

Ref. no.: 11.17.001.010.121

Decision

Demonstration of data subject's consent and provision of information relating to processing

1. A complaint was lodged with the Office of the Data Protection Ombudsman in Finland (Finland SA) against Naxex Invest Ltd (the Controller), whose establishment is in Cyprus. The complaint was subsequently transmitted to the Office of the Commissioner for Personal Data Protection (Cyprus SA) on the 22nd of June 2022, in line with Article 56 of the General Data Protection Regulation.
2. On the basis of the above, the Commissioner for Personal Data Protection (the Commissioner) is acting as the lead authority in this matter. In the course of the investigation, other EU countries, such as Finland SA, were identified as being concerned by this case.

Description of the case

3.1. According to the complaint, on the 15th of May 2020 the Complainant received a phone call from FXGM “*about investing*”. During the call, the Complainant requested to be informed about the collection and use of his data (his contact details) by FXGM. As he stated, he was informed that his contact details were collected via a Facebook-ad.

3.2. Following the call, on the same day, the Complainant submitted an access request via e-mail to FXGM, requesting, among others, the below:

1. information about the source used to collect his personal data (“*where and how, (...) when*”);
2. the categories of his personal data processed;
3. the purposes of the processing and the legal basis for the processing;
4. the recipients to whom the personal data have been or will be disclosed, in particular recipients in third countries;
5. a copy of his personal data undergoing processing.

3.3. On August 13, 2020 FXGM informed the Complainant that his personal data including his contact details, were provided by Swarmiz (<https://www.swarmiz.com/>) on the 26th of April 2018. FXGM assured the Complainant, that his data has never been disclosed to third parties and provided to the Complainant with a copy of his personal data which were under processing (Name, Telephone Number, Email address, I.P. address). The

Complainant was informed that FXGM would proceed with the deletion of his personal data from its database.

3.4. On the same day, the Complainant stated inter alia that there was an inconsistency to FXGM's reply, that his clear consent was not shown and he requested a proof of it. FXGM declared in its response that *"Furthermore, we would like to hereby inform you that the Company is not responsible for the security or privacy of any information that you may have submitted on your own accord with any third parties. Therefore, you can contact Swarmiz (<https://www.swarmiz.com/>) directly for any further enquiries that you may have."*

3.5. The Complainant doubted that he ever consented for the processing of his personal data.

3.6. The above-mentioned exchanged e-mails of the Complainant with the Controller were submitted to the Finland SA as an attachment to the complaint.

3.7. Upon receiving the complaint, on the 9th of March 2022, Finland SA asked the Controller for specific clarifications concerning the above-mentioned lodged complaint. The Controller has informed Finland SA, among others, the below:

1. the Complainant registered to a marketing campaign operated by Swarmiz SL;
2. the Complainant's data were provided to the Controller on the 26th April, 2018 as a result of his registration to Swarmiz SL's marketing campaign;
3. the Controller has satisfied Complainant's access request and his right to be forgotten;
4. the Controller has directed the Complainant to Swarmiz SL, in order to assist him with any further inquiries he may had.

Investigation by Cyprus SA

4.1. FXGM was at the time of the incident, a registered EU trademark exclusively used as a brand name of Depaho Ltd, a registered Cyprus Investment Firm regulated by the Cyprus Securities and Exchange Commission. Depaho Ltd is the previous name of the Controller. The Controller duly incorporated under Cyprus Law, with registration no. HE292004, is authorized and regulated by the Cyprus Securities and Exchange Commission as a Cyprus Investment Firm. Therefore, the Controller is authorized to offer certain online investment and ancillary services and activities on the basis of Law 87(I)/2017, under license number 161/11.

4.2. Cyprus SA contacted the Controller and requested its views on the matters raised by the Complainant. According to the Controller's responses (dated 31st of August 2022, 20th of October 2022 and 20th of February 2023):

1. The Controller was authorized to passport its services on a cross-border basis including Finland.
2. The Controller no longer provides services to retail clients, since November 3, 2021.
3. On the basis of a signed agreement dated 17th of December 2013, Internovus Ltd was providing marketing services to the Controller.

