THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 23

April

2020

DECISION

ZKE.440.22.2019

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2020, item 256), art. 160 sec. 1 and 2 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781) in connection with Art. 12 point 2 and art. 22 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended) and Art. 6 sec. 1 lit. c) and lit. f) and art. 57 sec. 1 lit. a) and lit. f) 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 protection of personal data) (Journal of Laws UE L 119 of May 4, 2016, page 1 and Journal of Laws UE L 127 of May 23, 2018, page 2), after conducting administrative proceedings regarding the complaint of Mrs. KK, for the processing of their personal data for marketing purposes by OSA and making them available to other entities cooperating with the Company, the President of the Office for Personal Data Protection

refuses to accept the request.

JUSTIFICATION

The President of the Personal Data Protection Office (previously: the Inspector General for Personal Data Protection) received a complaint from Ms KK, hereinafter referred to as: the Complainant, about the processing of her personal data for marketing purposes by OSA, hereinafter also referred to as: the Company, and to disclose this data to other entities with A cooperating company. The complainant submitted that despite a written request to the Company on [...] January 2013 to stop processing her personal data for marketing purposes, both the employees of the Company and other entities providing services to her repeatedly contacted the complainant by telephone, in order to presenting the OSA's commercial offer Despite the complainant's repeated complaints, the Company did not take effective steps to meet her request.

In connection with the events presented in the complaint, the Complainant requested the supervisory authority to take

appropriate actions in order (quoted) "to enforce the obligation to cease telephone contacts for marketing purposes by the company O. and its cooperating entities".

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

O. S.A. (legal successor of P. Sp. z o.o.) processed the complainant's personal data, obtained in connection with the conclusion of the contract for the provision of telecommunications services No. [...] of [...] February 2000, in the scope of telephone numbers: [...] and [...].

On […] December 2012, […] December 2012 and […] January 2013, the Company's employees contacted the Complainant by phone several times in order to present a marketing offer regarding the operator's services. The above-mentioned actions were then justified in the consent granted by the Complainant to the processing of her personal data for marketing purposes, expressed in the contract concluded with the Company.

By letter of [...] January 2013, submitted by the applicant in person at the O. S.A. showroom, the above-mentioned objected to the processing of her personal data for marketing purposes and requested the Company to provide information on the remedial measures taken in this regard.

By letter of [...] February 2013, the Company informed the Complainant that steps had been taken to withdraw the Complainant's personal data from the database of clients covered by the Company's advertising activities, and that the Complainant's telephone number would not be taken into account when creating new marketing campaigns or entrusted to partners The company or entities cooperating with it.

Despite the assurances made by the Company, on [...] March 2013, the Complainant again received advertising information by phone about the services offered by the operator, and therefore again, in a letter dated [...] March 2013, she objected to such processing of her personal data.

In response to the Complainant's complaint, by a letter of […] April 2013, the Company explained that due to a unitary human error, the Complainant's telephone numbers had been included in databases dedicated to telesales activities. At the same time, the Company stated that the complainant's subscriber account was modified on […] February 2013 with regard to the withdrawal of consents to the processing of telephone numbers: […] and […] for marketing purposes. The operator also pointed out that due to the complexity of the described process, after the introduction of the changes, there could still be

individual cases of contact between the Company's employees and the Complainant.

Contrary to the above assurances, on [...] May 2013 and [...] November 2013, acting on behalf of the Company - and employed by the company cooperating with O. S.A. an external company - customer advisers, contacted the Complainant twice by phone in order to present the Company's commercial offer. In connection with the above-mentioned incidents, in a letter of [...] November 2013, the complainant asked the mobile operator to indicate the name of the entity that came into possession of her personal data and the reasons for which the company had disclosed the data.

In a letter of [...] December 2013, the Company explained that the described marketing contacts were caused by a technical error, as a result of which the complainant's telephone number was included in the database of an external company cooperating with O. S.A. in order to sell its services. The complainant was again assured that the relevant updates of the marketing consents had been made in her subscriber account.

On [...] December 2013, the Complainant was contacted by telephone - in order to present a commercial offer - by an employee of the Promotion Department of the OSA Headquarters, therefore the Complainant once again asked the Company to provide a written explanation regarding the Company's compliance with the protection rules personal data and providing the names of entities to which the Company provided its personal data.

