

# THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 24

September

2021

## DECISION

DKE.523.26.2021

Based on Article. 105 § 1 of the Act of June 14, 1960 Code of Administrative Procedure (Journal of Laws 2021, item 735), 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 joke. 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 with Art. 57 sec. 1 lit. a) 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 ( Official Journal of the European Union L 119 of May 4, 2016, p. 1 and the Official Journal of the European Union L 127 of May 23, 2018, p. 2), after conducting administrative proceedings regarding the complaint of Mr. A.K., concerning irregularities in the processing of his personal data by K. Sp. z o.o., the President of the Personal Data Protection Office discontinues the proceedings.

## JUSTIFICATION

On [...] July 2015, the Office of the Inspector General for Personal Data Protection (currently: the Office for Personal Data Protection) received a complaint from A.K., hereinafter referred to as the "Complainant", regarding irregularities in the processing of his personal data by Ka. Sp. z o.o. Sp. k., hereinafter referred to as "K." be a "Company".

The complainant indicated in the complaint that the employees of K., in the period from 2014 to [...] February 2015, unlawfully processed his personal data for marketing purposes by sending marketing content to his private telephone number.

The complainant repeatedly - during telephone conversations - demanded that his telephone number be discontinued for those purposes, that the grounds for them be explained and that he be informed about his rights in this connection. He stressed that these interventions had resulted in a temporary cessation of the infringements. The complainant added that he had never consented to the processing of his personal data by the Company for these purposes and that the final re-use of the telephone

number took place on [...] February 2015, when quoted "he categorically demanded that its processing be stopped. personal data and until the situation is clarified, it suspended the sale of services offered by the Company in the form of telephone top-ups. "

In the content of the complaint, the Complainant also alleged that the Company failed to fulfill the information obligation referred to in Art. 33 of 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 the "Act of 1997", despite the submitted request for information regarding the use of personal data.

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

On [...] December 2004, the Complainant concluded a contract for the sale of electronic top-ups with Kab. Sp. z o.o. On the day of filing the complaint, the legal successor of this company was Sp. z o.o. Sp. k. However, on the date of issue of the decision in question, the legal successor of Ka. Sp. z o.o. Sp. k. is K. Sp. z o.o.

Pursuant to the wording of § [...] mentioned in the above point of the agreement, the Complainant undertook to achieve the minimum monthly sales of electronic top-ups for each terminal operated by Kab. Sp. z o.o. at the level of [...] PLN. If the minimum sales requirement is not met [...] Kab. Sp. z o.o. he could for example [...] terminate the contract with the Complainant (partner) with immediate effect (§ [...]). Moreover, it was indicated in § [...] of the agreement that if the Complainant (partner) breached his obligations under the agreement, which K. considered a serious breach of the agreement, or (ii) he would not remedy another breach of obligations after K. had received a letter requesting such repair or (iii) repeats the breach of obligation, K. may terminate the contract with the Complainant (partner) with immediate effect. However, § [...] indicates that after the termination of the contract for the above-mentioned reason, in addition to the unpaid amounts due to K., the partner will pay a contractual penalty of up to PLN [...] to cover all costs related to disconnection and removal of equipment and terminal from an authorized point of sale (...).

Due to the fact that as of [...] February 2015, the Complainant ceased generating the minimum sales at the level of PLN [...] and, despite the call of [...] March 2015, did not remedy the above breach, K. terminated the contract for the sale of electronic top-ups with immediate effect on the basis of the above-mentioned § [...] of this contract and called on the complainant to pay a contractual penalty in the amount of PLN [...] (letter from Ka. Sp.z o.o.Sp.k. of [...] April 2015 and a request to pay the penalty

contract of [...] April 2015).

The complainant agreed to receive by electronic means and then print from the terminal advertising, promotional and information materials regarding various goods and services offered by K. suppliers and other entities (§ [...] of the contract).

From the explanations given by Ka. Sp. z o.o. Sp. k. in the letter of [...] September 2018, it appears that the Company cooperated with the Complainant on the basis of the contract for the sale of electronic top-ups of [...] December 2004, and in a letter dated [...] April 2015, it immediately terminated the agreement with the Complainant. Company K. informed that in the period from [...] December 2004 to [...] April 2015 the Complainant cooperated with the Department [...], which on [...] May 2017 was sold to C. Spółka Akcyjna, hereinafter referred to as "P. ARE.". Currently, Spółka K. does not process the complainant's personal data for marketing purposes. It only has basic data in the "K." file, which it processes only for archival purposes. Company K. has no knowledge whether the Complainant asked for the fulfillment of his information obligation.

From the explanations of [...] October 2019 submitted by P. S.A. it appears that K. did not provide the complainant's personal data in the course of the sale of the Department [...]. P. S.A. she explained that she had never processed and does not process any personal data of the Complainant, that she has not received an objection from the Complainant regarding the processing of his personal data for marketing purposes, and has no information about the impact of such objection to K., The Complainant did not ask the Company to fill in his information obligation under Art. 33 of the 1997 Act and has no knowledge whether the complainant submitted the above-mentioned request to Company K.

Due to the discrepancies regarding the transfer of the complainant's personal data as a result of the sale by Company K. of the Department [...], the President of the Office for Personal Data Protection, in a letter of [...] September 2020, requested Company K. which show that the complainant's personal data was in fact transferred to P. S.A. as a result of the contract of [...] May 2017

In a letter of [...] September 2020, the Company K. explained that due to the fact that the subject of the agreement of [...] May 2017 were, inter alia, rights and obligations resulting from cooperation agreements with entrepreneurs cooperating with K. Company within the [...] Department, and the Complainant as at the date of conclusion of the above-mentioned of the contract, he did not cooperate with the Company K. - his personal data was not transferred to P. S.A.

