

Summary Final Decision Art 60

Complaint

EDPBI:CZ:OSS:D:2022:436

Administrative fine

Background information

Date of final decision:	31 October 2021
LSA:	CZ
CSAs:	All SAs
Legal Reference(s):	Article 6 (Lawfulness of processing), Article 13 (Information to be provided where personal data are collected from the data subject)
Decision:	Administrative fine
Key words:	Lawfulness of processing, Anonymisation, Clients, Definition of personal data, Big Data,

Summary of the Decision

Origin of the case

The controller offers an antivirus software (also for free) and has its main establishment in the Czech Republic. The LSA carried out an investigation on the basis of a complaint received on 22 February 2020 and of an inspection performed from 2 July 2018 to 19 March 2019 at the end of which the controller was required to adopt corrective measures in order to bring processing operations into compliance with the GDPR on a voluntary basis.

The administrative proceeding procedure was initiated to assess whether a fine should be imposed since in the Czech legal system remedial measures and administrative penalty for an offence follow two different objectives and therefore have two completely separate proceedings that do not overlap (due to the ne bis in idem principle).

As part of the cooperation procedure pursuant to Article 60(3) GDPR, a draft decision was submitted on 31 October 2021. No relevant and reasoned objections have been raised to the draft decision.

Findings

The LSA found that the controller, within its business activity of installing the antivirus program and its browser extensions, processes users data which are deemed to be personal data (as they relate to identifiable natural persons) since it assigns, by each installation of the antivirus software, an ID to each device on which the antivirus program is downloaded and collects the internet protocol address (IP address) of the device, the data subject's online search history, the device ID and data about the hardware or software of the system on which the antivirus program is installed.

Moreover, the LSA found that, at least over the period from April 2019 to July 2019, the controller transferred the collected personal data to a third party for statistical trend analysis purposes. The LSA rejected the controller's assumption that the data transferred is anonymous insofar as a reversal identification of data subjects was possible and both the controller and the third party were part of the same group. The controller originally relied this processing on the legal basis of the legitimate interest but, as for the users of the free antivirus program version, it considered that their data was anonymised and therefore not subject to the relevant legislation (nevertheless an opt-out button was provided to both paid and free versions). The controller introduced a direct consent (opt-in) for this processing in July 2019. The data transferring stopped at the end of January 2020 when the third party closed.

The LSA found that, at least over the period from April 2019 to July 2019, the controller transferred users' personal data of its antivirus program and related browser extension to a third party, which acted as a controller in order to produce a statistical trend analysis, without any legal grounds within the meaning of Article 6(1) GDPR. Firstly, the LSA stated that the given processing could not be based on Article 6(1)(f) GDPR since the controller did not sufficiently assess the existence of the legitimate interest, neither of itself nor of third parties, and it did not demonstrate that the necessity of the processing. The LSA also noted that, considering that the controller's activity was antivirus protection of users including the protection of their privacy, data subjects did not reasonably expect that their personal data could have been further processed for the purpose of statistical trend analysis. Secondly, the LSA stressed that the availability of an opt-out button does not constitute, as argued by the controller, user's consent according to Article 6(1)(a) GDPR since such consent must be given through a positive action, which is an expression of a free, specific, informed and unambiguous permission by a data subject.

With reference to transparency, the LSA found that the controller's data policy in the wording effective from at least April 2019 to July 2019 informed that it could share users' collected data with third parties generally and it principally presented these data as anonymous data. On that basis, the LSA stated that the controller failed to inform data subjects about the purposes and the legal basis underpinning the transfer of users' personal data to a third party, whereby it breached Article 13(1)(c) GDPR.

Decision

The LSA imposed an administrative fine pursuant to Article 83(5) GDPR in the amount of CZK 351.000.000 (approx. EUR 13.657.587).

The LSA concluded that the amount corresponding to 30 % of the maximum possible amount is an adequate initial amount for the calculation of the administrative fine, taking into account the circumstances of the specific case as provided for in Article 83(2) GDPR and the publicly accessible closing financial statement of the controller for the year 2020, as well as having regard to the very high level of severity of the detected conduct with reference to the lack of legal basis. This amount has been increased by 65 % for both infringements pursuant to Article 83(3) GDPR so that the final

amount corresponds to the half of the highest administrative fine applicable. The LSA pointed out that such an amount of the fine will have an appropriate dissuasive effect on the controller preventing it from any future infringement of other legal obligations laid down in the GDPR.