THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 17

September

2021

DECISION

DKE.523.33.2021

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended) in connection with joke. 18 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) and art. 160 sec. 1 and 2 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2018, item 1000, as amended) and 57 sec. 1 point f) of 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, and repealing Directive 95/46 / EC (Journal Urz. UE L 119 of 04.05.2016, p. 1, as amended), after conducting administrative proceedings regarding the complaint of Mr. A.B., about irregularities in the processing of his personal data by I. S.A., consisting in unlawful processing of the complainant's personal data for the purpose of other than the purpose for which they were collected, the President of the Personal Data Protection Office

refuses to accept the request.

JUSTIFICATION

On [...] May 2018, the Office of the Inspector General for Personal Data Protection (currently: the Office for Personal Data Protection) received a complaint from Mr. A.B. personal data by I. S.A., hereinafter also referred to as the "Company". The complainant alleged that the Company was unlawfully processing his personal data in order for him to sign the contract without informing how it came into possession of his data. The complainant demanded that the deficiencies be remedied and his personal data ceased to be processed for any purpose other than charging for the electricity consumed. As proof of the above, he presented the correspondence received from the Company, which - in his opinion - constitutes a commercial offer.

In the course of the proceedings conducted in this case, the President of the Personal Data Protection Office established the following facts:

I. S.A. is entered in the National Register of Entrepreneurs, hereinafter referred to as "KRS", under the number [...]. The scope

of the company's activities is, inter alia, trade and electricity generation.

On [...] January 2005, the Complainant concluded an electricity sales contract No. [...] with S. S.A., which on [...] May 2007 changed its name to R. S.A. Then [...] September 2008 R. S.A. changed its name to R. S.A., and the latter in turn - on [...] September 2019 - to I. S.A.

The complainant received from the Company:

Cover letter sent [...] May 2018 informing about:

changes related to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (general Regulation on the protection of personal data) (Journal of Laws UE L 119 of 04.05.2016, p. 1 and Journal of Laws UE L 127 of 23.05.2018, p. 2), hereinafter referred to as "Regulation 2016/679 ",

the introduction by the Company of new General Terms and Conditions [...] and the introduction of a new Electricity Tariff [...],

Tariff information [...] I. S.A. for customers [...] connected to the distribution network In. Sp. z o.o.

General Terms and Conditions [...] for an individual Client

Company letter fulfilling the information obligation,

Letter of the distribution system operator in the [...] area - In. Sp. z o.o.

The cover letter posted on [...] May 2018 also included the following information, quoting: “I. also introduces a new Electricity [...] Tariff in which, inter alia, a new tariff group [...] has been created. We encourage those who consume or intend to use electricity for heating to use it. If you want to take advantage of the offer, all you have to do is fill in the Application for changing the tariff group on the website [...] and send it signed by e-mail or visit any Salon I. ”.

In explanations of [...] March 2020, the Company indicated that in 2016 it ran an information campaign addressed to all customers about "internal transformations with the participation of S. S.A.", i.e. rebranding. As part of the campaign, the Company sent correspondence to the Complainant, which was aimed solely at the proper performance of the contract (Article 6 (1) (b) of the Regulation 2016/679) and the fulfillment of the legal obligations imposed on the Company (Article 6 (1) (c)). ) Of Regulation 2016/679). At the same time, the Company indicated that the quotation "(...) cannot agree with the Complainant's position that the above documents were of a commercial offer and their sending constituted the implementation of the purposes of processing against which the Complainant objected on [...] January 2019 r. The complainant misinterpreted the

documents sent to him as a form of commercial information ”.

In a letter of [...] January 2019, the Company explained to the Complainant the chronology of changes resulting from the rebranding, with particular emphasis on changes in the ownership and name of the entity with which the Complainant concluded the contract.

During the telephone conversation on [...] January 2019, i.e. before the Company received information about the lodging of a complaint with the local Office, the Complainant raised an effective objection to the Company against the processing of his personal data for purposes other than the performance of the electricity sales contract, i.e. for marketing purposes. Therefore, from that date, the Company had recorded the Complainant's objection to the processing of his personal data for the purposes of marketing, satisfaction and preferences research.

The company explained to the Complainant in a letter of [...] January 2019 (sign: [...]) that the change of its name quoted "does not change anything from a formal point of view: the conditions of the contracts signed and in force so far remain unchanged. , there is no obligation to sign any annexes [...] [...] the data is processed in accordance with the concluded contract "and commercial information will not be sent to him.

