

**Information and Data Protection Commissioner**

**CDP/COMP/134/2023**

████████████████████

**vs**

████████████████████

**COMPLAINT**

1. On the 17<sup>th</sup> February 2023, ██████████ through his legal counsel (the “**complainant**”), lodged a complaint with the Information and Data Protection Commissioner (the “**Commissioner**”) pursuant to article 77(1) of the General Data Protection Regulation<sup>1</sup> (the “**Regulation**”), alleging that ██████████ (the “**controller**”) failed to comply with his request to access his personal data.
2. As supporting documentation, the complainant provided a copy of the subject access request dated the 13<sup>th</sup> January 2023. In addition, the complainant submitted a copy of the reply provided by the controller on the 13<sup>th</sup> February 2023, wherein the controller informed the complainant that “[w]e have again carefully considered all specific circumstances and aspects relevant to your request and have weighed the legitimate interests of your client and ourselves with respect to your request. We believe that *your request is predominantly aimed to facilitate litigation*. In this light we believe it is necessary for the pursuit of our legitimate interests to restrict access to the data requested by denying your request” [emphasis has been added by the controller].

**INVESTIGATION**

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<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

3. On the 24<sup>th</sup> November 2023, the controller was provided with a copy of the complaint, including the supporting documentation. Pursuant to article 58(1)(a) of the Regulation, the Commissioner requested the controller to indicate whether there were, or there are, any ongoing judicial proceedings filed by the complainant against the controller, and if in the affirmative, to provide the necessary evidence.
  
4. In its reply dated the 30<sup>th</sup> November 2023, the controller submitted the following principal arguments for the Commissioner to consider in the legal analysis of the case:
  - i. that “[w]e now have a large number of cases from both Austria and Germany where refunds are claimed on the basis of perceived illegality of our services, all in all involving a substantial amount for us. As we have already seen competitors become insolvent as a result of claims, we treat these claims with great caution”;
  
  - ii. that “[a] number of cases have already seen judgements. Some cases are now in dispute in Malta, as a matter of enforcement. The claims are all based on substantially overlapping legal arguments, which are contrary to the views and policy of the MGA and the now enacted Bill 55 and moreover violate the freedoms at the heart of the European Union. Differences in legal arguments are likely ignored by Austrian and German courts which use templates. We need as many lines of defence as possible to protect our legitimate interests. Our interests together with those of a number of our competitors are of vital interest to the economy of Malta”;
  
  - iii. that “[o]ne of our key grounds of defence is disputing the amount involved. However, our ability to use this ground is at risk of being severely undermined by the IDPC in its dealings with the complaints in issue. We rely on the exemption invoked by us to enable our defence in litigation and the preparation thereof. Acceding to requests potentially relating to litigation would severely prejudice our defence of disputing the amount involved. The exemption concerned would be futile if it were to be invoked only if litigation has commenced. Requests for data are not made when litigation has been initiated but ahead of litigation. These requests enable litigation and the potential success thereof. Requests can be distinguished from normal requests which tend to have a narrow focus”;

- iv. that “[w]e currently have a number of law firms or groups of lawyers in Germany and in Austria representing clients claiming refunds for perceived illegality of our services. Most of these have over 10 cases against us, and one has over 35 cases against us. In our experience, claims by these lawyers are most often preceded by requests for data. Some of these requests are made by the players concerned, and others by the lawyers representing the players. Usually, some weeks or months pass after the data request before litigation is initiated. We should note that we have ceased accepting customers from Germany and from Austria a number of months ago. Requests for data we now receive from Germany and Austria are therefore no longer expected in relation to reasons common before the avalanche of litigation commenced or elsewhere, such as players wanting to verify if their winnings or losses are correct or needing to show their bank some evidence. Our lack of expectation of common reasons is confirmed by the fact that, since we ceased to accept German and Austrian customers in April 2023, we have seen that requests shifted to being made predominantly by lawyers from July 2023 onwards”;
- v. that “[i]n view of the above we believe that our experience provides sufficient basis for invoking the exemption to the right of access as we do, i.e. before litigation proceedings are ongoing. Indeed, we now consider data subject access requests from both Germany and Austria to be an initiation of litigation steps unless circumstances suggest otherwise”;
- vi. that “[w]e hold the belief that the concept of a necessity and proportionality test does not apply to exemptions such as that invoked by us. Should our belief not be acceptable to the IDPC, we will be willing to reconsider our belief. We therefore request you to provide us with the legal reasoning on which the IDPC's view is based that a necessity and proportionality test is required”;
- vii. that “[i]f and to the extent that a necessity and proportionality test is required, we attach an example of how we conduct the test. We have considered relevant factors including the following. In view of our considered understanding of the legal position in cases where refunds are claimed on the basis of perceived illegality, such claims have no legal ground whatsoever and are essentially extortionate in their nature. Parties making such claims therefore do not have any real interest.

