

**COMPLAINT**

1. On the 2<sup>nd</sup> June 2023, [REDACTED] (the “complainant” or the “data subject”) 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” or the “GDPR”) alleging that [REDACTED]<sup>2</sup> (the “controller”) contacted the complainant through two (2) direct and unsolicited marketing phone calls, even though the controller confirmed through another complaint, previously lodged by the complainant, that her personal data undergoing processing for direct marketing purposes had been erased and her two (2) mobile numbers were barred from the internal systems of the controller.
  
2. The complainant submitted a copy of the two (2) call logs and the following relevant facts in relation to her complaint:
  - a. that in August 2022, the complainant filed her first complaint against the controller, as despite sending multiple requests to the controller to erase her personal data, she continued to receive frequent telephone calls and a barrage of SMS advertising;
  
  - b. that the controller committed to erasing all of the complainant’s personal data and, consequently, refraining from contacting her for marketing purposes;

<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.

<sup>2</sup> [REDACTED] (according to the Malta Business Registry records, last accessed on the 28<sup>th</sup> June 2024).

- c. that recently, she received two (2) direct and unsolicited marketing phone calls from the controller, and she had no other option but to lodge another complaint with the Commissioner; and
- d. that these calls were made to both of her mobile numbers, indicating that the controller had retained the two (2) phone numbers in its systems.

## INVESTIGATION

### Request for submissions

- 3. Pursuant to the investigation procedure of this Office, the Commissioner provided the controller with a copy of the complaint, including the documentation attached thereto, and requested it to put forward its submissions, which it deemed relevant and necessary to defend itself against the allegation raised by the complainant. By means of a letter dated the 27<sup>th</sup> June 2023, the controller submitted the following principal arguments for the Commissioner to consider during the legal analysis of the case:
  - a. that in August 2022, the complainant lodged the first complaint against the controller with the Commissioner regarding direct marketing calls and SMSs that were sent to her mobile number. The issue was promptly addressed, leading to the permanent deletion of all the complainant's information from the controller's systems;
  - b. that further to this incident, it appears that the complainant received two (2) phone calls on two (2) separate occasions, and on two (2) separate dates, and the complainant again requested her personal data to be permanently deleted and filed the current complaint with the Commissioner;
  - c. that the calls received on the 29<sup>th</sup> May 2023 and on the 2<sup>nd</sup> June 2023 were made by individuals acting for and on behalf of the controller, but in both cases, the numbers were generated at random by a software that generates telephone numbers. This means that the identity of the call recipient (and indeed any other personal data) is unknown at the moment the call is made;
  - d. that in those instances, such as this one, where the data subject requests not to be contacted, the number in question is listed as '*do not call back*', so that no further calls are made by the department in question to that caller. In this particular case, the two

- (2) phone calls were generated by two (2) separate number generators serving two (2) separate departments over the space of three (3) days (29<sup>th</sup> May and 2<sup>nd</sup> June);
- e. that the controller contended that there has been no breach of any provision of the Regulation, because as a starting point, there has been no processing of personal data, in the sense that the numbers are randomly generated and without there being an identified or identifiable data subject in hand. The controller regrets the incident that has occurred with the complainant and for any inconvenience it may have caused her, and in a spirit of good will has decided to tweak its systems further to ensure that repeat-incidents are avoided as much as possible;
- f. that following this incident, and in order to ensure that the same number is not regenerated after a data subject has asked to be deleted, the following measures have been introduced with immediate effect:
- i. that “[a] barred list of numbers is applied to all outgoing calls on the [controller’s] centralised telephone system — this will include those numbers which have been marked as ‘do not call back’. This means that even if, for the sake the argument, the data subject’s number is randomly generated a 3rd, 4th time or subsequent time, the call will STILL not be able to go through. This therefore represents the technical measure that has been taken in order to fine tune the system”; and
  - ii. that “[a]ll personnel within the Group, whether on fixed line or on mobile, will be required to effect calls via the centralised telephone system, in order to ensure that the call is subjected to the technical measure described in the preceding paragraph. This therefore represents the organisational measure that has been taken in order to address the issue”.
4. On the 4<sup>th</sup> July 2023, the Commissioner provided the complainant with the opportunity to rebut the arguments made by the controller. On the 18<sup>th</sup> July 2023, the complainant submitted the following principal arguments:
- a. that this is the second formal complaint lodged against the controller with the Commissioner. The first complaint, filed in August 2022, became necessary as the controller persistently disregarded prior written requests to delete all personal data it kept about her. Furthermore, repeated attempts were made to the controller to refrain

from contacting the complainant for direct marketing purposes, and this became necessary after years of persistent harassment from the controller, involving unsolicited direct marketing communications at all hours of the day;

