

Decision on appeal with registration № PPN-01-358 / 28.05.2018 DECISION» PPN-01-358 / 2018 Sofia, 16.04.2019

Commission for Personal Data Protection ("Commission" / "CPDP") composed of: members - Tsanko Tsolov, Tsvetelin Sofroniev, Maria Mateva and Veselin Tselkov, at a regular meeting, conducted on January 30, 2019, on the grounds of Art. 10, para. 1, item 7 of the Personal Data Protection Act, considered on the merits a complaint with registration № PPN-01-358 / 28.05.2018, filed by S.D. against "****" EOOD. The administrative proceedings are by the order of art. 38 of the Personal Data Protection Act (PDPA). The complainant informed that he had been receiving spam SMS messages from S.BG for a year. (****, which site is administered by "****" Ltd.). Mr. S.D. he wrote to them countless times to remove his number from his lists, but the text messages continued. He stated that he had not given his consent for his personal data to be processed for that purpose. He considers that the presence of his personal data in these lists constitutes a violation of his rights. The complaint is accompanied by a printout of the SMSs and a conversation on Facebook. In addition to the complaint, Mr. S.D. notes that he was a customer of the store and has a registration on the site. Attaches a screen printout of the SMS he received after May 25, 2018, without giving his consent to receive it. In the conditions of the official principle laid down in the administrative process and in fulfillment of art. 26 of the APC, the person against whom the complaint is directed has been notified for initiating proceedings. The opportunity under Art. 34, para. 3 of the APC for expressing an opinion with relevant evidence on the allegations presented in the complaint. *** EOOD expresses an opinion that the complaint is unfounded. The company states that at the moment in their telephone exchange no attempt has been made to make contact from the address indicated in the complaint. They stated that the applicant had refused to receive e-mails via the company's Facebook page - *****. Although this is not the intended way to withdraw consent under the Company's Mandatory Data Protection Information, the request has been processed and the number is included in the register of persons who have withdrawn their consent to receive electronic communications. From the date of processing the request - 25.05.2018, so far no notifications have been sent to the complainant. According to the personal data protection policy of the administrator, the company processes personal data for the purposes of direct marketing only with the express consent of users of the site and its customers, which can be given at initial registration, ordering or separately with an application on newsletters or emails. The Manager points out for completeness that on June 26, 2018 the complainant logged in for the first time since the entry into force of the changes in the personal data protection policy in the company's system and the Mandatory Data Protection Information was visualized. On 20

July 2018 the applicant withdrew his consent to the general conditions and his profile was archived. "****" EOOD informs that the personal data of Mr. SD are provided by him when creating his profile on the company's website and are processed on the basis of his consent, including consent to the General Terms and Conditions. In Art. 23, para. 4 of the General Terms and Conditions, consent has been given for sending messages at any time. Pursuant to the obligation to notify data subjects of their rights and in particular the right to withdraw their consent to the processing of data for direct marketing purposes, each message sent contains a text with the possibility of refusal - via SMS, e-mail or phone call. Upon reference in the registers of the company it was established that a refusal was requested on 24.05.2018. The request was processed on the first working day - on 25.05.2018 and after that date no notifications were sent. They dispute the allegation that on 28.05.2018 a message was sent to Mr. S.D. In response to the opinion of *** EOOD, the complainant stated that the screenshots clearly showed the date and time, namely 28 May 14:11. He states that he did not give up only on Facebook, but he personally called several times on the phone to give up spam sms. To the answer, which was sent simultaneously to the CPDP and "****" EOOD, a screen printout of the received messages was again presented. In order to exercise its powers, the Commission must be properly seised. The considered complaint contains the obligatorily required requisites, specified in art. 30, para. 1 of the Rules of Procedure of the Commission for Personal Data Protection and its administration, namely: there are data about the complainant, nature of the request, date and signature, in view of which it is regular. The appeal is procedurally admissible - filed within the term under Art. 38, para. 1 LPPD by a natural person with a legal interest. It is the subject of an allegation of unlawful processing of the complainant's personal data and is directed against a personal data controller. The complaint was referred to a competent body to rule - the Commission for Personal Data Protection, which according to its powers under Art. 10, para. 1, item 7 of the LPPD considers complaints against acts and actions of the personal data controllers, which violate the rights of individuals under the LPPD. At a closed meeting of the Commission held on 16 January 2019, the complaint was declared admissible and the parties to the proceedings were constituted: complainant - S.D. and respondent - "****" Ltd., in the capacity of personal data controller. The parties have been notified of the open meeting scheduled for 30.01.2019 to consider the dispute on the merits. The applicant did not appear at the hearing on the merits. The respondent is a representative of the company. The proxy presented the General Terms and Conditions in force as of 05.01.2010. He disputed that no notice had been sent to the applicant on 28 May. He notes that the request was received on May 24, which is a day off, and the deletion was processed on the next working day and within the 24-48 hours accepted in the industry. He states that at the moment the