*Our refusal to accede to requests for data serving such claims are therefore proportional to the players interest. Given the large potential impact of the totality of claims on our finances, our interest on the other hand is proportional to refusal to provide data. As indicated above, our refusal is moreover necessary to mount an effective defence in litigation. Data are however not necessary for parties making such claims. These should be able to deduce the amount to be claimed from their own financial administration. Data not requested for common non-litigious purposes are not used for other purposes in our experience”.*

## LEGAL ANALYSIS AND DECISION

5. During the course of the investigation, the Commissioner established that the complainant had exercised his right to access his personal data in terms of article 15 of the Regulation, by means of a request dated the 13<sup>th</sup> January 2023. In the reply dated the 13<sup>th</sup> February 2023, the controller restricted the right of the complainant to access his personal data in the belief that the request is predominantly aimed to facilitate litigation. In this regard, the Commissioner sought to establish whether the restriction invoked by the controller pursuant to regulation 4(e) of the Restriction of the Data Protection (Obligations and Rights) Regulations, Subsidiary Legislation 586.09 (the “**Subsidiary Legislation 586.09**”) applies to the present case, particularly, by considering the assessment conducted by the controller to restrict the right of the complainant.

### Subject Access Request: Article 15 of the Regulation

6. Article 15 of the Regulation grants data subjects far-reaching rights of access in relation to the processing of their personal data. Its predominance is derived from article 8(2) of the Charter of Fundamental Rights of the European Union (the “**Charter**”), which explicitly refers to the right of access, by stating that “[e]veryone has the right of access to data which has been collected concerning him or her ...”. This corresponds to the objective of the Regulation which is clearly outlined in recital 10 of the Regulation, that is, to ensure a consistent and high level of protection of natural persons within the European Union.
7. It has been repeatedly stated by the Court of Justice of the European Union (the “**CJEU**”) that this right is instrumental to the exercise of the other data subjects’ rights as set forth in the

Regulation<sup>2</sup>, mainly articles 16 to 19, 21, 22 and 82. Notwithstanding this, the exercise of the right of access is an individual's right and is certainly not conditional upon the exercise of other rights<sup>3</sup>.

8. Article 15 of the Regulation provides the data subject with the right to request, whilst the controller has the obligation to provide information and personal data. Article 15(1) and (3) of the Regulation empowers the data subject to obtain from the controller: (i) confirmation as to whether or not personal data concerning him are being processed and, if so, to receive information about the processing activity, and (ii) to receive a copy of the personal data being processed.
9. The CJEU's Advocate General Pitruzzella in his Opinion explained that article 15(1) of the Regulation "*gives specific expression to the right of access to personal data and related information, defining the precise subject matter of the right of access and the scope of application*", whereas article 15(3) of the Regulation "*provides more details as to how that right is to be exercised, specifying in particular the form in which the controller must provide the data subject with personal data, that is to say, in the form of a copy and, therefore, a faithful reproduction of the data*"<sup>4</sup>.
10. Given that the right of access is an expression of article 8(2) of the Charter, it is formulated in very broad terms and, as a result, the CJEU adopted a wide interpretation of this article, with specific reference to the recent judgments delivered in 2023<sup>5</sup>. This is naturally due to the fact that the right of access is the crux of guaranteeing the protection of the data subjects' right to data protection. To this end, the controller should seek to handle the request in such a manner to give the broadest effect to the right of access.

