

# Summary Final Decision Art 60

## Complaint

### Compliance order & Reprimand

EDPBI:LSA:OSS:D:2021:292

## Background information

Date of final decision: 11 November 2021

Date of broadcast: 11 November 2021

LSA: NO

CSAs: FI, SE

Legal Reference: Article 5 (Principles relating to processing of personal data), Article 6 (Lawfulness of processing), Article 12 (Transparent information, communication and modalities for the exercise of the rights of the data subject), Article 13 (Information to be provided where personal data are collected from the data subject), Article 21 (Right to object)

Decision: Compliance order & Reprimand

Key words: Lawfulness of processing, Performance of contract, Direct marketing, Right to object

## Summary of the Decision

### Origin of the case

The complainant had been receiving direct marketing by e-mail without having the possibility to opt out upon registration of his e-mail address. He had objected to this processing in September 2018, yet he still received a direct marketing e-mail in November 2019. The complainant contacted the Data Protection Officer (DPO) of the controller on several occasions, and at times, his requests were answered in more than one month. When he requested the legal basis for processing his personal data, which he believed to be consent under Article 6(1)(a) GDPR, the DPO wrote in response that the legal basis was rather necessity for the performance of a contract pursuant to Article 6(1)(b) GDPR. Later, in another e-mail to the complainant, the DPO stated that the legal basis was Article 6(1)(f) GDPR for the purpose of marketing the bank's similar products, and Article 6(1)(b) GDPR for the purpose of marketing in relation to the customer benefit program.

### Findings

The LSA established that there was no designated opt out possibility for marketing from the controller, but it was possible to 'approve' digital marketing via e-mail and SMS on the user page. As regards the lawfulness of the processing, the LSA reasoned that processing based on contractual performance must be objectively necessary, i.e. the controller should be able to demonstrate how the main subject-

matter of the specific contract with the data subject cannot be performed without the specific processing of the personal data in question. The processing of personal data for marketing purposes by the controller was not necessary for the performance of the contract related to the provision of a credit card service, and therefore, Article 6(1)(b) GDPR could not provide legal basis for the processing. The LSA found that the controller could not retroactively change the legal basis (from contractual performance to legitimate interest) after having commenced with the processing, as this leads to a lack of predictability for the data subject. In any event, a change in the legal basis for processing shall be communicated to the data subjects pursuant to Articles 12-14 GDPR.

Further, the LSA found that the controller breached Article 21(3) GDPR by continuing the processing of the complainant's personal data for direct marketing purposes after his objection to the controller's DPO. The provision of insufficient information on the legal basis of processing and the failure to inform the data subject on his right to object to processing for direct marketing by the controller constituted a breach of Articles 13(1), 12(1) and 21(4) GDPR. Finally, the controller's delays of over a month to respond to the complainant's requests, and without giving him reasons for these delays, constituted a breach of Article 12(3) GDPR.

### Decision

The LSA issued a reprimand and ordered the controller to implement measures to ensure that personal data is no longer processed for direct marketing when so requested by data subjects and to ensure that data subject requests under Article 15-22 GDPR are answered within the time limits set in Article 12(3) GDPR.