



noyb - European Centre for Digital Rights
Goldschlagstraße 172/4/3/2
1140 Vienna
Austria

Garante per la Protezione dei Dati Personali
Piazza Venezia 11
00187 - Roma
Per E-Mail: protocollo@gpdp.it

Vienna,

noyb Case-No:

Complainant:

(see Annex 2 for biographical details)

Represented in accordance with
of Article 80(1) GDPR by:

noyb - European Centre for Digital Rights
Goldschlagstraße 172/4/3/2, 1140 Vienna

Counterparty/owner:

Subito.it S.r.l.
Via Benigno Crespi, 19
20159 Milan
Italy

e

any other data **controller** or **processor** that the Data Protection
Authority may wish to identify in the context of this complaint.

Concerns:

Non-authentication via cookies - Violation Articles 11, 12, 15, 24,
25 GDPR

COMPLAINT UNDER ART. 77 GDPR

1. PROXY FOR LITIGATION

1. *noyb-European* Centre for Digital Rights is a non-profit organisation with its registered office at Goldschlagstraße 172/4/2, 1140 Vienna, Austria ([REDACTED]) (hereinafter, "*noyb*") (**Annex 1**, Articles of association) Pursuant to Article 80(1) GDPR, the Complainant is represented by *noyb* in these proceedings (**Annex 2**).

2. FACTS

2. On 30.8.2022, the complainant browsed the webpage www.subito.it (the 'Site') provided and maintained by the data controller.
3. After accessing the Website, and accepting the cookies presented by the consent management platform therein, the complainant browsed for a few minutes, searching the website and consulting various links and articles. At the end of the navigation, the complainant generated two separate session files. The first consisted of a JSON file generated by a plugin capable of extracting the first and/or third party cookies installed by the Site within the complainant's browser (**Exhibit 3**). The second file, generated through Chrome's '*Inspect*' function, launched at the beginning of browsing, was a HAR file including all the interactions made by the user while browsing the Site (**Exhibit 4**).
4. The JSON file just mentioned shows that, in this case, the Site had directly installed some tracking cookies ("first-party cookies"), including cookies containing unique identification IDs such as `_fbp` (" [REDACTED] "), `_ga_` (" [REDACTED] ") (`__gads` (" [REDACTED] ")) (see Annex 3).
5. On 1.9.2022, the complainant sent, to the email address specified by the data subject in its privacy policy (**Annex 5**), a request for access pursuant to Article 15 GDPR (**Annex 6**).¹ In order to prove that the personal data covered by the request were related to the data subject itself, the latter attached the list of cookies deposited by the Site within its browser and contained in the JSON file in Annex 3.
6. In spite of an absolutely clear and specific request, on 6.9.2022, the controller gave a vague and inconclusive answer: '*Following a check in our databases, we inform you that no personal data referring to you and no account registered with the email address [REDACTED]*'. Upon receiving this unsatisfactory reply, on 9.9.2022, the complainant sent a further communication in which, among other things, he specified that (i) he had not at all '*requested to be authenticated through my email but I have provided the session cookies used by you*', (ii) the attached JSON file '*shows how personal data was collected. Cookies with unique identifiers have been installed in my browser and sent to your site and those of third parties*' and, consequently, (iii) referred back to the access request initially submitted in which '*I asked to be informed about, among other things, the sources, who receives and the protections put in place by you*' (**Exhibit 7**). Following this email for clarification, **no response has been received to date.**

1. In addition to a full explanation of the processing of personal data resulting from the acquisition via cookies (Article 15(1) and (2) GDPR), the request sought clarification of certain aspects so to speak typical of processing via cookies, requesting for example the precise details of the recipients of the personal data (Articles 15(1)(c) and 19 GDPR) as well as the sources of the same, where available (Article 15(1)(g) GDPR). It also required a perfect copy of all data processed in any way related to the user (Article 15(3) GDPR).

3. ELEMENTS OF THE COMPLAINT

7. The Complainant considers that, by its conduct, the controller has, at the very least, committed the following violations of the GDPR, as further set out in the following paragraphs:
 - 1) Incorrect user authentication and consequent failure to respond to an access request submitted by the complainant in violation of Articles 12 and 15 GDPR;
 - 2) Any other breach of the GDPR that the Garante, with its powers of investigation, may ascertain as a result of its analysis and investigation of this complaint.

1) *Incorrect user authentication and consequent failure to respond to a complainant's access request*