4. A GDPR agreement regarding the provision of the said services, was signed on 25th of May 2018 between the Controller and Internovus Ltd.
5. On the basis of the said agreement, marketing services would be provided only to potential clients who gave their consent to receive further information about the Controller. Individuals would give their consent to their personal data being shared with the Controller by registering to a marketing campaign.
6. Swarmiz SL was acting as a sub-affiliate of Internovus and it was providing online services to Finland. Therefore, Swarmiz SL was operating at the time, the marketing campaign which allowed interested individuals to register their details and express their interest and consent for their data to be shared with the Controller and to receive information about its services.
7. The Complainant's data were provided to the Controller on the 26th of April 2018 by Swarmiz SL, after he completed his registration on the marketing campaign run. As a result of the Complainant's registration, the Controller collected and stored his name, telephone number, email address and I.P. address.
8. There was only one telephone communication with the Complainant by the Controller on the 15th of May 2020. During the call, the Complainant exercised his right of access. On the same day, the Complainant submitted an access request via e-mail to the Controller's DPO.
9. On the 13th of August 2020, the Controller provided the Complainant with all the requested information. Taking into consideration that the Complainant had never registered to a trading account, the Controller proactively proceeded with the deletion of all his data. The Complainant was informed about his data deletion via e-mail, on the 13th of August 2020.
10. As the Controller stated, due to the Complainant data deletion, all the records indicating his consent were anonymized.
11. The Controller processed Complainant's data on the grounds of legitimate interest.
12. The purpose of the processing was limited to the Complainant's communication and information provision about its services.

As proofs of the above-mentioned, the Controller attached to its responses the below:

- the service Agreement between Depaho Ltd and Internovus Ltd signed on the 17th of December 2013;
- the GDPR data Processing Agreement between Depaho Ltd and Internovus Ltd signed on the 25th of May 2018;
- the "BON DE COMMANDE NoOI201821022018" between Internovus Ltd and Swarmiz SL, dated 21/02/2018;
- a screenshot of the Complainant's profile;
- the exchanged emails between the Controller and the Complainant regarding his access request.

Preliminary Decision

5.1. Taking into consideration all the explanations and information provided on behalf of the Controller, as mentioned above, on the 6th of October 2023, I issued

a Preliminary Decision regarding the Controller's failure to demonstrate the Complainant's consent and the lawfulness of the data collection.

5.2. Before the submission of its views and positions regarding the preliminary decision, the Controller requested the opportunity to orally represent the case. On the 8th of October 2023, a hearing was held at the Cyprus SA's offices in the presence of the Managing Director, the Data Protection Officer and the Legal Consultant of the Controller.

5.3. On the 17th of November 2023, the Controller responded to the Preliminary Decision, and stated, inter alia, that:

1. Interested individuals would register on their own will and volition, in different online campaigns, operated by Internovus Ltd or its sub-affiliates, expressing their interest and providing their consent and instruction to be contacted and receive further information about the Controller, its services and registration to its platform. These individuals were identified and categorized internally by the Controller as potential clients. The Controller would not engage in any direct communication or process personal information prior to the potential clients registering their interest in the services and consenting to be contacted to receive further information.
2. The Controller only contacted potential clients who had successfully registered their interest and provided their consent to be contacted.

This statement includes the Complainant's case. The Complainant had demonstrated interest in the Controller's services and consented to be contacted. As the Controller states, the Complainant's consent can be demonstrated by comparing the data maintained in the Controller's system (which was provided to the Cyprus SA before in the Screenshot) with the exchanged e-mails between the Controller and Internovus Ltd concerning his access request (emails dated May 19th, 2020 and August 4th, 2020).

3. The Complainant's successful registration to the online campaign in turn created a potential client profile in the Controller's systems as depicted in the provided Screenshot, confirming the information submitted by the Complainant being his name, surname, telephone number, email address. In addition to that information, the Controller retained the Complainant's registration time stamp, IP and online campaign to which he had registered to as depicted in the provided Screenshot as "*Attempt Time*" and "*Campaign*" respectively. Read in conjunction with the IP address, confirms and provides proof of Complainant's consent and instruction to be contacted by the Controller.
4. Cyprus Securities and Exchange Commission has stringent regulations on the promotion of investment firms' services. In adherence to these Applicable Laws¹, the Controller would only contact individuals who had

¹ L. 87(I)/2017 regarding the provision of investment services, the exercise of investment activities and the operation of regulated markets, Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Regulation (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the

successfully registered and have explicitly consented to the sharing of their personal information showing an interest in the services provided by the Controller.

