by analyzing the relationship between the licensor and the licensee based on the statements made by the licensee (= the controller), 3. by analyzing the documents submitted by the complainant and 4. by analyzing the privacy declaration and the imprint on the website.

Concerning the licence relationship between the licensor and the licensee the DPA Liechtenstein ascertained that the licensee (= the controller) when promoting and implementing events under the [REDACTED] brand, had a certain amount of leeway due to the nature of such activities. Within the scope of the license agreement, the licensee (= the controller) represented the [REDACTED] brand and in this context had certain discretionary power in deciding where, how and when data was processed. It was hence to be qualified as a controller.

The privacy declaration on the website stated that controller for the processing of personal data is the party stated in the various channels of communication (website, e-mail etc.). In the course of promoting and implementing events under the [REDACTED] brand, the controller sent the promotional emails subject of the complaint to the complainant. With these emails, the controller announced events under the [REDACTED] brand.

With regard to the newsletter recipients, amongst them the complainant, the controller, pursuant to statements made by it, accessed the platforms provided by the trademark and rights owner.

The controller argued that the newsletters of 22 April 2022 and 3 May 2022 were newsletters that were marked as "transactional" because they were addressed to voucher holders and were therefore not to be considered as advertising emails. By using this argumentation the controller tried to have resort to the legal basis of Art. 6 para. 1 letter f GDPR, eventually also Art. 6 para. 1 letter b GDPR.

The DPA Liechtenstein, by analyzing the subject emails, found that these emails in no way could be classified as transactional emails. To be classified as transactional emails such emails should only have been addressed to voucher holders. In reality, however, those emails were addressed to all persons listed in the data base. At the end of the emails it was stated: "You receive this newsletter (then followed by stating the email address of the complainant) because you have registered yourself with [REDACTED]." Based on this it had to be assumed that the emails were directed to any person who was registered in the data base as recipient of newsletters. Also, the content of the subject emails themselves supported no other result.

By using the argumentation that the subject emails were "transactional emails" the controller tried to find a legal basis directing away from the lack of consent. In fact, the basis of the consent as legal basis for the processing fell away upon deregistration by the complainant from the newsletter subscription. The complainant proved the deregistration on 7 March 2021 by submitting the relevant documentation thereto. The complainant from this date onwards, hence, should not have received further newsletters. The controller for his part confirmed to have found a date of deregistration on 23 April 2022. The complainant at least should not have received the email of 3 May 2022 then.

The infringement due to the transmission of the subject newsletters to the complainant without a legal basis pursuant to Art. 6 para. 1 letter a GDPR was attributable to the controller: In its function as licensee, the controller was responsible for the organization and implementation of the events under the [REDACTED] brand in Germany and as part

of the promotion of the events sent the emails in question to the complainant. The controller expressly confirmed having sent the emails to the complainant in its statement and confirmed its leeway therewith.

c) Infringement of the right of access according to Art. 15 GDPR

The controller confirmed in its statement that it was responsible for access requests according to Art. 15 GDPR. However, the controller claimed that it did not receive the respective access request stating that the complainant addressed the demand to an email address which did not reach it. The controller provided information on how it should have been contacted. The DPA Liechtenstein found that it cannot be the duty of the complainant to search through the website to find the appropriate way how the controller was meant to be contacted. The Liechtenstein DPA found that it was indeed correct that the complainant addressed his demand according to Art. 15 GDPR to the email address where the emails were sent from by the controller. Said email address was not marked as a no reply-email-address. Indirectly the controller admitted the fault. In fact, it stated that emails directed to the said email address were now redirected to it and would reach it henceforth.

In its statement, the controller left unanswered the question who was responsible for the lack of forwarding of such e-mails sent to [REDACTED] to it. It offered no evidence for that. However, the controller conceded that it was responsible for requests made by data subjects pursuant to Art. 15 GDPR. According to Art. 15 para. 1 GDPR, it is the responsibility of the controller to comply with requests for information in accordance with Art. 4 para. 7 GDPR. Failure on the part of the controller to comply with the obligation resulting from Art. 15 GDPR led to a violation of Art. 15 GDPR by the same.

d) Infringement of the right of erasure according to Art. 17 GDPR

The request by the complainant to delete his personal data in accordance with Art. 17 para. 1 letter b GDPR was made by the complainant using the option provided for on the website to unsubscribe from newsletters on 7 March 2021. The complainant gave clear evidence for this. Therefrom onwards the complainant should no longer have received newsletters from the controller. In fact, however, the controller subsequently received the promotional emails of 4 April 2022, 22 April 2022 and 3 May 2022. This means that the complainant's personal data was still registered as recipient for newsletters on 3 May 2022.

In its statement to the DPA Liechtenstein the controller argued that the trademark and rights holder (licensor), [REDACTED] was responsible for registering the deregistration from the newsletter mailing. Unsubscribing from the newsletter was automated in the CRM system and the settings for this was set up by the licensor. The controller did not provide any evidence that it was not responsible for the deletion, but rather the licensor. In accordance with this, the failure to delete the data pursuant to Art. 17 para. 1 letter b GDPR was attributable to the controller and it was established that the controller committed an infringement of Art. 17 GDPR.