

# THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 22

January

2020

## DECISION

ZKE.440.45.2019

Based on Article. 105 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096 as amended), 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 with Art. 57 sec. 1 points 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 (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), after conducting administrative proceedings regarding a complaint of Ms MM about irregularities in the process processing of her personal data, including failure to comply with the above-mentioned information obligation by L. Sp. z o.o., President of the Personal Data Protection Office discontinues the proceedings.

## JUSTIFICATION

The President of the Personal Data Protection Office (previously: the Inspector General for Personal Data Protection) received a complaint from Ms M. M., (hereinafter referred to as: the Complainant), about irregularities in the processing of her personal data, including failure to fulfill the above-mentioned information obligation by L. Sp. z o.o. (hereinafter also referred to as: the Company) - administrator of the internet portal: "[...]".

In the content of her complaint, the complainant pointed out that in the period of several months preceding the moment of lodging the complaint, she had received her private telephone number many times from the administration of the above-mentioned a website for SMS messages containing advertising material. The marketing activities described in the complaint were carried out by the entity, despite the fact that the complainant never provided it with her personal data, nor did she consent to their processing for purposes related to the promotion of its services. Exercising her rights, the complainant

sent an e-mail to the e-mail address of the portal "[...]" requesting that she fulfill the information obligation under Art. 33 of the Act of August 29, 1997 on the Protection of Personal Data - this message, however, remained unanswered.

In connection with the above, the Complainant requested the personal data protection authority to take appropriate steps to investigate the legality of the processing of her personal data by the administrator of the portal "[...]" and to enforce compliance with the information obligation towards the complainant.

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

In 2015, the complainant received to her telephone number - [...] numerous SMS messages containing advertising materials promoting the activities of the website: "[...]". Text messages with the following words: "[...]" and "[...]" came from various telephone numbers, including: [...], [...] and [...].

In view of the content of the messages sent to her, the complainant contacted the entity directing the questioned marketing content to her by phone, in order to determine on what legal basis the complainant's telephone number was entered into its database and is processed there - as a result of which she obtained only laconic information that this number it appears in the public telephone directory from which it was obtained and as such may be processed by the administrator for advertising purposes.

On [...] November 2015, the complainant additionally sent an e-mail to the e-mail address of the portal "[...]", requesting that she comply with the information obligation under Art. 33 of the Act of August 29, 1997 on the Protection of Personal Data.

Despite the expiry of the 30-day period for responding to the complainant's request, the portal administrator did not provide the complainant with any reply.

According to the website regulations, published on the website "[...]", the domain administrator is currently L. Sp. z o.o.

According to the entry in the National Court Register (KRS number: [...]), the subject of the Company's activities is, inter alia, repair and maintenance of computers and peripheral devices, repair, maintenance and installation of machines and devices, and activities related to software and IT consultancy. The company was registered in the National Court Register on [...] December 2016.

In order to thoroughly investigate the circumstances of this case, in a letter of [...] May 2017, the President of the Personal Data Protection Office requested the Company to respond in writing to the allegations raised by the complainant, and in

particular to indicate: a) when, from what the source and for what purpose the Company obtained the complainant's personal data; b) on what legal basis, for what purpose (and in particular whether for marketing purposes), to what extent and collection, the Company is currently processing the above-mentioned data; c) whether the Complainant requested the Company to delete her personal data or objected to the processing of such data for marketing purposes, and if so, how the Company responded to it and; d) whether the Company fulfilled the information obligation towards the Complainant, referred to in Art. 24 or article. 25 of the Act of August 29, 1997 on the Protection of Personal Data. The letter, addressed to the address of the Company's seat disclosed in the National Court Register, despite its double notification, was returned to the sender as not received on time by the addressee.

In connection with the above, the authorized employees of the Office for Personal Data Protection performed control activities at the place where the Company actually operates, ie [...] (control file reference number - [...]). The scope of the control covered the processing by the Company of the complainant's personal data for the purpose of marketing its own products and services, which are the subject of the complaint considered in these proceedings.

As evidenced by the inspection activities, the Company has never processed and is not currently processing the complainant's personal data, either in the IT system or in a paper record.