In a letter dated [...] January 2014, the Company informed that it processes personal data of subscribers for the purposes of marketing its own products and marketing products and services of entities cooperating with the Company, in particular in the field of finance, banking and insurance. Pursuant to Art. 31 of the Act of August 29, 1997 on the protection of personal data, on the basis of contracts concluded with these entities, the Company entrusted them with the personal data of the complainant. The request of the Complainant to indicate them exhaustively was directed to the competent unit of the Company in order to obtain an appropriate list.

In written explanations of [...] February 2015, submitted to the President of the Personal Data Protection Office, the Company indicated that as at the date of the above-mentioned the letter no longer processes the complainant's personal data for marketing purposes. Moreover, these data were not made available to data recipients, as defined in art. 7 point 6 of the Act of August 29, 1997 on the protection of personal data. Access to the complainant's data processed in the set of subscribers of telecommunications services of O. S.A. can only be obtained by entities entrusted with the processing of personal data, in accordance with art. 31 above the law. These entities could process data from the above-mentioned set only for the purposes

defined by the Data Administrator for this set, e.g. to maintain the infrastructure of the telecommunications network, maintain the ICT infrastructure, support customer contact channels (accepting orders, notifications, complaints or complaints and target service), payment processing, sale of telecommunications services, printing and enveloping correspondence to the customer and finally the implementation of letter and courier items.

As of [...] May 2015, the complainant ceased to use the telecommunications services provided by the Company with regard to the telephone number [...], operated as part of the prepaid service - the so-called prepaid. Regarding the telephone number: [...] On the other hand, on [...] October 2017, the applicant signed an annex to the contract for the provision of telecommunications services No. [...], extending its term until [...] October 2019. Pursuant to § 7 point 8 of the annex, the complainant agreed to “contact the telephone numbers available to OSA in order to present an offer to O. "

After the expiry of the term of the contract, as a result of the complainant's written instruction to resign from further use of the services provided to her by the Company, the telephone number [...] was deactivated on [...] November 2019.

Currently, the personal data of the Complainant in the scope of: name, surname, PESEL number, number and series of ID cards, address, e-mail address and numbers of telecommunications services are processed by the Company only in order to fulfill its legal obligations, in particular in order to: a) provide responses to complaints within the time limit and in the form provided for by law; b) issuing and storing invoices and accounting documents, and c) ensuring network security, including data retention in accordance with the provisions of the Telecommunications Law, and for the purposes of the legitimate interests pursued by the Company, including establishing, defending and pursuing claims related to implementation of the contract for the provision of telecommunications services No. [...] of [...] February 2000, concluded with the applicant. Thus, the legal basis for the processing of the complainant's personal data by the Company is art. 6 sec. 1 lit. c) and f) 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, page 1 and Journal of Laws UE L 127 of May 23, 2018, page 2)

The complainant's personal data are currently not processed by the Company or its cooperating entities for the purpose of marketing its own services and products.

After reviewing the entire evidence gathered in the case, the President of the Personal Data Protection Office, hereinafter also

referred to as: the President of the Personal Data Protection Office, 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, pursuant to the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, . item 922, as amended), hereinafter referred to as: "uodo 1997 "- in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2020, item 256), hereinafter referred to as" the Code of Administrative Procedure ". All actions taken 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).

At the same time, from May 25, 2018, Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing the Directive 95/46 / EC (Journal of Laws UE L 119 of 04/05/2016, p. 1 as amended), hereinafter referred to as "Regulation 2016/679".

Pursuant to Art. 57 sec. 1 of Regulation 2016/679, without prejudice to other tasks set out under it, each supervisory authority on its territory monitors and enforces the application of this regulation (letter a) and considers complaints brought by the data subject or by an authorized by him - in accordance with Art. 80 by 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 also be pointed out here that the President of the Personal Data Protection Office, when issuing an administrative decision, is obliged to decide on the basis of the actual state of affairs 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 implements the goal 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 personal data processing, 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 lawful manner" .

Bearing in mind the above, the President of the Personal Data Protection Office (UODO), on the basis of the evidence collected in this case, assessed the processing of the complainant's personal data in the context of the provisions of Regulation 2016/679, as well as the provisions of u.o.d.o. in force on the date of filing the complaint. 1997.

Pursuant to the wording of Art. 23 sec. 1 u.o.d.o. 1997, applicable in the period covered by the complaint, the processing of personal data was permissible when: the data subject has consented to it, unless it was the deletion of data relating to him (point 1), it was necessary to exercise the right or fulfill an obligation resulting from a legal provision (point 2), it was necessary for the performance of the contract when the data subject was a party to it or when it was necessary to take action before concluding the contract at the request of the data subject (point 3), it was necessary to perform tasks specified by law for the public good (point 4) or it was necessary to fulfill legally justified purposes pursued by data controllers or data recipients, and the processing did not violate the rights and freedoms of the data subject (point 5). The provision of art. 23 sec. 4 u.o.d.o. 1997 stipulated 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.