- b. that in relation to the submissions dated the 27<sup>th</sup> June 2023, despite the controller's legal counsel indicating that this issue '*was swiftly dealt with*' at the time, the complainant emphasised that she had made several requests to the controller, all of which were ignored until she filed a complaint with the Commissioner. It was only after filing the complaint that the controller took action. Furthermore, she asserted that just as text messages to her numbers were supposedly barred on its systems, a similar restriction could and should have been applied to calls made to her numbers. The complainant referred to the controller's submissions dated the 27<sup>th</sup> June 2023, which stated that both her numbers were last checked as being on the '*system block list*' on the 19<sup>th</sup> August 2022, however, calls still went through in May and June 2023;
- c. that its disregard reflects very poor internal controls and lack of respect towards data subjects, including herself;
- d. that it is of utmost importance in this case to consider the sequence of events which took place. On the 29<sup>th</sup> May 2023, during the first phone call, the complainant specifically requested the person in question to refrain from contacting her again. The controller in its submissions stated that in both cases, "*the numbers were generated at random by software that generates random telephone numbers*" and that "*the identity of the call recipient (and the indeed any other personal data) is unknown at the moment the call is made*". This statement appears to be untrue for the following reasons:
  - i. that during the call made on the 29<sup>th</sup> May 2023, the complainant asked for her number to be deleted and not to be used for any further marketing phone calls;
  - ii. that with reference to the controller's submissions, particularly the two (2) emails dated the next day (30<sup>th</sup> May 2023), the complainant observed that the subject line included her professional title, the full name and the contents of the email as well as both her mobile numbers, even though the call had been made to only one number up until that day;
  - iii. that the controller's submissions include another email dated the 31<sup>st</sup> May 2023, with the subject line containing her professional title, full name and both her

mobile numbers. In this email, she inquired whether both of her numbers had been deleted from the system of the controller, and the individual responding confirmed that *“the below numbers were blocked from our system”*;

- iv. that subsequently, on the 2<sup>nd</sup> June 2023, she received a second direct marketing phone call from the controller on her other mobile number, which was supposedly blocked. Her complaint was filed on the same day, the 2<sup>nd</sup> June 2023;
  - e. that had the controller really blocked her numbers, neither of the calls would have been successful, irrespective of the numbers being *‘randomly generated’* as alleged by the controller in their submissions. In fact, although the controller’s employee, mentions *‘proof that the below numbered [sic] were blocked from our system’*, no such proof was attached to the said document. Furthermore, if the controller had really deleted her personal data, the controller would not have had information as to her professional title (which is specific and not a generic Ms), full name and both mobile numbers simply from making a call to *‘a randomly generated number’* on the 29<sup>th</sup> May 2023; and
  - f. that even if the *‘random number generation’* argument could be accepted by the Commissioner, the randomness of number generation software claimed by the controller is still not a sufficient reason to justify the poor internal controls that the controller had in place at the time. Further to the above, and without prejudice to the above, should the Commissioner accept the argument by the controller that the number was randomly generated and that no personal data of the complainant were held, a mobile number *per se* is unique to each person and could be therefore used for identifying purposes, such as gender and age group of the callee, and thus still falls under the definition of ‘personal data’ and its implications as per the Regulation.
5. In line with this Office’s internal complaint-handling procedure, the Commissioner provided the controller with the final opportunity to rebut the arguments made by the complainant. In this regard, by means of an email dated the 26<sup>th</sup> September 2023, the controller submitted its reply and highlighted the following salient arguments:
- a. that *“[t]he complainant notes that she filed a complaint in August 2022 against the respondents on a similar matter. This is correct, but it is important to highlight that the former complaint is substantially different to the current one in the sense that the legal basis for processing data has changed completely since then. Whereas the current complaint has its roots in a system where no personal data is collected from any*

