

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 23

of December

2019

DECISION

ZKE.440.4.2019

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) in connection with joke. 160 sec. 1 and 2 of the Act of 10 May 2018 on the protection of personal data (Journal of Laws of 2019, item 1781) in connection with joke. 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. f) and art. 57 sec. 1 lit. a) and h) 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 data protection) (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 carrying out an ex officio administrative procedure regarding irregularities in the process data processing carried out by R. Sp. z o.o.,
President of the Personal Data Protection Office

discontinues the proceedings

Justification

The President of the Personal Data Protection Office, hereinafter also referred to as the President of the Personal Data Protection Office, obtained information on irregularities in the processing of personal data carried out by R. Sp. z o.o., hereinafter also referred to as the "Company" or R.

Signals that reached the President of UODO indicated possible breaches of the provisions on the protection of personal data by the Company, consisting in obtaining from persons who, via the website at the address: [...] joining the loyalty program [...], their personal data and their children too broadly.

According to the information obtained by the President of the Personal Data Protection Office from the Company's website at the address: [...], the Company obtained, inter alia, data on the date of birth of parents joining the loyalty program [...]. There was therefore a need to check the adequacy and purposefulness within the meaning of Art. 26 sec. 1 point 3 of the Act of

August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), hereinafter also referred to as: the Personal Data Protection Act of 1997, obtaining and processing by the Company personal data for the purposes of participating in a loyalty program [...].

The President of the Personal Data Protection Office (UODO) conducted an ex officio administrative procedure in this case, under which, acting pursuant to Art. 58 sec. 1 lit. a) and lit. e) 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 data protection) (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), hereinafter also referred to as "Regulation 2016/679", obtained from the Company in writing explanations regarding the circumstances of the case and appropriate evidence to confirm them. Based on the evidence collected in this way, the President of the Personal Data Protection Office established the following:

1. In R. there are rules of the loyalty program [...], which are addressed to parents or legal guardians of children aged 0-3 years and to people awaiting the birth of their child.
2. The program participant [...] accepting the regulations is bound by its provisions which are used to verify whether a given person meets the participation conditions. One of the conditions is the status of a parent or legal guardian of children from 1 day of age to 36 months of age or expecting the birth of a child. It is verified on the basis of the date of the child's birth or the planned date of childbirth provided by the participant, because people who expect the birth of a child can also join the program.
3. The program participant [...] fills in the application form, in which he provides his / her data in the scope of: name and surname, place of residence, mobile phone number, e-mail address.
4. At present, the Company obtains the following personal data from persons joining the loyalty program [...]:
 - 1) personal data of persons who joined this program in the scope including: name and surname of the participant, place of residence, mobile phone number, e-mail address, as well as whether persons who joined the above-mentioned of the program are the parents, or whether they are expecting a child, and if so, when is the expected date of birth of this child, as well as whether people who joined the program already have children (number of children);
 - 2) personal data of children of people who joined the above-mentioned the program, the scope of which includes: name and surname, sex, date of birth, information on the planned date of birth, indicated as a date falling no later than 9 months from the

date of registration.

5. The legal basis for the processing of personal data of program participants is Art. 6 sec. 1 letter b) of Regulation 2016/679, i.e. processing is necessary for the performance of a contract to which the data subject is a party. The legal basis for the processing of personal data is also Art. 6 sec. 1 lit. f) Regulation 2016/679, i.e. the legitimate interest of the data controller, in this case R., consisting in the need to verify the correct use of the program [...] and the provisions of the regulations and in the implementation of R.'s tasks in the field of providing offers and recommendations in accordance with the age of the child , gender and participant-generated purchasing history. In the event that the program participant expresses his voluntary optional consent to receive the newsletter and SMS messages, the legal basis for data processing will be art. 10 of the Act of July 18, 2002 on the provision of electronic services (Journal of Laws of 2019, item 123, as amended) and art. 172 of the Act of July 16, 2004, Telecommunications Law (Journal of Laws of 2018, item 1954, as amended).