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<sup>2</sup> Case C-487/21, '*FF vs Österreichische Datenschutzbehörde*', decided on the 4<sup>th</sup> May 2023: "*In particular, that right of access is necessary to enable the data subject to exercise, depending on the circumstances, his or her right to rectification, right to erasure ('right to be forgotten') or right to restriction of processing, conferred, respectively, by Articles 16, 17 and 18 of the GDPR, as well as the data subject's right to object to his or her personal data being processed, laid down in Article 21 of the GDPR, and right of action where he or she suffers damage, laid down in Articles 79 and 82 of the GDPR.*" (para. 35).

<sup>3</sup> European Data Protection Board, '*Guidelines 01/2022 on data subject rights - Right of access*' (Version 2.0), adopted on the 28<sup>th</sup> March 2023 (para. 12).

<sup>4</sup> Case C-487/21, Opinion of Advocate General Pitruzzella, delivered on the 15<sup>th</sup> December 2022, (para. 48 and 49).

<sup>5</sup> Case C-487/21, '*FF vs Österreichische Datenschutzbehörde*', decided on the 4<sup>th</sup> May 2023, & and Case C-154/21, '*RW v Österreichische Post AG*', decided on the 12<sup>th</sup> January 2023.

11. It is evident from the wording of article 15 of the Regulation, that the law does not require the data subject to justify or give any reasons for a request under the Regulation, and any beliefs of the controller as to what the data subject's reasons are, should not affect that request as otherwise this would render the right of access futile and ineffective.
12. This is further supported by the interpretation provided by the European Data Protection Board (the “EDPB”) in its Guidelines 01/2022 published in March 2023, which reads as follows: “[c]ontrollers should not assess “why” the data subject is requesting access, but only “what” the data subject is requesting ... and whether they hold personal data relating to that individual .... [F]or example, **the controller should not deny access on the grounds or the suspicion that the requested data could be used by the data subject to defend themselves in court in the event of a dismissal or a commercial dispute with the controller**”<sup>6</sup> [emphasis has been added].

#### Restriction in terms of Subsidiary Legislation 586.09

13. Recital 4 of the Regulation provides that the right to the protection of personal data is not an absolute right, and it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This has been reaffirmed by the CJEU in the judgment of Facebook Ireland and Schrems<sup>7</sup>.
14. The fundamental right to the protection of personal data may be subject to some limitations pursuant to article 52(1)<sup>8</sup> of the Charter. This therefore means that the limitations should be provided by law, respect the essence of the rights and freedoms, and be necessary and proportionate to genuinely meet objectives of general interest or the need to protect the rights and freedoms of others. Therefore, a restriction should not be extensive and intrusive in such a manner that it would void a fundamental right of its basic content.
15. Whereas the Regulation does not define the term ‘restrictions’, the EDPB defines it “as any limitation of scope of the obligations and rights provided for in Articles 12 to 22 and 34 GDPR

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<sup>6</sup> Ibid 4 (para. 13).

<sup>7</sup> Case C-311/18, ‘Data Protection Commissioner vs Facebook Ireland and Maximilian Schrems’, decided on the 16<sup>th</sup> July 2020 (para. 172).

<sup>8</sup> Article 52(1) of the Charter provides that: “1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

as well as corresponding provisions of Article 5 in accordance with Article 23 GDPR". The EDPB further provides that a "restriction to an individual right has to safeguard important objectives, for instance, the protection of rights and freedoms of others or important objectives of general public interest of the Union or of a Member State which are listed in Article 23(1) GDPR. Therefore, restrictions of data subjects' **rights can only occur when the listed interests are at stake and these restrictions aim at safeguarding such interests**"<sup>9</sup> [emphasis has been added].

