

National File Number: **E/06395/2019 - E/09473/2019**  
IMI Reference Number: **82502**

### FINAL DECISION

To discontinue proceedings carried out upon the reception in the Spanish supervisory authority (hereinafter, AEPD) of a complaint reporting an alleged infringement of the 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 (from now on, the GDPR) and based on the following:

### FACTS

FIRST: On May 13, 2019, and registry number 024101/2019, a complaint was lodged with the AEPD regarding a crossborder processing carried out by QATORO LTD. (WOWMUSICMIX.COM), (the controller) due to a potential infringement of Articles 6, 12, 13 and 14 of GDPR.

Arguments in support of the complaint are:

- Subscription to a payment service of the controller without the consent of the data subject

Together with the complaint, the following evidence was provided:

- Extract from the e-mail received by the data subject informing her about the creation of an account in the service offered by the controller

SECOND: The data controller has its main or single establishment in Cyprus.

THIRD: Taking into account the cross-border nature of the complaint, on October 9, 2019, it was agreed to provisionally discontinue the proceedings and inform Cyprus supervisory authority about the complaint, so that it could handle it as lead supervisory authority (LSA), pursuant to Article 56(1) of the General Data Protection Regulation (GDPR).

FOURTH: The complaint was communicated through the Internal Market Information System (IMI) to the Cyprus data protection authority, who accepted to handle the case as LSA, on September 25, 2019. The supervisory authorities concerned (CSA) were France, Austria and Italy.

FIFTH: In accordance with the procedure laid down in Article 60 GDPR, after agreeing to dismiss or reject the complaint, the Cyprus SA has broadcasted among the concerned SAs the draft decision, which has been accepted.

### LEGAL GROUNDS

## I – Competence

Pursuant to Article 60(8) of GDPR, the Director of the Spanish SA shall have competence to adopt this decision, in compliance with both the art. 12(2)(i) of the Royal Decree 428/1993, of 26<sup>th</sup> of March, which approves the Charter of the Spanish Agency for Data Protection, and the First Transitory Provision of the Organic Law 3/2018 of 5 December on Personal Data Protection and safeguard of digital rights (hereinafter, LOPDGDD).

## II – The Internal Market Information System (IMI)

The Internal Market Information System is regulated by Regulation (EU) N° 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (“the IMI Regulation”). It helps competent authorities of Member States to fulfil their cross-border administrative cooperation, mutual assistance and information exchange.

## III – Determination of the territorial scope

The art. 66 of LOPDGDD specifies that:

*“1. Except for the cases referred to in article 64.3 of this organic law, the Spanish Data Protection Agency shall, prior to the execution of any other action, including the admission for processing of a complaint or the commencement of preliminary investigation proceedings, examine its competence and determine the national or cross-border nature of the procedure to be followed, in any of its forms.*

*2. If the Spanish Data Protection Agency considers that it does not have the status of lead supervisory authority for handling the procedure, it shall, without any further delay, refer the complaint submitted to the lead supervisory authority deemed competent, so that it may be properly addressed. The Spanish Data Protection Agency shall notify this situation to the person who has submitted the complaint, as the case may be.*

*The agreement which resolves the referral mentioned in the preceding paragraph shall imply the provisional filing of the procedure, without prejudice to the Spanish Data Protection Agency issuing, as appropriate, the resolution referred to in paragraph 8 of article 60 of Regulation (EU) 2016/679.”*

## IV – Main establishment, cross-border processing and lead supervisory authority

Article 4(16) of GDPR defines «main establishment»:

*“(a) as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in which case the establishment having taken such decisions is to be considered to be the main establishment;*

(b) *as regards a processor with establishments in more than one Member State, the place of its central administration in the Union, or, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;”*

According to Article 4(23) of GDPR «cross-border processing» means either:

- (a) *processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or*
- (b) *processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.*

Pursuant to Article 56(1), regarding the competence of the lead supervisory authority, and without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure provided in Article 60.

In the case under examination, as outlined above, **QATORO LTD. (WOWMUSICMIX.COM)** has its main or single establishment in Cyprus and therefore Cyprus supervisory authority is the competent authority to act as lead supervisory authority.