*individual, but is randomly generated by software, the former complaint was based on an issue where personal data was originally collected from clients and customers and then processed legitimately for marketing purposes. While my clients appreciate the inconvenience this has caused in a situation where the same data subject has been, entirely coincidentally, affected twice, the two complaints nonetheless remain distinct and separate because the circumstances and legal basis on which each is based are similarly distinct and separate”;*

- b. that “[t]he complainant comments on the fact of whether her number/s were actually included on a call block list or not. A further clarification is required in this sense, even though paragraph 3 of our reply of the 27<sup>th</sup> June included a brief reference to the matter:
  - i. *The numbers WERE effectively blocked from [the controller’s] internal systems after [the complainant’s] former complaint. This means that any call raised from within [the controller’s] telephone system would have disallowed/blocked a call from being made to the blocked numbers.*
  - ii. *The calls forming the merit of this current complaint were made by two individuals who were not using [the controller’s] telephone systems, but were using their own telephones due to the fact that they were sub-contracted individuals (duly operating in terms of a contract of service).*
  - iii. *This exposed the flaw in the system, which was subsequently corrected in the manner explained in our submissions of the 27<sup>th</sup> June”;* and
- c. that “[t]he rest of the submissions made in our reply of the 27<sup>th</sup> June remain unchanged. [The controller] reiterate[s] and confirm[s] that on this occasion [the complainant’s] numbers were randomly generated, and are prepared to open their systems to verification by the IDPC’s office to substantiate what they are saying. [the complainant’s] contention that her numbers were not deleted/blocked following her former complaint are pure conjecture based on guesswork on her part that, in this case, is incorrect. It is for this reason that the remaining observations she has made cannot be rebutted because they are based on an erroneous premise: a premise that does not exist in this case”.

6. On the 4<sup>th</sup> April 2024, the complainant informed the Commissioner that, “[u]nfortunately, despite [the controller] stating that they have blocked my numbers from their systems, I have just received another marketing call just now from [the controller], as per the attached”, and submitted dated evidence of the telephone call.
  
7. In this regard, on the 15<sup>th</sup> April 2024, the Commissioner requested the controller to provide any feedback or comments regarding this incident. Subsequently, on the 22<sup>nd</sup> April 2024, the controller provided the following comments and explanations in relation to the incident reported by the complainant:
  - a. that the Group CEO has spoken directly with the complainant in question and has explained the facts in full;
  
  - b. that “[a]t the outset it bears mentioning that following past incidents involving the same complainant, the complainant’s telephone number was successfully marked as blocked, that is to say, her number was excluded from the list of randomised numbers generated by the system, and calls to that number were therefore prevented”;
  
  - c. that “[a]t some time after the second incident involving [the complainant], [the controller] took the decision to terminate the sub-contracting agreement it had with [a telecommunications company], as it felt that the system was not proving to be sufficiently adequate or reliable. It simultaneously took the decision to transfer these services to another provider, that is to say 3CX”;
  
  - d. that “[i]n migrating to the new provider, the issue of the numbers that had been blocked under the current system was flagged by the Group DPO, and the data migration process therefore included a step that made provision for the blocked numbers to also remain blocked post-migration”;
  
  - e. that “[w]hen the data was migrated, all numbers on the blocked list included the 356 country prefix, whereas the new sub-contractor did not make provision for this prefix. Consequently, the new system did not recognise the list of blocked numbers - and this error was not immediately detected”;
  
  - f. that “[t]he error was only detected following [the complainant’s] latest complaint, and the new providers were immediately contacted and requested to fix the error, and to ensure that the error did not repeat itself. This bug-fix had been carried out and the

*system is being closely monitored in order to detect any other bugs that have not been apparent so far”;*