5. There was a telephone conversation with the Complainant on the 15th of May, 2020, during which the Controller provided him with the relevant information regarding the Controller and its services, as legally obligated under Applicable Laws (to provide potential clients with the information and relevant risk disclosures during the pre-contractual phase) and directed the Complainant to its website, where all pertinent details and information, including the Privacy Policy, were readily accessible in a durable medium. The Complainant exercised his right to access information during the call, which was subsequently followed up in writing. The Complainant never proceeded further to finalize his registration.
6. The Controller promptly acknowledged receipt of the Complainant's request to access his information. On the 13th of August, 2020, the Controller provided the Complainant with its official response; furnishing all information available in its records. Within the same response, the Controller informed the Complainant that "*it would at that time proceed with the "deletion of your personal data from our database"*". The Complainant did not, at any time, raise any objection or express discomfort regarding the Controller's notification to delete the specific collected information.
7. The Controller adheres to specific obligations governed by Applicable Laws (Law 87(I)/2017, Directive 2014/65/EU, Regulation (EU) No 600/2014, Commission Delegated Regulation (EU) 2017/565) regarding the collection, processing, and retention of personal data. It is noted that these requirements pertain specifically to the Controller's clients.
8. The Complainant's information submitted and shared with the Controller were limited only to his full name, email, telephone number and IPaddress. For the avoidance of any doubt, the Controller disclosed all information to the Complainant at the time of his request, as shown on the relevant correspondence.
9. It is the Controller's position that the legal basis and legal purpose for the collection and process of the Complainant's data was in accordance with the Applicable Laws and Articles 6 and 7 of the GDPR.
10. On the 13th of August, 2020, the Controller did respond to the Complainant's access request, providing him with all the available and relevant information it hid in its systems (as shown in the Screenshot).
11. The Controller has clarified in its response dated 17 November 2023, that despite proceeding with notifying the Complainant for the intention to delete his data, the Controller's DPO has retained the exchanged e-mails between the Controller and Internovus Ltd concerning the Complainant's access request (emails dated May 19th, 2020 and August 4th, 2020) within his internal records as part of the procedure of handling the request.
12. In relation to Article 6 of the GDPR, which sets out the legal basis under it is allowed personal data can be processed, **the Controller is of the opinion that it was acting in compliance with the provisions therein.**

- As per the Controller, the collection and processing of the Complainant's personal information was based on Article 6(1)(a), (b) and (f). The conditions of Article 7 in relation to consent are duly satisfied by the Complainant's registration attempt on the Controller's system as provided in the relevant Screenshot.
 - Following the comment of the Cyprus SA that the information in the Screenshot does not link to the Complainant due to being anonymised, the Controller's DPO was able to find relevant correspondence regarding the Complainant's request in its internal records (emails dated May 19th, 2020 and August 4th, 2020).
 - As evident in the said correspondence, the email subjects of both e-mails, labelled "*CRM Lead 13071131*," aligns with the Lead ID specified in the provided Screenshot.
 - Additionally, both emails encompass the personal information held by the Controller in relation to the Complainant, which was also disclosed to the Complainant in the Controller's response to his request on the 13th of August, 2020.
 - Further, email dated 4th of August 2020 provides a report extracted from the Controller's system at the relevant time, presenting an overview of the Complainant's information within the Controller's system records. The "Serial ID" corresponds to the identifier presented in the Screenshot.
 - Both e-mails also evidence that the Controller maintained and maintains necessary records in place relating to Complainant's access request.
13. The Controller noted that the decision to proceed with the deletion was based on the following considerations:
- that the Complainant, on his own will and volition proceeded with the registration on the promotional campaign, expressing his interest to receive further information thus was categorised as a potential client;
 - that the Complainant never finalised his registration to become a client indicating that his interest ceased to exist;
 - that the Controller fully satisfied the Complainant's request for access to his information;
 - the Controller's decision to proceed with anonymisation was done after proper notification to the Complainant was made and without receiving his opposition to the notification from his side; and
 - in any event, the Controller is of the opinion that the deletion would not and has not adversely affected in any way the Complainant's legal rights, specifically in this case, his right to privacy.
14. The Controller considered that since there was no *lex specialis* obligation to further retain the Complainant's information, the deletion of the Complainant's information was in accordance with the provisions of Preamble 39 of the GDPR.
15. The Controller, having considered that the Complainant was only a potential client that did not show further interest in its services after being contacted and has not finalised his registration further, considered that deletion of Complainant's information was justified under Article 5(1)(e)

since the legal purpose for the collection and processing of the information ceased to exist.