8. On 6.9.2022, the controller rejected the access request on the grounds that '*Following a check of our databases, we inform you that no personal data relating to you and no account registered with the email address: [REDACTED] was found*'. The controller's reply is completely inconclusive. As specified in the request for access, and reiterated in the clarification of 9.9.2022 (which was completely ignored), the complainant, having no account on the controller's Site, had never requested to be authenticated through his email address. Instead, he had provided a JSON file within which it was possible to identify the tracking cookies deposited by the Site.
9. This procedure is confirmed by the EDPB itself which has recently clarified that, in the case where the data subject *tries to exercise his access right by e-mail or by regular mail, then in this context [the controller] will have no other choice to ask [the data subject] to provide "additional information" (Art. 12(6)) in order to be able to identify the advertising profile associated with [the data subject himself]. In this case, the additional information will be the cookie identifier stored in the terminal equipment of [the data subject]*'. [emphasis added] (EDPB, Guidelines 01/2022 on data subject rights - Right of access, pp. 24-25).
10. The onus was therefore on the holder to carefully read the access request and the attached JSON file, identify its cookies, and correctly authenticate the complainant. Instead of doing so, the holder adopted an authentication factor - the complainant's email address - which could only have given a negative result in terms of correct authentication. The complainant, in fact, had never created an account on the holder's site. This error allowed the controller to reject the claim. However, this was a culpable error. With regard to the exercise of rights, in fact, it is the controller's responsibility under Article 24 GDPR to take appropriate technical and organisational measures to **recognise** the content of the access request and to follow it up fully.
11. Confirmation of this can be found in recent EDPB guidelines. On the subject of right of access '*the controllers should be proactively ready to handle requests for access to personal data. This means that the controller should be prepared to receive the request, assess it properly [...] and provide an appropriate reply without undue delay to the requesting person.*' [emphasis added] (EDPB, Guidelines 01/2022 on data subject rights - Right of access, p. 18). In this sense, the 'peculiarity' of the request, based on cookies as an authentication factor, was thus not a justification for not replying properly. Indeed, '[t]he way the controllers will prepare themselves for the exercise of access requests should be **adequate and proportionate and depend on the nature, scope, context and purposes of processing as well as the risks to the rights and freedoms of natural persons, in accordance with Art. 24 GDPR**' [emphasis added] (EDPB, Guidelines 01/2022 on data subject rights - Right of access, p. 19).
12. In other words, where the controller decides to use a certain technology (in our case, cookies) and initiate a certain processing (behavioral advertising based on such trackers), it also assumes the responsibility of adapting its internal structure to the requests for the exercise of rights that **may arise from that specific situation**. In the present case, therefore, the controller would have had to, in this sequence,

(i) recognise the access request, (ii) locate its own cookies within the JSON file, and, (iii) following an internal search of its own databases, (iv) respond in full to the access request.

13. This was clearly not the case in this instance. The holder culpably used the wrong authentication factor (the email address instead of the cookies in the JSON file) and wrongly rejected the access request. This resulted in a violation of, *inter alia*, Articles 12, 15 and 24 GDPR.

2) Other possible breaches relating to the authentication system when using profiling cookies

14. Finally, it is requested that the Garante make a more general assessment in relation to systems of authentication and exercise of rights through cookies. The GDPR, as is well known, places particular emphasis on the effectiveness of the data subject's rights set out in Articles 15-22 (Recital 11) and, in the present case, it is not considered that such effectiveness has been guaranteed. In fact, the complainant had to engage the data controller with the support of lawyers and technical specialists in order to obtain rather meagre results, hence the present complaint. The Garante is therefore asked to verify whether, in the light of an interpretation oriented to the principles of effectiveness and facilitation of rights, the data controller has put in place all the appropriate technical and organisational measures to respond to the request for the specific processing in question (Articles 24 and 25 GDPR).

4. REQUESTS

1) Request to carry out any necessary investigation

15. In light of the above, the Complainant requests the Garante to investigate the data processing practices of the controller in relation to the controller's authentication practices related to the use of tracking cookies. It is also requested to ascertain whether, in relation to the type of processing considered, the controller has taken all necessary organisational measures pursuant to, *inter alia*, Articles 24 and 25 GDPR, in order to properly authenticate the Complainant and respond in a complete and timely manner to access requests.

(2) Request to establish the violation and issue specific orders

16. The Complainant hereby petitions the Data Protection Authority to ascertain any breach arising from the facts set out and/or ascertained in the investigation and to adopt any remedy deemed appropriate to bring the data processing back into compliance with the GDPR. In particular, the Complainant respectfully petitions the Data Protection Authority:

- 1) pursuant to Article 58(2)(c) GDPR, orders the data controller to give full effect to the request for access;
- 2) having ascertained the lack of adequate technical and organisational measures to authenticate the user through the use of cookies in violation of, *inter alia*, Articles 12(2), 24 and 25 of the GDPR, orders, pursuant to Article 58(2)(d) of the GDPR to make the operations compliant, in a specific manner, including, where necessary, automatic authentication tools via cookies;
- 3) in view of any other breach of the GDPR that the Garante, with its investigative powers, may ascertain as a result of its analysis and investigation of this complaint, adopt any remedy it deems appropriate.

3) Request to impose an administrative fine

17. The Complainant suggests the imposition of an effective, proportionate and dissuasive fine for the violations found. In particular, it should be noted that (i) thousands of internet users visit the data controller's website every day; (ii) the articles on the website relate to special categories of data within the meaning of Article 9 of the GDPR; (iii) other companies have installed their own profiling cookies through the Site, thus allowing the further dissemination of personal information, by and to other non-compliant data controllers.

5. CONTACTS AND FURTHER INFORMATION

18. Communications between *noyb* and the Garante in the course of this procedure may take place by e-mail to [REDACTED] with reference to the case number indicated in the title of this complaint. We will be happy to assist you with any further factual or legal details you may require to process this complaint.

Signature