- g. that “[f]ollowing this latest incident, [the controller] has taken the decision to embark on a centralised CRM system which will effectively act as a gatekeeper for all phonecalls made through the randomised number marketing system. This will ensure that [the controller] will retain full control over any numbers that are blocked or otherwise earmarked for some specific purpose or instruction of any data subject”;*
- h. that “[i]t should be more than obvious that [the controller] has no intention or interest in pursuing [the complainant] in this manner. [The complainant] has made it amply clear that she does not wish to be contacted, and that she is not interested in the services provided by [the controller]. It stands to reason therefore, that it would be foolish of [the controller] to deliberately pursue her time and again to try to attract her custom. What has happened is an unfortunate series of coincidences that have (almost incredibly) affected [the complainant’s] mobile number”;* and

*that “[w]hile we regret these coincidences that have affected [the complainant], we must nonetheless reaffirm the [the controller’s] commitment to achieving and maintaining the highest level of compliance with the law. Indeed, it is in this light that [the controller] has not only changed its provider in order to ensure a higher quality service, but will also be rolling out the centralised CRM system that has been described above”.*

## **LEGAL ANALYSIS AND DECISION**

### Initial Request by the Complainant

- 8. As the first step in the legal analysis of this case, the Commissioner noted that the protection of natural persons in relation to the processing of their personal data is a fundamental right recognised by article 8(1) of the Charter of Fundamental Rights of the European Union. Within this context, the rights of the data subjects as laid down in articles 12 to 22 of the Regulation are the fulcrum and the basis of the law, and their role is crucial to ensure effective and comprehensive protection of the personal data processed by controllers.

9. The facts gathered during the course of the investigation show that the complainant had previously lodged a complaint with the Commissioner against the controller in August 2022<sup>3</sup>, alleging continued receipt of unsolicited communications despite objecting to the processing of her personal data pursuant to article 21 of the Regulation. An amicable settlement was reached, wherein the controller confirmed by means of an email dated the 19<sup>th</sup> August 2022, that “*all necessary measures have been taken, we are extremely sorry for any inconvenience which we might have caused [...] this was a genuine mistake due to a technical hitch and rest assured of our complete compliance*” [emphasis has been added]. Furthermore, the controller provided two (2) screenshots demonstrating that the complainant’s mobile numbers were added to an ‘SMS barred numbers’ list (**marked and annexed as IDPC Doc. 1**).
  
10. Notwithstanding the fact that the controller informed the complainant that her mobile numbers “*have been deleted from system*” on the 19<sup>th</sup> August 2022, the controller contacted the complainant again on the 29<sup>th</sup> May 2023 and the 2<sup>nd</sup> June 2023.

#### Right to Object

11. In the present case, it resulted that the complainant exercised her right to object to the processing of her personal data for the purpose of direct marketing. The controller confirmed that it complied with the request by putting the numbers of the complainant on a ‘do not call back’ list and barring her numbers from outgoing calls on its centralised telephone system. In spite of this, the complainant was contacted again by the controller for the same purpose she specifically objected to.
  
12. Accordingly, the Commissioner sought to establish whether the measures taken by the controller to handle the request to objection in terms of article 21(2) of the Regulation were appropriate to give the broadest effect to the right exercised by the complainant.
  
13. Article 21 of the Regulation grants the data subjects the right to object to the processing of their personal data at any time in two forms. Article 21(1) of the Regulation provides a general right to object whilst article 21(2) of the Regulation grants the right to object in the case of the processing for the purposes of direct marketing. In the latter case, the data subject shall have the right to request the controller to stop processing his or her personal data for direct marketing purposes without the need to demonstrate that the controller has a compelling legitimate ground

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<sup>3</sup> Case file registered internally as CDP/COMP/325/20222

to process that data. Upon receipt of a request, the controller shall ensure that the personal data of the data subject is no longer processed for the purposes of direct marketing.