Currently, the complainant's personal data is not processed by the Company for the purposes of marketing its own products and services, as well as satisfaction and preferences research. The Company processes the Complainant's personal data only for the purpose of performing the contract (Article 6 (1) (b) of Regulation 2016/679), establishing, investigating or defending against any claims on the part of the Complainant (Article 6 (1) (f) of the Regulation) 2016/679) and fulfillment of legal obligations imposed on the Company under EU or Polish law (Article 6 (1) (c) of Regulation 2016/679), while the scope of the Complainant's personal data processed by the Company includes: name and surname, address of residence: street, house number, flat number, postal code, city, correspondence address: street, house number, flat number, zip code, city, telephone number, PESEL number, type of identity card, series and number of identity card, bank account number, name and name of the account owner, bank name, as well as the commercial and technical parameters of the contract: […].

After reviewing the entirety of the evidence collected in the case, the President of the Office for Personal Data Protection considered the following.

On the date of entry into force of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2019, item 1781), hereinafter referred to as "u.o.d.o. 2018 ”, ie on May 25, 2018, the Office of the Inspector General for Personal Data

Protection became the Office for Personal Data Protection. Proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before May 25, 2018, are conducted by the President of the Personal Data Protection Office, on the basis of u.o.d.o. 1997, in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), hereinafter referred to as "the Code of Administrative Procedure". All activities undertaken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective (Article 160 (1–3) of the Act on Personal Data Protection, 2018).

Pursuant to Art. 57 sec. 1 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (general regulation on the protection of personal data) (Journal of Laws UE L 119 of May 4, 2016, p. 1 and Journal of Laws UE L 127 of May 23, 2018, p. 2), hereinafter referred to as "Regulation 2016/679", without prejudice to other tasks established pursuant to this regulation, each supervisory authority on its territory monitors and enforces the application of this regulation (point a) and deals with complaints brought by the data subject or by a data subject empowered by him in accordance with Art. 80 with Regulation 2016/679 - the entity, organization or association, to the extent appropriate, conducts proceedings on these complaints and informs the complainant about the progress and results of these proceedings within a reasonable time (point f).

It should be noted here that the President of the Personal Data Protection Office, when issuing an administrative decision, is obliged to decide on the basis of the facts existing at the time of issuing this decision. As the doctrine points out, “the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. This rule also applies to the assessment of the legal status of the case, which means that a public administration authority issues an administrative decision based on the provisions of law in force at the time of its issuance (...). Settlement in administrative proceedings consists in applying the applicable law to the established factual state of an administrative case. In this way, the public administration body fulfills the objective of administrative proceedings, which is the implementation of the applicable legal norm in the field of administrative and legal relations, when such relations require it "(Commentary to the Act of June 14, 1960, Code of Administrative Procedure, M. Jaśkowska, A . Wróbel, Lex., El / 2012). Also the Supreme Administrative Court - in the judgment of May 7, 2008 in case no. Act I OSK 761/07 stated that: "when examining the legality of the processing of personal data, the GIODO is obliged to determine whether the data of a specific entity are processed on the date of issuing the

decision on the matter and whether it is done in a legal manner".

Pursuant to the wording of Art. 23 sec. 1 u.o.d.o. 1997, applicable in the period covered by the Complainant's complaint, the processing of personal data was permissible when: the data subject consents to it, unless it concerns the deletion of data relating to him (point 1), it is necessary to exercise the right or fulfillment of the obligation resulting from a legal provision (point 2), it is necessary to perform the contract when the data subject is its party or when it is necessary to take action before concluding the contract at the request of the data subject (point 3) , is necessary to perform the tasks specified by law for the public good (point 4), it is necessary to fulfill legally justified purposes pursued by data administrators or data recipients, and the processing does not violate the rights and freedoms of the data subject (point 5). The provision of art. 23 sec. 4 u.o.d.o. 1997 provided that for the legally justified purpose referred to in Art. 23 sec. 1 point 5, it shall be considered, in particular, direct marketing of the controller's own products or services.

Pursuant to the provisions currently in force (from May 25, 2018, i.e. from the date of application of the provisions of Regulation 2016/679), the processing of personal data is lawful if the data controller has at least one of the provisions set out in art. 6 sec. 1 of Regulation 2016/679, the material premises for the processing of personal data. According to the above-mentioned provision, the processing of personal data is lawful only if one of the following conditions is met: a) the data subject has consented to the processing of his 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 to fulfill the legal obligation incumbent on the controller; d) processing is necessary to protect the vital interests of the data subject or 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 these interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular when the data subject is a child.

In the light of recital 47 of Regulation 2016/679, the legitimate interest referred to in art. 6 sec. 1 lit. (f) There may, for example, be a relevant and appropriate type of relationship between the data subject and the controller, for example where the data subject is a customer of the controller. In addition, in accordance with the said recital, the purpose of data processing resulting from a legitimate interest should be, among others, direct marketing of the administrator.