16. In addition to the above and for the avoidance of any doubt, the Controller also considered that the deletion of the Complainant's personal information is also in compliance with Preamble 64 of the GDPR which states that "... *A controller should not retain personal data for the sole purpose of being able to react to potential requests.*" As provided in the Applicable Laws, the Controller's specific record keeping obligations is in relation to individuals that are categorised as clients of the Controller. Considering that there is no specific reference to the retention of potential clients' records, the Controller treats such additionally in line with the GDPR provisions.
17. Therefore, in conclusion of all the above, it is the Controller's opinion that all the actions taken by the Controller in relation to the collection, process and anonymization of Complainant's specific data submitted at the time were made in absence of any bad faith or effort to elude from any of its legal obligations and the Controller genuinely believes to have been acting in accordance with the provisions of the GDPR.

As proofs of the above-mentioned, the Controller attached to its response the below:

- the service Agreement between Depaho Ltd and Internovus Ltd signed on the 17th of December 2013;
- the GDPR data Processing Agreement between Depaho Ltd and Internovus Ltd signed on the 25th of May 2018;
- the "BON DE COMMANDE NoOI201821022018" between Internovus Ltd and Swarmiz SL, dated 21/02/2018;
- a screenshot of the Complainant's profile;
- the exchanged e-mails between the Controller and Internovus Ltd concerning the Complainant's access request (emails dated May 19th, 2020 and August 4th, 2020);
- the exchanged emails between the Controller and the Complainant regarding his access request.

Legal framework

6.1. Recital 39 of the Preamble:

"Any processing of personal data should be lawful and fair. It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the

processing of personal data and how to exercise their rights in relation to such processing. In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. The personal data should be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, ensuring that the period for which the personal data are stored is limited to a strict minimum. Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. In order to ensure that the personal data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review. Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or use of personal data and the equipment used for the processing.”

6.2. Recital 42 of the Preamble:

“Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware of the fact that and the extent to which consent is given. In accordance with Council Directive 93/13/EEC (1) a declaration of consent preformulated by the controller should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment”

6.3. Recital 47 of the Preamble:

“(47) The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. (...) At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing. (...) The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.”

6.4. Recital 61 of the Preamble:

“(61) The information in relation to the processing of personal data relating to the data subject should be given to him or her at the time of collection from the data subject, or, where the personal data are obtained from another source, within a

reasonable period, depending on the circumstances of the case. Where personal data can be legitimately disclosed to another recipient, the data subject should be informed when the personal data are first disclosed to the recipient. Where the controller intends to process the personal data for a purpose other than that for which they were collected, the controller should provide the data subject prior to that further processing with information on that other purpose and other necessary information. Where the origin of the personal data cannot be provided to the data subject because various sources have been used, general information should be provided.”

6.5. Recital 64 of the Preamble:

“The controller should use all reasonable measures to verify the identity of a data subject who requests access, in particular in the context of online services and online identifiers. A controller should not retain personal data for the sole purpose of being able to react to potential requests.”

6.6. Article 6: Lawfulness of processing

Pursuant to Article 6(1) of the GDPR,

“1. 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;

(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. Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.”

6.7. Article 7: Conditions for consent

According to Article 7(1) of the GDPR, *“Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.”*

6.8. Article 12: Transparent information, communication and modalities for the exercise of the rights of the data subject

According to Article 12(1) of the GDPR, *“The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically*

to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means.”

6.9. Article 13: Information to be provided where personal data are collected from the data subject

“1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;

(b) the contact details of the data protection officer, where applicable;

(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;

(d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(e) the recipients or categories of recipients of the personal data, if any;

(f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:

(a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;

(c) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;

(d) the right to lodge a complaint with a supervisory authority;

(e) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;

(f) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 shall not apply where and insofar as the data subject already has the information.”