Art. 32 sec. 1 point 8 u.o.d.o. 1997 granted the data subject the right to object to the processing of his personal data in the cases specified in art. 23 sec. 1 points 4 and 5. This means that the data subject could object to the data controller against the processing of their personal data for marketing purposes. At the same time, at the disposal of Art. 32 sec. 3 u.o.d.o. 1997, after such objection was noted, further processing of the contested data was unacceptable.

In accordance with the current legal status (i.e. from May 25, 2018, when the provisions of Regulation 2016/679 began to apply), the processing of personal data is lawful when the data controller has at least one of the provisions of 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 of another natural person; e) processing is necessary for the performance of a task carried out in the public interest or as part of the exercise of official authority entrusted to the controller interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Recital 40 of Regulation 2016/679 emphasizes that in order for data processing to be lawful, it should be based on the consent of the data subject or on other justified grounds provided for by law or in a regulation or in another legal act of the European Union or in law. of the Member State referred to in this Regulation, including it must comply with the legal obligation to which the controller is subject or with the agreement to which the data subject is a party, or in order to take steps at the request of the data subject they concern, before concluding the contract.

In the light of recital 47 of Regulation 2016/679, for actions performed in the legitimate interest referred to in art. 6 sec. 1 lit. f), it is necessary to recognize, inter alia, the processing of personal data for the purposes of direct marketing.

On the other hand, the provisions of Art. 6 sec. 1-3 of Regulation 2016/679, analogically to the previously applicable regulation of art. 32 sec. 1 point 8 and art. 32 sec. 3 u.o.d.o. 1997, provide for the right of the data subject to object to the processing of his personal data for the purposes of direct marketing of the administrator, resulting in inadmissibility of further processing for this purpose.

Referring the above-mentioned provisions to the facts of the present case, it should be stated that in the legal status applicable in the period covered by the complaint, the Company violated the provisions on the protection of personal data, consisting in the unauthorized processing of the complainant's personal data in the scope of telephone numbers: [...] and [...] - which the Company and entities cooperating with the Company used for marketing purposes without the consent of the Complainant.

Undoubtedly, the obligation of the Company resulting from the above-mentioned regulations was to properly record in its IT systems and databases information about the Complainant's objection to the processing of her personal data for the purpose of marketing its own services or products, and as a consequence - to stop processing her personal data for these purposes.

As is clear from the established facts, such an objection was raised by the Complainant on […] January 2013, and the Company informed the Complainant that it had complied with her request and took appropriate steps to withdraw consents to

the processing of her personal data. The changes declared by the Company were to be introduced in the complainant's subscriber account on [...] February 2013. Despite the assurances made, the employees of the Company and other entities to which the Company entrusted the processing of the complainant's personal data on the basis of binding contracts, continued to contact over the phone with the complainant in order to present the operator's offer. Contrary to the Company's claims, these incidents cannot be considered individual, in particular due to the fact that they were repeated many times over the next ten months counted from the date on which the complainant objected to the processing of her personal data. In the opinion of the President of the Personal Data Protection Office, the above clearly proves that the Company did not correct the system properly and did not remove the Complainant's data from the databases in which information about customers was collected, to whom the Company directed advertising campaigns by phone. Thus, it should be considered that in the period from [...] January 2013 to [...] December 2013 (i.e. the date on which the last contact by the employees of the Company took place), the controller's activity consisting in data processing the complainant's personal data for marketing purposes, there was no basis in the provisions of law in force at that time.

Regardless of the above, however, it should be pointed out that currently - that is, in the factual state at the time of issuing this decision - the Company processes the complainant's personal data only for the purpose of fulfilling its legal obligations, including, inter alia, in order to respond to complaints, issue and store invoices and accounting documents and ensure network security, including data retention in accordance with the provisions of the Telecommunications Law, and also for purposes arising from legitimate interests pursued by the Company, especially to defend and pursue claims, related to the implementation of the contract for the provision of telecommunications services No. [...] of [...] February 2000 concluded with the complainant. The legal basis for the processing of the complainant's personal data by the company is therefore currently art. 6 sec. 1 lit. c) and f) of Regulation 2016/679.