Pursuant to Art. 21 sec. 2 of Regulation 2016/679, if personal data are processed for direct marketing purposes, the data subject has the right to object at any time to the processing of his personal data for such marketing purposes, including profiling, to the extent that the processing is related to such direct marketing. If the data subject objects to processing for direct marketing purposes, personal data may no longer be processed for such purposes (Article 21 (3) of Regulation 2016/679). Referring the above to the circumstances of the present case, it should be noted that the Complainant, during a telephone conversation conducted [...] in January 2019, effectively objected to the processing of his personal data for marketing purposes pursuant to 21 par. 2 of the Regulation 2016/679. From that date, the Company ceased to process the Complainant's personal data for the purposes of marketing, satisfaction and preferences research. Currently, the Company processes the Complainant's personal data only for the purpose of performing the contract (Article 6 (1) (b) of Regulation 2016/679), establishing, investigating or defending against any claims by the Complainant (Article 6 (1) (f)) Regulation 2016/679) and fulfillment of legal obligations imposed on the Company under EU or Polish law (Article 6 (1) (c) of Regulation 2016/679). The President of the Personal Data Protection Office cannot agree with the position of the Company that among the documents that the Company sent to the Complainant, there were none containing commercial information. In the cover letter posted on [...] May 2018, the Company clearly indicated that the quotation "I. also introduces a new Electricity [...] Tariff in which, inter alia, a new tariff group [...] has been created. We encourage those who consume or intend to use electricity for heating to use it. If you want to take advantage of the offer, all you have to do is fill in the Application for changing the tariff group on the website [...] and send it signed by e-mail or visit any Salon I. ". Thus, the above letter contained commercial information addressed to the Complainant. However, it should be emphasized that the Company had a legal basis at that time to process the Complainant's personal data for this purpose, as specified in Art. 23 sec. 1 point 5 u.o.d.o. 1997 (which currently corresponds to Article 6 (1) (f) of Regulation 2016/679). The activity of the Company was necessary to fulfill its legally justified purpose, which was direct marketing of its own products or services (Article 23 (4) (1) of the Act on Consumer Protection, 1997). However, referring to the reservation that the implementation of the legitimate goal of the administrator (in this case - the marketing goal) may not violate the rights and freedoms of the data subject (Article 23 (1) point 5 of the Act on The company's own marketing purpose in this case does not violate the rights and freedoms of the complainant. Firstly, the activities of the Company were closely related to the contractual relationship between the parties and related to the marketing of services which the Complainant used or which - in the Company's reasonable opinion - could be interested. Secondly, the

sending of commercial information by the Company only minimally entered the sphere of privacy of the Complainant, because it was included, somehow, in the written correspondence in which the Company fulfilled the information obligation towards the Complainant related to the future application of the provisions of Regulation 2016/679 and presented new general terms and conditions. electricity sales contracts. In the opinion of the President of the Personal Data Protection Office, such encroachment into the Complainant's sphere of privacy does not provide grounds for stating that it outweighs the justified interest of the Company. As it is assumed in the literature on the subject - following the solutions adopted in Directive 95/46 / EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Journal WE L 281 of 23 November 1995, p. 31, as amended; Official Journal of the EU, Polish special edition, chapter 13, vol. 15, p. 355, as The administrator's goal should not be placed so much on the "inviolability" of the rights and freedoms of the data subject, but rather on requiring that they do not outweigh the legitimate interests of the administrator (Act on the Protection of Personal Data. Commentary, Arwid Mednis, Warsaw 1999, p. 68, cf. also: Janusz Barta, Paweł Fajgielski and Ryszard Markiewicz, commentary on Article 23 in: Personal data protection. Commentary, VI edition. LEX, 2015).

In these administrative proceedings, the allegations of the Complainant regarding the unlawful processing of his personal data by the Company have not been confirmed. The Company provided the Complainant with the commercial information described above took place before his objection was raised and was based on the premise specified in Art. 23 sec. 1 point 5 u.o.d.o. 1997. However, after an objection by the Complainant, the Company processes his personal data only for the purposes of: performance of the contract, establishing, investigating or defending against any claims from the Complainant and fulfilling the obligations imposed on the Company under the law, to which it is authorized by the provisions of Art. 6 sec. 1 of the Regulation 2016/679.

In this factual and legal state, the President of the Personal Data Protection Office resolved as in the sentence.

Based on Article. 127 § 3 of the Code of Civil Procedure of the decision, the party has the right to submit an application for reconsideration of the case within 14 days from the date of its delivery to the party. If a party does not want to exercise the right to submit an application for reconsideration of the case, he has the right to lodge a complaint against the decision with the Provincial Administrative Court in Warsaw within 30 days from the date of its delivery to the party. The complaint is lodged through the President of the Personal Data Protection Office (address: ul. Stawki 2, 00-193 Warsaw). The entry fee for the

complaint is PLN 200. The party has the right to apply for the right of assistance, including exemption from court costs.

2021-11-03