6.10. Article 14: Information to be provided where personal data have not been obtained from the data subject

“1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;

(b) the contact details of the data protection officer, where applicable;

(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;

(d) the categories of personal data concerned;

(e) the recipients or categories of recipients of the personal data, if any;

(f) where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with the following information necessary to ensure fair and transparent processing in respect of the data subject:

(a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(c) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability;

(d) where processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;

(e) the right to lodge a complaint with a supervisory authority;

(f) from which source the personal data originate, and if applicable, whether it came from publicly accessible sources;

(g) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. The controller shall provide the information referred to in paragraphs 1 and 2:

(a) within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;

(b) if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or

(c) if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

4. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were obtained, the controller shall provide the data subject prior to that further processing with information on that

other purpose and with any relevant further information as referred to in paragraph 2.”

6.11. Article 15: Right of access by the data subject

“1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

- (a) the purposes of the processing;*
- (b) the categories of personal data concerned;*
- (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;*
- (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;*
- (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;*
- (f) the right to lodge a complaint with a supervisory authority;*
- (g) where the personal data are not collected from the data subject, any available information as to their source;*
- (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.*

2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others”

6.12. Pursuant to Article 58(2) GDPR, *“each supervisory authority shall have all of the following corrective powers:*

(...) (b) to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation”

6.13. L. 87(I)/2017 regarding the provision of investment services, the exercise of investment activities and the operation of regulated markets

- “client means any natural or legal person to whom an IF provides investment or ancillary services;”*
- Article 17 of the L. 87(I)/2017:
“(7)(a) - “The records provided for in subsection (6) shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the*

provision of client order services that relate to the reception, transmission and execution of client orders."

"(7)(h) - "The records kept in accordance with this subsection shall be provided to the client involved upon request and shall be kept for a period of five years and, where requested by the Commission, for a period of up to seven years."

- Article 25 of the L. 87(l)/2017:

"25.-(1) A CIF must, act honestly, fairly and professionally when providing investment services, or, where appropriate, ancillary services, to clients, in accordance with the best interests of its clients, and comply, in particular, with the principles set out in section 26.

(...)

(3) CIFs must ensure that:

(a) all information, including marketing communications, addressed to clients or potential clients are fair, clear and not misleading, and

(b) marketing communications are clearly identifiable as such."

(4)(a) A CIF ensures that appropriate information is provided in good time to clients or potential clients with regard to the CIF and its services, the financial instruments and proposed investment strategies, execution venues and all costs and related charges, and that, such information includes the following:

(i) when investment advice is provided, the CIF must, in good time before it provides investment advice, inform the client:

(A) whether or not the advice is provided on an independent basis; and

(B) whether the advice is based on a broad or on a more restricted analysis of different types of financial instruments and, in particular, whether the range is limited to financial instruments issued or provided by entities having close links with the CIF or any other legal or economic relationships, such as contractual relationships, so close as to pose a risk of impairing the independent basis of the advice provided;

(C) whether the CIF will provide the client with a periodic assessment of the suitability of the financial instruments recommended to that client;

(ii) the information on financial instruments and proposed investment strategies must include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies and must state whether the financial instrument is intended for retail or professional clients, taking account of the identified target market in accordance with subsection (2);

(iii) the information on all costs and associated charges must include information relating to both investment services and ancillary services, including the cost of advice, where relevant, the cost of the financial instrument recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments.

(b) The CIF ensures that the information about all costs and charges, including costs and charges in connection with the investment service and the financial instrument, which are not caused by the occurrence of underlying market risk, shall be aggregated to allow the client to understand the overall cost as well as the cumulative effect on return of the investment, and if the client so requests, an itemised breakdown of the costs shall be provided. Where applicable, such information shall be provided to the client on a regular basis, at least annually, during the life of the investment."

6.14. DIRECTIVE 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

- Article 16 of the Directive 2014/65/EU:

“(6) An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive, Regulation (EU) No 600/2014, Directive 2014/57/EU and Regulation (EU) No 596/2014, and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market.

(7) Records shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders (...)

(...) The records kept in accordance with this paragraph shall be provided to the client involved upon request and shall be kept for a period of five years and, where requested by the competent authority, for a period of up to seven years”

6.15. REGULATION (EU) No 600/2014 on markets in financial instruments and amending Regulation (EU) No 648/2012:

- Article 25(1) of the Regulation (EU) No 600/2014:

"Investment firms shall keep at the disposal of the competent authority, for five years, the relevant data relating to all orders and all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Directive 2005/60/EC of the European Parliament and of the Council (1). ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010."