#### V – Concerned Supervisory Authorities (CSAs)

In accordance with Article 4(22) of GDPR, ‘concerned supervisory authority’ means a supervisory authority which is concerned by the processing of personal data because:

- (a) the controller or processor is established on the territory of the Member State of that supervisory authority;
- (b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or
- (c) a complaint has been lodged with that supervisory authority;

In this procedure, the supervisory authorities concerned are those enumerated in the fourth fact.

#### VI – Cooperation and consistency procedure

In the present case, the complaint has been handled according to the procedure established in Article 60.8, which states the following:

*“8. By derogation from paragraph 7, where a complaint is dismissed or rejected, the supervisory authority with which the complaint was lodged shall adopt the decision and notify it to the complainant and shall inform the controller thereof.”*

#### VII – Subject-matter of the complaint and legal reasoning

In this case, a complaint has been lodged at the AEPD in connection with a cross-border data processing carried out by **QATORO LTD. (WOWMUSICMIX.COM)**, because of alleged infringement of the following provisions: Articles 6, 12, 13 and 14 of GDPR.

The complaint was transferred to the supervisory authority of Cyprus as the competent to act as lead supervisory authority within the meaning of Article 56 (1) GDPR. In accordance with the procedure laid down in Article 60 of the GDPR, Cyprus Supervisory Authority has communicated to the authorities concerned the draft decision that has been accepted.

In reference with the case, in a letter sent by that authority to the complainant, he/she was informed of the contacts held with the controller regarding the complaint. Moreover, he/she was requested to provide further case-related information.

In the reply provided by the controller, it was assured that at no time participate in competitions or contests was offered and the only service offered is music streaming.

The mail sent to the complainant from the controller was due to the fact that the complainant was registered for the period of proof of the service offered, for which he paid EUR 1.

According to the information provided by **QATORO LTD**, in the complainant's register as a subscriber, it appears that he/she had accepted the Privacy Policy and Terms and Conditions of service by ticking the appropriate box, without which it would have been impossible to access the payment process.

The investigation carried out by the Cypriot authority did not find evidence of the existence of the above-mentioned online contest and everything suggests that the data from the data subject were obtained through the subscription service offered by the controller.

Given the absence of tangible evidence to continue the investigation, through the letter sent by Cypriot Authority, the data subject was given a chance to provide new evidence within the deadline of two months after receipt of the communication, with no reply received from the complainant.

Consequently, the Cypriot authority proposed the closure of the file due to the impossibility to continue with the investigation.

In the case under examination, after analysing the arguments alleged by **QATORO LTD**, this Agency has been able to attest the lack of rational evidence of the existence of an infringement, and it is opportune to agree on the conclusion of the proceedings, according to the principle of presumption of innocence, which prevents from imputing an administrative infringement when no evidence or hints of its existence have been obtained.

Consistently with the conclusions described, it is agreed by the Director of the Spanish SA:

FIRST: TO DISCONTINUE the proceedings and dismiss the complaint.

SECOND: TO NOTIFY this decision to the CLAIMANT.

THIRD: TO INFORM **QATORO LTD** about the decision adopted.

Pursuant to Article 50 of LOPDGDD, this resolution shall be published after the notification of the parties concerned.

This resolution finalizes the administrative procedure pursuant to Article 114 (1) (c) of the Act 39/2015 of 1 October on Common Administrative Procedure of Public Administration. According to Articles 112 and 123 of the aforementioned Act 39/2015, it is possible to appeal this decision before the Director of the Spanish SA within a month starting the day which follows the receipt of this notification. In accordance with Article 25 and Additional Provision 4(5) of the Act 29/1998 of 13 July regulating the Jurisdiction for Judicial Review, it is also possible directly appeal before the contentious-administrative division of the Spanish National High Court. Pursuant to Article 46 (1) of the Act 29/1998, the period for filing for judicial review shall be two months long, counting from the day following the date of this notification.

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Mar España Martí  
Director of the Spanish SA