16. The scope of the obligation and right provided for in article 15 of the Regulation may be restricted by national legislation. To this effect, regulation 4(e) of Subsidiary Legislation 586.09 provides that "[a]ny restriction to the rights of the data subject referred to in Article 23 of the Regulation shall only apply where such restrictions are a necessary measure required: (e) **for the establishment, exercise or defence of a legal claim and for legal proceedings which may be instituted under any law**" [emphasis has been added].
17. Regulation 7 of Subsidiary Legislation 586.09 makes it abundantly clear that any restriction must be a "necessary and proportionate measure", which effectively means that an assessment needs to be undertaken by the controller on a case-by-case basis to determine whether such measure is indeed "a necessary and proportionate measure", rather than merely refusing to comply with a request.
18. Pursuant to article 5(2) of the Regulation, the controller must be able to concretely demonstrate how the restriction is indeed necessary and if this part of the test is passed, the controller must proceed to show the element of proportionality. The case law of the CJEU emphasises that any limitation to the rights of the data subjects must pass a strict necessity test. In C-73/07, the CJEU held that "derogations and limitations in relation to the protection of personal data ... must apply only insofar **as is strictly necessary**"<sup>10</sup> [emphasis has been added].
19. Thus, in his assessment, the Commissioner analysed the reply provided by the controller on the 30<sup>th</sup> November 2023, particularly that "[w]e hold the belief that the concept of a necessity and proportionality test does not apply to exemptions such as that invoked by us". In this regard, the Commissioner noted that before a controller decides not to provide the requested personal data,

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<sup>9</sup> European Data Protection Board, 'Guidelines 10/2020 on restrictions under Article 23 GDPR' (Version 2.0), adopted on the 13<sup>th</sup> October 2021 (para. 8).

<sup>10</sup> Case C-73/07, 'Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy', decided on the 16<sup>th</sup> December 2008, (para. 56).

it is required to conduct a necessity and proportionality test. In this case, the controller failed to undergo this exercise and instead imposed a restriction without conducting the necessary necessity and proportionality test. Such failure can be construed as a non-fulfilment of the obligation to adequately balance the rights of the individual against the legitimate interests of the controller or any other affected parties.

20. The context within which the controller invoked the restriction could only be justified if the controller concretely demonstrates that the restriction is indeed necessary to defend a legal claim **and** legal proceedings which may be instituted by the complainant under any law. During the course of the investigation, the controller reiterated that the right of the data subject was being restricted on the basis that the *“request is predominantly aimed to facilitate litigation”*. The Commissioner does not consider this reason to be compliant with the objective of the restriction as set forth in regulation 4(e) of Subsidiary Legislation 586.09. The said regulation provides that the right of the data subject may only be restricted *“for ... defence of a legal claim **and** for legal proceedings”* [emphasis has been added]. Thus, the restriction shall only apply if it is necessary for the controller to defend an actual legal claim **and** legal proceedings instituted under any law. Hence, the controller cannot invoke the restriction merely on the assumption that the data subject **may**, following the provision of the information, institute legal proceedings against the controller. This led the Commissioner to conclude that the controller has failed to provide evidence that there is a legal claim and legal proceedings between the parties [emphasis has been added].
21. Without prejudice to the above, it must be emphasised that even in the eventuality that there is an actual legal claim and legal proceedings, for the restriction to apply, the controller shall demonstrate that the application of the restriction is indeed a necessary and a proportionate measure.

**On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller has failed to demonstrate how restricting the right of the complainant, at the time of receipt of the request, was indeed a necessary measure in terms of regulation 4(e) of Subsidiary Legislation 586.09. This therefore led to an infringement of article 15 of the Regulation.**

**In terms of article 58(2)(c) of the Regulation, the controller is hereby being ordered to comply with the request and provide the complainant with the information prescribed under article**



15(1)(a) to (h) of the Regulation, and also with a “*copy of the personal data undergoing processing*” at the time of receipt of the request.

The controller shall comply with this order without undue delay and by no later than twenty (20) days from the date of receipt of this legally binding decision and inform the Commissioner immediately thereafter of the action taken.

Non-compliance with this order shall lead to an administrative fine in terms of article 83(6) of the Regulation.

After considering the nature of the infringement, the controller is hereby being served with a reprimand pursuant to article 58(2)(b) of the Regulation and warned that, in the event of a further similar infringement, the appropriate corrective action shall be taken accordingly.

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**Ian Deguara**  
**Information and Data Protection Commissioner**

**Right of Appeal**

In terms of article 26(1) of the Data Protection Act (Cap 586 of the Laws of Malta), “*any person to whom a legally binding decision of the Commissioner is addressed, shall have the right to appeal in writing to the Tribunal within twenty days from the service of the said decision as provided in article 23*”.

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to:

The Secretary  
Information and Data Protection Appeal Tribunal  
158, Merchants Street  
Valletta.