14. During the course of the investigation, the controller submitted that the calls received by the complainant on the 29<sup>th</sup> May 2023 and on the 2<sup>nd</sup> June 2023 were made by individuals who were acting on its behalf using their own devices. The controller explained that despite the fact that the numbers of the complainant were barred from all outgoing calls on its centralised telephone system, the sub-contracted individuals were not making use of this system, and as a result, the complainant was contacted again after her numbers were randomly generated by a software.
15. The Commissioner recognises that a suppression or exclusion list is considered to be a tool which enables the controller to effectively respect and uphold the rights of the data subject, in particular, to ensure that the algorithm does not re-generate the excluded numbers, and therefore, ascertain that the data subject is not contacted again in the future.
16. In the present case, it resulted that the controller implemented a measure on its centralised telephone system to suppress all outgoing calls which were marked as *'do not call back'*. Whereas the Commissioner considers this measure to be appropriate to respect and uphold the right of the data subject, the investigation revealed that this measure was not being used by the sub-contracted individuals who were acting on behalf of the controller. As a result, the complainant was contacted again despite her previous objections not to be reached for the purpose of direct marketing. Given that the sub-contracted individuals were using their own devices instead of the centralised telephone system, the measure implemented by the controller to suppress the numbers of the complainant on its centralised telephone system was rendered completely ineffective and useless.
17. This shortcoming was also acknowledged by the controller itself during the course of the investigation and described this as a *"flaw in the system"*. In fact, the controller sought to take the necessary corrective measure to address this shortcoming and informed the Commissioner that *"[a]ll personnel within the Group, whether on fixed line or on mobile, will be required to effect calls via the centralised telephone system, in order to ensure that the call is subjected to the technical measure ... This therefore represents the organisational measure that has been taken in order to address the issue"* [emphasis has been added].
18. Moreover, despite repeated assurances from the controller that the complainant's phone numbers were barred from their systems to prevent further marketing communications, the

complainant reported receiving another unsolicited marketing call from the controller on the 4<sup>th</sup> April 2024. In this regard, the controller acknowledged a flaw in their data migration process when switching telecommunications providers, which resulted in blocked numbers not being properly transferred, and hence, this negligent behaviour allowed the complainant to receive another marketing call. This notwithstanding the controller's multiple assertions that the complainant's personal data undergoing processing for direct marketing purposes have been erased and her two (2) mobile numbers were barred from its internal systems.

19. In this regard, the Commissioner analysed the accountability principle enshrined in article 5(2) of the Regulation, which provides that the controller shall be responsible for, and be able to demonstrate compliance with the principles relating to the processing of personal data as set out in article 5(1) of the Regulation. This principle of accountability stipulates an overarching compliance with the aim and purposes of the Regulation, which is essential to safeguard the rights and freedoms of the data subjects. It therefore follows that the controller is the main entity bound by the provisions of the Regulation and has responsibility and liability in terms of compliance.
20. This leads the Commissioner to conclude that when the complainant exercised her right to object on the 1<sup>st</sup> July 2020, the controller failed to give the right of the complainant its full broadest effect and respect her wishes not to be contacted again for the purpose of direct marketing.

#### Exercise of Corrective Powers

21. Having scrutinised the set of corrective powers at the disposal of the Commissioner in the capacity of a supervisory authority pursuant to article 58(2) of the Regulation where the processing operation infringes the provisions of the Regulation, which include *inter alia* the power to impose an effective, proportionate and dissuasive administrative fine pursuant to the list of circumstances that refer to the features of the infringement.
22. The Commissioner therefore proceeded to examine article 83(2) of the Regulation, which provides certain guiding criteria in deciding whether to impose an administrative fine and on the amount of the administrative fine in each case based on the specific circumstances of the case.

### Article 83(2)(a) of the Regulation

23. Due regard was given to article 83(2)(a) of the Regulation, which refers to *“the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them”*.
24. Insofar as the nature of the infringement is concerned, the Commissioner observed that the controller failed to give the right of the complainant its full broadest effect. The rights of the data subjects as set forth in Chapter III of the Regulation are the fulcrum and the basis of the law, and their role is crucial to give the data subjects control over their personal data. The investigation conducted by the Commissioner revealed that despite the fact that the complainant objected to the processing of her personal data for direct marketing purposes, the controller did not have in place the appropriate measures to ensure that the wishes of the complainant are fully respected.
25. It is indeed the intention of the legislator to sanction any infringement of the data subjects’ rights in an appropriate and effective manner, considering that these rights constitute the fundamental basis on the strength of which protection and control are afforded to data subjects with regard to the processing of their personal data. To this end, the Commissioner considers this infringement to be a serious one, in particular, after taking into account the series of events which should have been easily avoided by the controller.
26. Additionally, the Commissioner examined the duration of the infringement, which significantly contributes to the gravity of the infringement of a fundamental right. The timeline of the infringement spans from the initial complaint in August 2022 to the most recent incident reported in April 2024. This period highlights the controller’s prolonged and systematic failure to adequately address the complainant’s request. Notwithstanding the complainant’s multiple requests and the subsequent complaint in 2022, she still received unsolicited marketing calls on the 29<sup>th</sup> May 2023 and on the 2<sup>nd</sup> June 2023, by individuals acting for and on behalf of the controller. The controller’s explanation that the calls were randomly generated contradicted the complainant’s assertions. In her submissions dated the 4<sup>th</sup> July 2023, the complainant pointed out several reasons why this statement is untrue, specifically, she noted that the communications dated the 30<sup>th</sup> May 2023 and the 31<sup>st</sup> May 2023, made reference to her personal information, such as her professional title, full name and both her mobile numbers (**marked and annexed as IDPC Doc. 2**).