6. The personal data of participants in the [...] program are collected in order to participate in the program. Participation in the program [...] provides each participant with various privileges and benefits, in particular, the participant receives a 3% discount on the purchase of products for children in R. drugstores, as detailed in the annexes to the regulations, along with the possibility of increasing the discount to 10%, as well as dedicated promotions prices and other attractive surprises. The personal data of the program participants regarding the place of residence are collected in order to send dedicated surprises, in the case of a telephone number or e-mail address, the data is collected in order to contact the program participant regarding the notification of additional promotions. Personal data of children of persons who joined the program are obtained for their own purposes, i.e. in order to be able to select optimal promotional offers appropriate to the age of the child and to provide the program participant with gifts in accordance with the age of his child; while in the case of the expected date of birth, the data is collected in order to obtain additional benefits resulting from the self-change of status after the child's birth, and in the case of gender, the data is collected in order to dedicate the right offer to the boy or girl.

7. At present, R. is not collecting data on the date of birth of parents joining the loyalty program [...] for the purpose of participating in the loyalty scheme [...]. By letter of [...] September 2017, the Company informed the President of the Personal Data Protection Office that it was no longer obtaining the date of birth of parents joining the loyalty program [...], while by letter of [...] November 2019, it informed that the application supporting the program and enabling registration in the selected program has been updated, and the form to be completed by the person wishing to join the program no longer contains a field

in which the parent (program participant) could enter his date of birth.

The President of the Personal Data Protection Office informed the Company about conducting administrative proceedings, as a result of which evidence was collected sufficient to issue an administrative decision and about the possibility to comment on the collected evidence and materials as well as the requests submitted in accordance with Art. 10 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), hereinafter also referred to as "Kpa", within 7 days from the date of receipt of the above-mentioned writings.

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

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) entered into force, hereinafter also referred to as the "Act on the Protection of Personal Data of 2018. ".

Pursuant to Art. 160 sec. 1-3 of the Act on the Protection of Personal Data of 2018, 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 of Laws of 2016, item 922, as amended), hereinafter also referred to as the "Personal Data Protection Act of 1997", in accordance with the principles set out in the Code of Administrative Procedure. At the same time, the activities performed in the proceedings initiated and not completed before the date of entry into force of the provisions of the Act on the Protection of Personal Data of 2018 remain effective.

From May 25, 2018, Regulation 2016/679 also applies. 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 Personal Data Protection Act of 1997 (with regard to the provisions governing the administrative procedure) and on the basis of Regulation 2016/679 (to the extent decisive about the legality of the processing of personal data).

The President of the Personal Data Protection Office is the competent authority for the protection of personal data and the supervisory authority within the meaning of Regulation 2016/679 (Article 34 (1) and (2) of the Act on the Protection of Personal Data of 2018). The President of the Personal Data Protection Office conducts proceedings regarding infringement of the provisions on the protection of personal data (Article 60 of the Personal Data Protection Act of 2018), and in matters not covered by the Personal Data Protection Act of 2018, administrative proceedings before the President of the Personal Data

Protection Office, in particular, the provisions of the Code of Administrative Procedure (Article 7 (1) of the Act on the Protection of Personal Data of 2018) regulated in Chapter 7 of the Act - proceedings on infringement of provisions on the protection of personal data. Pursuant to Art. 57 sec. 1 of Regulation 2016/679, without prejudice to other tasks set out under this Regulation, each supervisory authority on its territory monitors and enforces the application of this Regulation (point a) and conducts investigations on the application of this Regulation, including on the basis of information received from other supervisory authority or other public authority (point h). The instruments for the implementation of the tasks provided for in Art. 57 sec. 1 of Regulation 2016/679 are in particular specified in art. 58 sec. 2 of Regulation 2016/679, corrective powers, including the possibility of: issuing warnings to the administrator or processor regarding the possibility of violating the provisions of this Regulation through planned processing operations (point a), issuing reminders to the administrator or processor in the event of a breach of the provisions of this Regulation by processing operations (point b), to order the controller or processor to adapt the processing operation to the provisions of this Regulation, and, where applicable, indicate the method and date (point d).

