

Ref: 11.17.001.009.097

Decision

Right to erasure – Viverno Markets Ltd

Mr xxx (the complainant) has lodged a complaint with the State Commissioner for Data Protection North Rhine-Westphalia SA against *BDSwiss Holding PLC* (the Controller) that was received by the Office of the Commissioner for Personal Data Protection (Cyprus SA, henceforth the “Commissioner”) according to the provisions of the cooperation and consistency procedures of the GDPR.

2. In line with Article 56 of the Regulation, the Commissioner is acting as the lead supervisory authority, as the Controller has its establishment in Cyprus.

3. It is noted that the Controller has changed its name to VIVERNO MARKETS LTD. The Commissioner has verified through the companies’ Registrar that there has been a name change and the company registration number is the same (HE 300153).

Summary of the Complaint:

4. According to the complainant, the Controller did not delete his personal data despite repeated requests. In response to his requests by e-mail, he only received the message that his account had been closed, but his data was still stored. Unfortunately, he no longer has the corresponding e-mails.

Legal Framework

5.1. Article 12 of the GDPR states the following:

1. 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. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.

2. The controller shall facilitate the exercise of data subject rights under Articles 15 to 22. In the cases referred to in Article 11(2), the controller shall not refuse to act on the request of the data subject for exercising his or her rights under Articles 15 to 22, unless the controller demonstrates that it is not in a position to identify the data subject.

3. The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject.

4. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

5. Information provided under Articles 13 and 14 and any communication and any actions taken under Articles 15 to 22 and 34 shall be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

(a) charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested; or

(b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

6. Without prejudice to Article 11, where the controller has reasonable doubts concerning the identity of the natural person making the request referred to in Articles 15 to 21, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

7. The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing. Where the icons are presented electronically they shall be machine-readable.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of determining the information to be presented by the icons and the procedures for providing standardised icons.

5.2. Article 17 of the GDPR states the following:

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defence of legal claims.

Investigation of the complaint

6. After contacting the Controller about the complaint, the Controller has informed the Commissioner the following:

The complainant has emailed the Controller asking for the closure of his account and the deletion of his personal data. The Controller closed the account and informed the complainant on the same date. On the same date, the complainant, emailed the Controller again, asking for the deletion of his personal data, in addition to the closure of the account. The Controller stated that it did not reply to his email due to the fact that the deletion of his data was not possible, due to the legal obligation to retain the data, and the complainant had already accepted the policy of the Controller. The legal obligation to retain the personal data stems from article 68.1 of the national Law for the Prevention and Suppression of Money Laundering and Terrorist Financing Law of 2007 to 2021, based on which the Controller has an obligation to maintain his data for a period of five (5) years after the end of the business relationship with the customer or after the date of an occasional transaction.

7. Following the above communication, the Controller has sent an email to the complainant informing him that his data cannot be deleted due to the above legal obligation and that his data will be retained for at least 5 years.

8. The Commissioner contacted the Controller again in order to clarify what is the exact retention period. It was clarified that the Controller has also an obligation to retain the data for 6 years from the end of the fiscal year, based on the tax legislation (the law on Certification and Collection of Tax Laws, Law 4/1978 (Section (30(2))).

9. Based on the above, the complainant is hereby informed that his data will be retained for a period of up to 6 years from the end of the fiscal year of the end of the business relationship with the Controller.

Assessment

10. The Controller was not obliged to delete the complainant's data, based on Article 17(3)(b) due to the fact it had a legal obligation to retain the data. However, the Controller has infringed the provisions of Article 12(4) because it did not reply to the complainant's 2nd email to provide him within one month, of the reasons for not taking action and about the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

11. Based on Article 58(2)(b) the Commissioner issues a **reprimand** to the Controller for the infringement of Article 12(4).

Right of an effective remedy

12. Based on the Cyprus Constitution and on *The Establishment and Operation of the Administrative Court Law of 2015* (Law 131(I)/2015) the affected parties have the right to file an appeal against this Decision at the Cyprus Administrative Court, within 75 days from the day that the Decision was communicated to the affected party.

Irene Loizidou Nicolaidou
Commissioner for Personal
Data Protection
Cyprus
(Cyprus SA)

26 January 2024