27. Furthermore, the incident of April 2024, where the complainant yet received another unsolicited call, shows that this issue has been ongoing for nearly two years and effectively gives strong indications to the Commissioner that the controller is far from demonstrating compliance with the provisions of the Regulation.

### **Article 83(2)(b) of the Regulation**

28. Article 83(2)(b) of the Regulation provides that one of the general conditions is the “*intentional or negligent character of the infringement*”. The Commissioner examined whether the character of the infringement committed by the controller was intentional or negligent. The EDPB’s ‘*Guidelines on the application and setting of administrative fines*’<sup>4</sup> provide that “*in general, intent includes both knowledge and willfulness in relation to the characteristics of an offence, whereas ‘unintentional’ means that there was no intention to cause the infringement although the controller/processor breached the duty of care which is required in the law*”.
29. After identifying objective facts gathered during the investigation of the case and taking into consideration the controller’s repeated failure to honour the complainant’s requests to stop the unsolicited marketing calls, the Commissioner determined that the controller acted negligently. This negligence stems from lack of due diligence and failure to ensure the effectiveness of the implemented measure, namely that the sub-contracted individuals were not instructed to use the centralised telephone systems when contacting individuals for the purpose of direct marketing.
30. Moreover, in assessing whether the controller’s actions were intentional or negligent under article 83(2)(b) of the Regulation, the incident in April 2024 serves as a critical example. Despite prior complaints directed both at the controller and the Commissioner, the controller failed to prevent another unsolicited marketing call to be made to the complainant, and thus, this indicates a pattern of negligence on the part of the controller. The controller’s actions in April 2024 continued to demonstrate negligence by failing to effectively implement measures to honour the complainant’s requests to cease marketing activities. This incident highlights the controller’s persistent failure to implement effective corrective measures, resulting in repeated infringements of the data subject’s data protection rights.

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<sup>4</sup> Article 29 Data Protection Working Party, ‘*Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679*’, adopted on the 3<sup>rd</sup> October 2017

## Article 83(2)(e) of the Regulation

31. For the purpose of article 83(2)(e) of the Regulation, previous infringements of the same subject matter of the present complaint are considered as relevant. The Guidelines of the EDPB outline that “[e]ven though all prior infringements might provide an indication about the controller’s or processor’s general attitude towards the observance of the GDPR, infringements of the same subject matter **must be given more significance, as they are closer to the infringement currently under investigation, especially when the controller or processor previously committed the same infringement (repeated infringements). Thus, same subject-matter infringements must be considered as more relevant than previous infringements concerning a different topic**”<sup>5</sup> [emphasis has been added].
32. In this context, the Commissioner analysed another data protection complaint received by this Office on the 27<sup>th</sup> August 2021, lodged by ██████████ against the controller<sup>6</sup>. The case related to a same subject matter where the complainant alleged that the controller continued sending marketing material despite her request submitted on the 26<sup>th</sup> July 2021. In the same complaint, ██████████ sent an email to the controller requesting the controller to remove her personal data from its internal systems. The complainant stated that she never received an acknowledgment nor a reply from the controller and that “*I have still received promotional sms even after I sent this email*”.
33. Apart from this, the same complainant had previously lodged a complaint with the Commissioner regarding the same subject matter on the 12<sup>th</sup> August 2022. In that complaint, she stated that “*I have asked [the controller] as the holding company as well as on behalf of their subsidiary companies to stop sending me marketing material, to remove all my data from their systems, and to stop giving my personal data to other companies (such as Dune and Minus Three) since I had never authorized this nor was ever a customer of these companies. Despite a number of promises that this would stop, including from the CEO ..., I keep receiving multiple advertising messages, sometimes in twice within the same minute [...] I kept on receiving since my instructions to them on the 21<sup>st</sup> July 2020*”. The Commissioner resolved this issue amicably, as agreed with the complainant, and following the controller’s confirmation that the “*numbers have been completely deleted from the system*”<sup>7</sup>, the casefile was closed accordingly (**marked and annexed as IDPC Doc. 3**).