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

At the outset, it should be noted that on May 25, 2018, the provisions 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.", entered into force. Pursuant to Art. 160 sec. 1-3 of the Personal Data Protection Act, proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before the date of entry into force of this Act, are conducted by the President of the Personal Data Protection Office on the basis of the Act of August 29, 1997 on the Protection of Personal Data (Journal U. of 2016, item 922, as amended), in accordance with the principles set out in the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended). At the same time, the activities performed in the proceedings initiated and not completed before the effective date of the provisions of the Act on

From May 25, 2018, also 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

Directive 95 / 46 / WE (EU Official Journal L 119 of 04.05.2016, p. 1 and EU Official Journal L 127 of 23.05.2018 p. 2.), hereinafter referred to as "Regulation 2016/679".

Pursuant to Art. 57 sec. 1 of Regulation 2016/679, without prejudice to other tasks specified under this regulation, each supervisory authority on its territory monitors and enforces the application of this regulation (point a) and considers complaints submitted by the data subject or by - in accordance with Art. 80 of 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).

Taking into account the above, it should be stated that the present proceedings, initiated and not completed before May 25, 2018, are conducted on the basis of the Act of August 29, 1997 on the protection of personal data (with regard to the provisions governing the administrative procedure) and on the basis of the Regulation 2016/679 (in the scope determining the legality of the processing of personal data). The manner of conducting proceedings in cases initiated and pending before the date of entry into force of new regulations on the protection of personal data, resulting from the provisions of law, correlates with the well-established position of the doctrine, according to which "a public administration body assesses the actual state of the case according to the date of issuing the administrative decision. This rule also applies to the assessment of the legal status of the case, which means that the public administration authority issues an administrative decision on the basis of the provisions of law in force at the time of its issuance "(Commentary to the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws No. 00.98.1071) M. Jaśkowska, A. Wróbel, Lex., EI / 2012).

Referring the above to the established facts, it should be emphasized that in the course of the investigation, the President of the Office for Personal Data Protection established that currently the complainant's personal data are not processed by the administrator of the website "[...]" - Spółka L. Sp. z o.o. Moreover, having regard to the period in which the complainant received the questioned SMS messages containing marketing content - in line with the complainant's claims for 2015 - it should be stated that the Company could not process the complainant's personal data in the scope covered by the complaint. As it follows from the information disclosed in the National Court Register, the Company was registered on [...] December 2016, i.e. a year after the events which were the subject of the complaint initiating the proceedings in this case. At the same time, the evidentiary activities carried out by the supervisory body did not reveal any entities other than the Company responsible for administering the website: "[...]".

For the above reasons, the proceedings in question had to be discontinued pursuant to Art. 105 § 1 of the Code of Administrative Procedure, as it is irrelevant.

Pursuant to the above-mentioned provision, when the proceedings for any reason have become redundant in whole or in part, the public administration authority issues a decision to discontinue the proceedings, respectively, in whole or in part. As it results from the aforementioned regulation, the finding that the procedure is groundless is an obligatory condition for its discontinuation by the body conducting the procedure. 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 proceedings are instituted, which will be revealed only in the pending proceedings, and it may also arise during the course of the proceedings, i.e. in a case already pending before an administrative authority (B. Adamiak, J. Borkowski, Code of Administrative Procedure Comment ", 14th edition, CH 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 with reference number 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".

In the present case, an element of the substantive legal relationship that did not exist at the time of the decision concluding these administrative proceedings was the processing of the complainant's personal data by the entity concerned by the complaint. The determination of the existence of such processing would only allow to decide on its legality (the existence of a legal basis for processing) and compliance with the provisions on the protection of personal data (including the data controller fulfilling its obligations listed in Article 33 of August 29, 1997. on the protection of personal data, to be investigated by the complainant).

The determination by the public administration body of the existence of the condition referred to in Art. 105 § 1 of the Code of Civil Procedure obliges him, as it is emphasized in the doctrine and jurisprudence, to discontinue the proceedings, because there are no grounds to decide the merits of the case, and the continuation of the proceedings in such a case would be defective, which would have a significant impact on the result of the case.

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 Administrative Procedure, the party has the right to file 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 Office (address: ul. Stawki 2, 00-193 Warsaw). 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.

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