6.16. Commission Delegated Regulation (EU) 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive:

- Article 72 (2):

"Investment firms shall keep at least the records identified in Annex I to this Regulation depending upon the nature of their activities.

The list of records identified in Annex I to this Regulation is without prejudice to any other recordkeeping obligations arising from other legislation.”

Views of the Commissioner

7.1. After examining the facts and the information provided by the Complainant and the Controller, and taking into consideration the comments from the concerned Supervisory Authorities, I would like to mention the below.

7.2. Naxex Invest Ltd as the legal entity, who determined the purposes and means of the processing is considered as the Controller. The Complainant as the natural person whose personal data were being processed is considered as the data subject.

7.3. According to the Controller, the Complainant registered his details and express his interest and consent to receive information about the Controller's services. During the data collection the Complainant was provided with some initial information about the purpose of the processing. Furthermore, during the call on the 15th of May 2020, the Controller provided some additional information regarding the data processing to the Complainant. It was explained to the Complainant that his data were provided to the Controller as a result of his registration to a marketing campaign regarding the Controller. It was moreover explained that the Complainant consented for his details sharing in order to receive information about the Controller and its services. According to the Controller, during the call the Complainant was provided with the relevant information regarding the company and its services, and was directed to its website, where all pertinent details and information, including the Privacy Policy, were readily accessible in a durable medium.

7.4. Following the call and upon the receipt of the Complainant's request of access (dd May 15th, 2020), the Controller has provided the relevant information concerning the data processing on the 13th of August 2020. With the said e-mails:

- The Controller informed the Complainant about the collection, the recipients of his data and provided him with a copy of his personal data undergoing processing.
- The Controller informed the Complainant that it would proceed with the deletion of his personal data from its database.
- The Controller referred the Complainant to Swarmiz SL's for further details concerning the ad.

7.5. Based on the facts, the collected personal data were used only for communication of the Controller's services with the Complainant. The Complainant was informed about the processing of his personal data at the time of the collection and at the time of the Controller's first communication. The Controller provided the Complainant with additional information about his data processing by its reply to the submitted access request.

7.6. Taking into consideration the above, the Controller provided to the Complainant information about his data processing at the time of the collection and at the first communication (in accordance with Articles 12, 13 and 14 of the GDPR). Moreover, it responded to his access request within the specified time frame (as defined in Article 12 of the GDPR) and provided the information the Complainant has requested in his access request.

7.7. As the Controller stated, the Complainant's data were collected and further processed (storage and use) based on consent and on the grounds of legitimate interest. It was also stated that the processing was necessary in order the

Controller to take steps at the request of the data subject prior to entering into a contract.

7.8. The Complainant has disputed that he previously consented to receive information about the Controller. In order to investigate the validity of the Complainant's consent, the Controller was instructed to send to my Office any relevant documentation has in its possession. As a proof of the data subject's consent, the Controller initially sent to my Office a Screenshot of the Complainant's profile. The Screenshot shows a Table which contains the below information:

- Lead ID: 13071131
- Label: FXGM_FIN
- Attempt time: 26-Apr-18 7:25:51 AM
- Campaign: Swarmiz_Trainees_Finland [26FEB2018] [14622]
- Serial Id: 1156290
- IP address: C2C55A8850O347AA10D47OD55D97DBEE
- Pseudonymized first name, last name, phone, e-mail of the Complainant.

7.9. The Controller stated that the above-mentioned information was anonymized due to the deletion of the Complainant's data. As it was clarified to the Controller, anonymous registration doesn't prove the Complainant's consent. Therefore, before the issuance of the Preliminary Decision, the Controller was requested to provide further documentation in order to prove the Complainant's consent. On the 20th of February 2023, the Controller stated that has already provided my Office with all the available information and supporting documents. Consequently, taking into consideration that the Complainant has never requested his data deletion and repeatedly asked for a proof of his consent, in my preliminary decision I found that the Controller did not have a plausible reason to proceed with the deletion of his data and I concluded that the Controller had failed to demonstrate the Complainant's consent and the lawfulness of the data collection.