consent for direct marketing is through a checkbox and not through the acceptance of the general conditions. In the factual situation thus established, the Commission examined the complaint on the merits, accepting the complaint as well-founded, based on the following conclusions: Regulation 2016/679 and the Personal Data Protection Act (PDPA) set out the rules regarding the protection of individuals with the processing of their personal data. The aim is to protect the fundamental rights and freedoms of individuals, in particular their right to protection of personal data. The parties do not dispute that S.D. has registered on the company's website - ****. When registering his account, the applicant provided two names, a telephone number and an e-mail. This information is personal data about the person, as it can be used to identify the person. In the course of the proceedings it was established that when registering a user on the company's website there are several checkboxes, the unchecking of which agrees with the statement - one of the checkboxes is for processing personal data for direct marketing and mandatory information about protection of personal data, second - for agreement with the General Terms of Delivery and third - for creating a profile and accepting the order. In examining this mechanism, the Commission finds that there is a contradiction between the General Terms and Conditions of the company and Regulation 2016/679. On the one hand, the administrator has provided a checkbox for the processing of personal data for the purposes of direct marketing, which may not be noted by the registrant, but on the other hand the user must agree to the Terms and Conditions in order to register and make orders, but in Art. 23, para. 4 of these General Terms and Conditions states consent to processing for these purposes. In this way, the circumvention of the requirement of Art. 7 (2) of Regulation 2016/679 and recital 32 to it, which provide for consent to be given by a clearly affirmative sign expressing freely given, specific, informed and unambiguous consent. In this sense, "****" Ltd. should take action to eliminate the violation in its General Terms. The specific subject of the complaint is the withdrawal of consent to the processing of personal data for the purposes of direct marketing, which is the supply of goods and services to individuals by mail, telephone or other direct means, as well as consultation to investigate the goods offered and services. In Art. 7 of Regulation 2016/679 provides for the conditions for giving consent when the processing of personal data is based on it. Paragraph 3 of the same article provides that the data subject has the right to withdraw his or her consent at any time. Withdrawal of consent does not affect the lawfulness of processing based on consent prior to its withdrawal. Withdrawal of consent should be as easy as giving it. In the specific case, the withdrawal of consent for data processing for the purposes of direct marketing was made on 24.05.2018. The administrator claims that the withdrawal was processed on 25.05.2018, in support of which a statement was submitted that the phone number is included in the

Blacklist (register of persons who refused to receive messages) on 25.05.2018 at 09:32. To the answer to the opinion of "****" EOOD the complainant presented a screen printout of a message received on 28.05 at 14:11 . In this sense, the statement of the representative of "****" Ltd. that the processing of the application may take 24-48 hours from receipt and within this period it is possible to send a new message is inconsistent with the extract from Blacklist , which indicates as the date of processing the application - 25.05.2018, 09:32 h. At the same time, the complainant was sent a text message on 28.05. In his opinion, the administrator points out that a check made in the registers of the company for sending text messages and logs for sent messages established that no electronic messages were sent after a refusal was made by Mr. S.D. Given the fact that an extract from the register of sent messages for 28.05.2018 has not been attached, the evidence provided by the complainant that he actually received the electronic message should be credited.

In view of the above, the Commission considers that the data subject's right to withdraw his consent to the processing of his personal data for direct marketing purposes has not actually been respected by the data controller, as a result of which the complainant's rights have been violated.

In the event of such an infringement, the complaint must be upheld. The Commission has operational independence and, in accordance with the functions assigned to it, assesses which of the corrective powers under Art. 58, para. 2 of Regulation 2016/679 to exercise. The assessment is based on the considerations of expediency and effectiveness of the decision, taking into account the specifics of each case and the degree of impact on the interests of the individual - data subject, as well as the public interest. The powers under Art. 58, para. 2, without the one under letter "i", have the character of coercive administrative measures, the purpose of which is to prevent or stop the commission of an infringement, thus achieving the due behavior in the field of personal data protection. The administrative penalty "fine" or "property sanction" under Art. 58 par. 2, letter "i" has a sanction character. In applying the appropriate corrective action under Article 58, para. 2 of the Regulation shall take into account the nature, gravity and consequences of the infringement, as well as all mitigating and aggravating circumstances. The assessment of what measures are effective, proportionate and dissuasive in each case reflects the goal pursued by the chosen corrective measure - prevention or cessation of the violation, sanctioning of illegal behavior or both, as provided in Art. 58, para. 2, letter "i".

As mitigating circumstances, the Commission finds that the rights of one person have been affected and that no significant adverse effects on the data subject have occurred. The violation is the first for the administrator.

In view of the stated reasons, as the most appropriate corrective measures the Commission finds that under Art. 58, para. 2, letter "d" of the Regulation - order to the administrator to comply with the processing operations with the provisions of the Regulation.

The Commission for Personal Data Protection, taking into account the facts and circumstances presented in the present administrative proceedings, and on the grounds of Art. 58, para. 2, letters "d" of Regulation 2016/679,

HAS DECIDED AS FOLLOWS:

1. Declares a well-founded complaint reg. № PPN-01-358 / 28.05.2018, filed by S.D. against "****" EOOD for violation of Art. 7 (2) in conjunction with recital 32 and paragraph 3 of Regulation 2016/679;
2. On the grounds of art. 58, paragraph 2, letter "d" of Regulation 2016/679 orders the administrator "****" EOOD:
 - A) To comply with the processing operations in accordance with the provisions of the Regulation - to suspend the processing of personal data for the purposes of direct marketing after the withdrawal of the consent of the data subject;
 - B) To bring its General Terms and Conditions in line with the requirements of Regulation 2016/679 within one month from the entry into force of this decision, for the implementation of which to present evidence to the CPDP.

The decision is subject to appeal within 14 days of its service, through the Commission for Personal Data Protection, before the Administrative Court Sofia - city.

MEMBERS:

Tsanko Tsolov

Tsvetelin Sofroniev / p /

Maria Mateva / p /

Veselin Tselkov / p /

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