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<sup>5</sup> European Data Protection Board, ‘Guidelines 04/2022 on the calculation of administrative fines under the GDPR’, (Version 2.1) adopted on the 24<sup>th</sup> May 2023

<sup>6</sup> Case file registered internally with file number CDP/COMP/354/2021

<sup>7</sup> Case file registered internally with file number CDP/COMP/325/2022

#### **Article 83(2)(f) of the Regulation**

34. According to article 83(2)(f) of the Regulation, the degree of cooperation with the supervisory authority should be considered when determining whether to impose an administrative fine and the amount of the fine.
35. The Commissioner acknowledges that the controller cooperated with his Office throughout the investigation process by providing the requested information and documentation in a timely manner.

#### **Article 83(2)(h) of the Regulation**

36. After assessing article 83(2)(h) of the Regulation, the Commissioner noted that the infringement became known to him as a result of a complaint lodged pursuant to article 77(1) of the Regulation.

#### **Article 83(2)(i) of the Regulation**

37. The Commissioner examined article 83(2)(i) of the Regulation which relates to situations *“where measures referred to in article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures”*.
38. For this purpose, the Commissioner examined the Guidelines of the EDPB, which provide that *“[a]s opposed to Article 83(2)(e) GDPR, this assessment only refers to measures that supervisory authorities themselves have previously issued to the same controller or processor with regard to the same subject matter. In this respect, the controller or processor might hold reasonable expectations that compliance with measures previously issued against them would prevent a same subject-matter infringement from taking place in the future. However, since compliance with measures previously ordered is mandatory for the data controller or processor, it should not be taken into account as a mitigating factor per se. On the contrary, a reinforced commitment on the part of the controller or processor in the fulfilment of previous measures is required for this factor to apply as mitigating, e.g., taking additional measures beyond those ordered by the supervisory authority”*.

39. In this regard, the Commissioner analysed the complaint received on the 27<sup>th</sup> August 2021, in the names of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]<sup>8</sup>. The Commissioner took note of the controller's submissions in relation to this specific case, where it stated that "[f]rom my investigation, I can only conclude that this was a genuine technical glitch beyond our control". By means of a decision dated the 4<sup>th</sup> November 2021, the Commissioner determined that the controller infringed the right of the data subject when it failed to erase her personal data following the exercise of her right. Consequently, the controller was served with a reprimand in accordance with article 58(2)(b) of the Regulation and warned that in the event of a similar infringement, the appropriate corrective action would be taken accordingly.

**On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller has infringed:**

- i. article 21(2) of the Regulation for failing to instruct its sub-contracted individuals acting on its behalf to use the centralised telephone system when making calls for the purpose of direct marketing, and therefore, failed to take the appropriate action to respect the right of the complainant; and**
- ii. the accountability principle as enshrined in article 5(2) of the Regulation, for not being able to demonstrate compliance with the provisions of the Regulation.**

**After assessing the criteria listed in article 83(2) of the Regulation, the Commissioner considers that an administrative fine is a necessary and adequate measure to respond to the nature and gravity of the infringement. In terms of article 58(2)(i) of the Regulation, the Commissioner is hereby imposing an effective, proportionate and dissuasive administrative fine of fifteen thousand Euro (€15,000), which shall be paid within twenty (20) days from receipt of this legally-binding decision.**

Ian  
DEGUARA  
(Signature)

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by Ian DEGUARA  
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Date: 2024.06.28  
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**Ian Deguara  
Information and Data Protection Commissioner**

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<sup>8</sup> Ibid 10

### 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.