7.10. According to the Controller's response to my Preliminary Decision, the Complainant's registration and consent provision can be demonstrated by the information mentioned in the previous paragraphs. In order to prove that, the Controller sent to my Office two additional emails. Those emails were exchanged in 2020 (May 19th, 2020 and August 4th, 2020) between the Controllers and Internovus Ltd employees regarding the Complainant's access request. The e-mail dated August 4th, 2020 includes a report extracted from the Controllers system at the relevant time, presenting an overview of the Complainant's information. The report includes among others the below:

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"email=horn.alexander%40gmail.com&firstname=Horn&lastname=Alexander&country=Finland&phone=0442117333&ud=2018-04-26+09%3A14%3A00&FormId=2189&SerialId=1156290&f=139689&e=2&adv=1&a=4&u=FEFCF7DE-AC34-4F5D-A330-6614A71031D2&p=&k=&r=plpxelservice%3A&eid=F1E34BBB-B3FC-4581-9FA2-3442B9E077C3&cid=horn.alexander%40gmail.com&au=FEFCF7DE-AC34-4F5D-A330-6614A71031D2"
"log_record_ip": "107.21.38.12"
```

7.11. Reading the above-mentioned details in comparison with the information given in the Screenshot of the Complainant's profile, the Controller is of the

opinion that it can be concluded that the information which categorized as anonymous relates to the Complainant and indicates his registration.

7.12. It is important to highlight that, according to Recital 26 of the Preamble of the GDPR, anonymous information is information which does not relate to an identified or identifiable natural person. Consequently, the data regarding the Complainant cannot be considered and characterized as anonymous (as the Controller initially stated), since the Complainant can be indirectly identified.

7.13. Moreover, according to Guidelines 05/2020 on consent under Regulation 2016/679, Article 7(1) of the GDPR clearly determines the explicit obligation of the controller to demonstrate the data subject's consent. According to the same Article, the burden of proof of the consent validity is on the controller. Recital 42 of the Preamble of the GDPR states: "*Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation.*" As per the Guidelines 05/2020, Controllers are free to develop methods to comply with this provision in a way that is fitting in their daily operations. The controllers should have enough data to show a link to the processing (to show consent was obtained) but they shouldn't be collecting any more information than necessary.

7.14. The GDPR does not prescribe exactly how the Controller must prove its compliance with the GDPR. In any case, the Controller must be able to prove that the data subject has given consent to the processing operation.

7.15. Taking into consideration all the above, I am of the opinion that the provided information and the documentation indicates up to a point the Complainant's registration to the marketing campaign. However, the provided information (including all the additional documentation) doesn't demonstrate compliance with the main elements of the consent requirement as stipulated in Articles 4(11) and 7 of GDPR (freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her).

7.16. Concerning the processing of the Complainant's personal data for direct marketing purposes, I consider that processing for direct marketing purposes may be regarded as carried out for the Controller's legitimate interest.

7.17. Regarding the deletion of the Complainant's data, I am of the opinion that the Controller did not act in a way that negatively affect the Complainant's rights and freedoms. In any case, I find important to highlight that controllers have an obligation to stop the processing actions concerned and to delete data that was processed on the basis of consent once that consent is withdrawn, in the event that no other purpose exists justifying the continued retention. The completion of the examination of pending requests before any deletion and the provision of accurate and comprehensive information are deemed necessary.

Conclusion

8. Having regard to all the above information, and based on the powers vested in me by **Articles 58 and 83 of Regulation (EU) 2016/679 and article 24(b) of National Law 125(I)/2018**, I conclude that there is an infringement of **Articles 6 and 7 GDPR** on behalf of Naxex Invest Ltd for the reasons mentioned above.

9. Under the provisions of Article 83 of the GDPR, I take into account the following mitigating (1-6) and aggravating (7) factors:

1. The Controller no longer provides services to retail clients.
2. There is no previous violation of the GDPR by the Controller.
3. The categories of personal data affected by the infringement.
4. The cooperation of the Controller with the supervisory authority.
5. The negligent character of the infringement.
6. The level of the damage the Complainant suffered.
7. The inability of the Controller to prove that all conditions for valid explicit consent were met.

10. In view of the above and on the basis of the powers conferred on me by the provisions of subparagraph (b) of paragraph (2) of Article 58 of the GDPR, I have decided to **issue a Reprimand** to Naxex Invest Ltd for the infringement mentioned in paragraph 8 above.

Irene Loizidou Nicolaidou
Commissioner
For Personal Data Protection
Cyprus

28th of March 2024