However, referring to the Complainant's application regarding the enforcement of the "obligation to cease telephone contacts initiated by entities cooperating with the Company", it should be noted that, according to the Company's explanations, access to the Complainant's personal data processed in the subscribers of OSA telecommunications services could only be granted to entities, entrusted with the processing of personal data in accordance with art. 31 u.o.d.o. 1997, according to which the data controller could entrust another entity, under a written contract, with the processing of data (paragraph 1). As the Company explained, entities cooperating with it on the above-mentioned principles, could process the data of the Company's customers

only for the purposes defined by it, including for marketing purposes. According to the evidence gathered in the case, the complainant received information by phone about the services offered by the Company twice, i.e. on [...] May 2013 and [...] November 2013, and the telephone contact was initiated in both of these cases by employees of external entities, not employees of the mobile operator. Undoubtedly, the above actions constituted a breach of the complainant's rights, as they took place after she had objected to the processing of her personal data.

Despite the shortcomings identified in this respect, it should be clarified that in the case no other than the above-mentioned cases of processing the complainant's personal data by entities referred to in art. 31 u.o.d.o. 1997. Thus, it should be inferred that the events described by the complainant were incidental and did not repeat during the further term of the contract for the provision of telecommunications services concluded with the Company. In view of the above, there are no grounds for the supervisory authority to take any further action with respect to the complainant's requests mentioned in the complaint submitted by her.

In connection with the findings, it should be noted that the continuation of administrative proceedings by the President of the Personal Data Protection Office, initiated by a complaint about irregularities in the processing of the complainant's personal data by the Company and entities cooperating with it, aimed at issuing an administrative decision pursuant to Art. 18 sec. 1 of the 1997 Act is unfounded.

According to the wording of the above-mentioned of the provision, in the event of a breach of the provisions on the protection of personal data, the President of the Personal Data Protection Office ex officio or at the request of the person concerned, by way of an administrative decision, orders the restoration of the lawful state, in particular: removal of deficiencies (1), supplementing, updating, rectification, disclosure or non-disclosure of personal data (2), application of additional security measures for the collected personal data (3), suspension of the transfer of personal data to a third country (4), data protection or transfer to other entities (5) or deletion of personal data (6) . From the wording of Art. 18 sec. 1 of the Act of 1997, and at the same time from the definition of an administrative decision - as an act decisive in a ruling manner about the rights and obligations of the parties to the proceedings in the factual and legal status established and valid at the time of its issuance - it follows that the personal data protection authority does not assess past events, no continued at the time of adjudication. The decision of the President of the Personal Data Protection Office (UODO) is an instrument to restore lawfulness in the data processing process carried out at the time of issuing the decision.

Considering the above, it should be stated that there are currently no grounds for formulating an order referred to in Art. 18 sec. 1 of the Act, because the complainant's personal data are no longer processed by the Company for marketing purposes, but only for the purpose of fulfilling its legal obligations, which is in line with applicable law and does not require the complainant's consent. Due to the above, the administrative proceedings in the present case should have been concluded with a decision refusing to grant the applicant's request.

The President of the Personal Data Protection Office points out that the possible regulation on the grounds that the complainant may seek legal protection and pursue her claims is the Act of 23 April 1964 Civil Code (Journal of Laws of 2019, item 1145), hereinafter referred to as "the Civil Code ". According to the content of Art. 23 of the Civil Code Regardless of the protection provided for in other regulations, personal rights of a person, including the right to privacy, remain under the protection of civil law. The provision of Art. 24 of the Civil Code guarantees the person whose personal rights has been endangered with the right to request to refrain from acting violating the personal rights, and in the event of an already committed violation of the request, that the person who committed the infringement will complete the actions necessary to remove its effects. At the same time, pursuant to Art. 448 of the Civil Code, in the event of infringement of a personal interest, the court may award an appropriate amount to the person whose interest has been infringed as compensation for the harm suffered, or, upon his request, order an appropriate amount of money for the social purpose indicated by it, regardless of other measures needed to remove the effects of the infringement. Therefore, if, in the opinion of the complainant, her personal rights were violated by sending marketing information to her without any legal basis, she may pursue her claims in this respect by way of a civil action brought before the locally competent common court.

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

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). However, due to the state of epidemic in force on the date of the decision, pursuant to Art. 15zzr paragraph. 1 point 1 of the Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis

situations caused by them (Journal of Laws of 2020, item 374), the running of this period currently it will not start; it will start to run on the day following the last day of the epidemic or immediately following any possible epidemic threat.

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

2021-03-23