In explanations from [...] July 2021, K. Sp. z o.o. stated that it was not currently processing the Complainant's personal data for any purpose. The complainant's personal data was permanently deleted and anonymised without the possibility of their

re-decoding.

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, pursuant to the 1997 Act, in accordance with the principles set out in the Act of June 14, 1960 Code of Administrative Procedure (Journal of Laws of 2021, item 735), hereinafter referred to as the "k.p.a.". 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), without prejudice to other tasks defined pursuant to this regulation, each in its territory, it monitors and enforces the application of this regulation (point a) and deals with complaints brought by the data subject or by authorized 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 realizes the goal of administrative proceedings, which is the implementation of the binding 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., EI / 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, GODO 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".

The decisive factor for the decision that must be issued in the case at hand is the fact that at present K. Sp. z o.o. does not process the Complainant's personal data for any purposes (this data has been permanently deleted and anonymized without the possibility of further decoding). Due to the lack of processing of the complainant's personal data by K. Sp. z o.o. it is not possible to refer to the complainant's requests presented in the complaint, and the President of the Personal Data Protection Office is obliged to deem these proceedings to be redundant and, consequently, to discontinue them pursuant to Art. 105 § 1 of the Code of Civil Procedure

Pursuant to Art. 105 § 1 of the Code of Civil Procedure when the proceedings for any reason have become redundant in whole or in part, the public administration authority shall issue a decision to discontinue the proceedings, respectively, in whole or in part. The wording of the above-mentioned provision leaves no doubt that in the event that the proceedings are deemed groundless, the authority conducting the proceedings will obligatorily discontinue them. At the same time, the literature on the subject indicates that the pointlessness of the administrative procedure, as provided for in Art. 105 § 1 of the Code of Civil Procedure means that there is no element of a material legal relationship, and therefore a decision to settle the matter cannot be issued by deciding on its substance. The prerequisite for discontinuation of the proceedings may exist even before the initiation of the proceedings, which will be revealed only in the pending proceedings, and it may also arise during the proceedings, i.e. in the case already pending before the administrative authority (B. Adamiak, J. Borkowski, Code of Administrative Procedure Comment ", 14th Edition, C.H. Beck Publishing House, Warsaw 2016, p. 491). The same position was taken by the Provincial Administrative Court in Kraków in its judgment of 27 February 2008 in the case no. act III SA / Kr 762/2007, in which he stated that "the procedure becomes pointless when any of the elements of the substantive legal relationship is missing, which means that it is impossible to settle the matter by deciding on the merits". The jurisprudence has developed the view that the art. 105 § 1 of the Code of Civil Procedure the phrase "for any reason" means "any reason resulting in the lack of one of the elements of the material legal relationship in relation to its subjective or objective party"

(judgment of the Supreme Administrative Court of March 18, 1997, SA / Rz 258/96, LEX No. 58125). This creates the basis for distinguishing the subjective and objective reasons for the redundancy of the proceedings. The subjective causes include the death of the party (unless the case mentioned in Article 97 § 1 point 1 occurs), the loss of its legal existence by a party other than a natural person, as well as the lack of a legal interest on the part of the entity requesting the decision, provided that the authority he will state it after the proceedings have been initiated (A. Krawczyk in: Code of Administrative Procedure. Commentary on Art. 105 [online], Wolters Kluwer Polska, 2019-10-30, <https://sip.lex.pl/#/commentary / 587785940 / 583380>). However, referring to the application submitted by the Complainant for possible notification of law enforcement authorities, it should be indicated that a party to administrative proceedings may request the Inspector General for Personal Data Protection to issue an administrative decision only, and not a notification of a crime that must be submitted by the Inspector General for Personal Data Protection. he decides ex officio. The above position of the Inspector General for Personal Data Protection was confirmed by the Supreme Administrative Court, which in its judgment of November 21, 2002 (file number II S.A. 1682/01) stated that "in the light of the Act, violation of its provisions becomes a source of administrative liability leading in fact, only to the obligation to restore legal status (Article 18) and criminal liability (Articles 19, 49-54). However, only the first type of responsibility is exercised in the form of an administrative decision. " The Supreme Administrative Court also stated that "if the results of the control activities indicate that the action or omission of the head of an organizational unit, its employee or another natural person being the data controller bears the features of a crime, GIODO is obliged to submit a notification of the crime to the body appointed to prosecute crimes. (...). However, it does not do this, as in the case of Art. 18 by way of an administrative decision, but by way of an application, which is the exercise of its competence in this case. This is indicated both by the explicit definition of the form of the decision in Art. 18 of the Act, and the lack of this definition in Art. 19, as well as the essence and importance of the administrative decision. It imposes on the party certain rights or obligations or refuses to grant them. Meanwhile, an application to the prosecutor's office with information about a suspected crime is not of this nature. As a rule, it cannot be settled in the form of a decision ". Also in the judgment of November 19, 2001 (file no. II SA 2702/00), the Supreme Administrative Court in Warsaw indicated that "a person seeking protection of his / her cases under the above-mentioned Act on the Protection of Personal Data is not the subject of proceedings issuing a decision to notify a relevant authority about an offense in the scope of personal data processing and may not be demanded from GIODO in the administrative and legal forms of this procedure. (...) GIODO may take actions only on the basis and in the forms provided for by the Act. The manner of

settling the matter on the merits is regulated by the above-mentioned Art. 18 of the Act, granting GIODO the power to order the administrator in breach of law to restore the lawful state. "

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 the decision 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