The fact that, as at the date of this decision, there are no irregularities in the processing of personal data by the Company, the signals of which were received by the President of the Personal Data Protection Office and on the basis of which he initiated the proceedings in this case, is of decisive importance from the point of view of its settlement. In this situation, the present proceedings are subject to obligatory discontinuation pursuant to Art. 105 § 1 of the Code of Administrative Procedure - in view of its redundancy. In accordance with the above-mentioned a provision, when the proceedings for any reason have become redundant, the public administration authority issues a decision to discontinue the proceedings. The wording of the above-mentioned regulation leaves no doubt that in the event that the procedure is deemed groundless, the body conducting the procedure will obligatorily discontinue it. 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 Administrative Proceedings means that there is no element of the material legal relationship, and therefore it is not possible to issue a decision settling the matter by deciding on its substance (B. Adamiak, J. Borkowski "Code of Administrative Procedure. Comment" 7th edition Wydawnictwo CH Beck, Warsaw 2005, p. 485). The literature and jurisprudence also emphasize the following quotation: "(...) The irrelevance of the proceedings may be (...) the result of a change in the facts of the case. The proceedings must be considered redundant as a result of the cessation of the facts to be regulated by the administrative authority by way of a decision (...) "(see: MP Przybysz"

Code of Administrative Procedure. Updated Comment "Published: LEX / el. 2019 and the judgment of the Supreme Administrative Court cited therein of September 29, 1987, file reference: IV SA 220/87, published: ONSA of 1987, No. 2, item 67).

An important attribute of the administrative decision is the so-called double specificity, meaning that the decision specifies the consequences of applying a legal norm in an individual case of a specific addressee (party) (cf. Wróbel Andrzej, Jaśkowska Małgorzata, Wilbrandt-Gotowicz Martyna "Updated commentary of the Code of Administrative Procedure" LEX / el. 2018 - commentary, legal status: December 13, 2018, other editions (25)). Changes in the factual or legal status of the case that took place after the initiation of the proceedings must be taken into account when adjudicating the case - otherwise, this decision would be grossly contrary to the principle of substantive truth (see above in W. Siedlecki, Civil Procedure, 1972, p. 371).

Consequently, as it is emphasized in the literature on the subject, the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. The above principle also applies to the assessment of the legal status of the case, therefore the public administration authority issues an administrative decision based on the provisions of law in force at the time of its issuance (see above). Also the Supreme Administrative Court in Warsaw, in its judgment of October 4, 2000, file ref. act: V SA 283/00) underlined that the quotation: "(...) It should be pointed out (...) the need to apply the norms of substantive law in force on the date of the decision. It should be clearly emphasized that the provisions of the Code of Administrative Procedure do not bind the date of initiation of the proceedings on the factual and legal grounds for examining the case. The decisive factor in this respect is the state in force on the date of the decision (see B. Adamiak, Commentary, Warsaw 1998, p. 363) (...)".

Taking into account the comments made so far, it should be noted that the impulse to initiate ex officio proceedings in this case were signals about possible irregularities in the processing of personal data made by the Company. The proceedings initiated in this connection served to verify the truthfulness of the above-mentioned reports and eliminating deficiencies in the area of personal data processing - if it is confirmed that they do occur as of the date of the decision. In other words, confirmation of the existence of the alleged irregularities would constitute the basis for the President of the Personal Data Protection Office to assess them in law and use - in order to eliminate them - the legal instruments of a remedial nature provided for in Art. 58 sec. 2 of the Regulation 2016/679. Meanwhile, bearing in mind that the irregularities in the processing of personal data by the Company notified to the President of the Personal Data Protection Office do not take place as of the date of the decision, there

are no grounds for their legal assessment, in the context of the possible use of the instruments provided for in Art. 58 sec. 2 of the Regulation 2016/679 - i.e. instruments to eliminate them.

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 submit an application for reconsideration of the case within 14 days from the date of delivery of the decision 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 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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