

2019 (Department) The Personal Data Protection Authority met in the composition of the Department at its headquarters on Wednesday 06.03.2019 upon the invitation of its President, in order to examine the case referred to in the history of the present. The Deputy President Georgios Batzalexis, in the absence of the President of the Authority Constantinos Menoudakos, and the alternate members of the Authority Panagiotis Rontogiannis, Evangelos Papakonstantinou, as rapporteur and Grigorios Tsolias, in place of the regular members Antonio Symbonis, Konstantinos Lambrinoudakis and Charalambos Anthopoulos, were present, respectively, who, although legally summoned in writing, did not attend due to disability. The meeting was also attended, without the right to vote, by Ephrosyne Siougle, special scientist - auditor, as assistant rapporteur, who left after the discussion of the case and before the conference and the decision-making, and Irini Papageorgopoulou, an employee of the Department of Administrative Affairs , as secretary. The Authority took into account the following: A's complaint No. C/EIS/8821/08-11-2018 was submitted to the Authority, as supplemented by No. C/EIS/10243/19-12-2018 document. According to it, the complainant complains that he received promotional short text messages of unsolicited e-mail 1 on his mobile phone (SMS) from the gym "Hygiesomatica" (hereinafter "the controller"). The complainant states that he was a former customer of the gym in question and that suddenly after years the controller started sending him promotional messages. In 2016 he contacted the controller several times, initially by phone and asked to stop receiving promotional SMS. On 11/4/2016 he sent an email to the email address info@igiosomatiki.gr, with which he requested to be excluded from the advertising actions of the controller. The controller, however, ignored his wish and continued to send him promotional SMS. On 24 May 2018 at 19:51 the complainant received an SMS, asking him to give his consent to be informed by the controller about offers by selecting the link provided in the said message. Specifically, the content of this message was as follows: "Give us permission to inform you about offers by clicking here <http://nai-oxi.gr/gdpryes.php@m=306972205873> and we will give you 1 month of free subscription. 210 7625352". The complainant stated in his complaint that he did not consent to the processing in question because he did not choose the link provided. On June 15, 2018 at 14:51 he received a new promotional SMS. Because, as he states in his complaint, his failure to provide consent to be notified of promotions was ineffective, he changed the link in the 5/24/2018 message (from [gdpryes](http://nai-oxi.gr/gdpryes.php) to [gdprno](http://nai-oxi.gr/gdprno.php)) to deny the receiving advertising messages from the controller. Specifically, he visited the link <http://nai-oxi.gr/gdprno.php?m=306972205873>. However, on November 6, 2018 at 1:24 p.m., he received a new promotional message from the controller. He filed this complaint because

he could not be removed from the controller's list of promotions. The Authority, with its document No. C/EX/415/21-01-2019, sent a copy of the complaint to the controller, who submitted his views with No. C/EIS /1177/12-02-2019 document. With this response document, the data controller informed the Authority that the general partnership with the name "D. HATZITHEODOROU AND CO. OE." and distinctive title "Physical", is active in the field of fitness 2 and aesthetics. In addition, he briefly stated that he had the address and telephone number of the complainant in his file because he was a former client of his, that is, he was a registered member of him, as well as of all his former and current clients. He sent messages to the complainant and generally sends messages to all his customers, periodically and specifically whenever he wishes to inform them of the current offers, without their consent, because, based on article 11 par. 3 of the law. 3471/2006, their contact information was obtained legally in the context of previous contact and provided them with the possibility to object in an easy and clear way to each message. According to the controller's response document, the complainant falsely states that he called the controller to inform him that his messages were spam to him. Also, the controller claims that he did not receive a message from the complainant at the address info@igiosomatiki.gr, although he may have sent it, because this email address was deactivated for about a year (2016-2017) and he activated it on 24/ 5/2018 and presented a document showing the amount of 244 euros, which he paid for the activation of the above e-mail address. The controller indicated that on 10/1/2019 a negative option (no) was entered in his system for advertising actions to the complainant and for this reason the complainant was removed from the controller's lists and received no further communication. Further, the controller stated that he sent a cell phone message to his entire customer base on 5/24/2018, asking them if they wished to remain or be removed from his lists. The Authority, after considering all the elements of the file, after hearing the rapporteur and the assistant rapporteur, who then withdrew before the conference and decision, and after thorough discussion, CONSIDERED ACCORDING TO LAW 3 1. Article 2 of Law 2472/1997 defines that "personal data" is "any information that refers to the subject of the data". "Data subject" is "the natural person to whom the data refer, and whose identity is known or can be ascertained, i.e. can be identified immediately or indirectly, in particular on the basis of an identification number or on the basis of one or more specific elements characterizing the his physical, biological, mental, economic, cultural, political or social status". In this context, the telephone number of a natural person is personal data, since it can function as an element of indirect identification of its owner, allowing communication with him. It should be noted that, according to Opinion 4/2007 of the working group of Article 29 of the E.U. on the concept of personal data, especially in the operation of electronic services, indirect identification elements, can in some

cases sufficiently distinguish a person from others within a certain set, even if his name has not been verified. According to article 2 par. g) Law 2472/1997, as "controller", any natural or legal person who determines the purpose and manner of processing personal data is defined. Corresponding definitions for both personal data and the data controller are provided for in article 4 par. 1 and par. 7 of Regulation (EU) 2016/679 (General Data Protection Regulation - GDPR) which has been implemented from 25/5/2018. 2. According to article 3 paragraph 1 of Law 3471/2006 "For the processing of personal data carried out in the context of non-public electronic communications networks and services, Law 2472/1997 (A`50) applies, as applicable.". Also according to par. 2 of the same article "Law 2472/1997, as applicable, and the executive laws of article 19 of the Constitution, as applicable, apply to any issue related to the provision of electronic communications services, which is not specifically regulated by this law." 3. When the purpose of the processing is the direct commercial promotion of products and services for advertising purposes using automatic calling systems, the more specific article 11 of Law 3471/2006 4 on the protection of personal data in electronic communications shall apply. In particular, according to par. 1 of the above article, "the use of automatic dialing systems, in particular using facsimile (fax) or e-mail devices, and more generally the making of unsolicited communications by any means of electronic communication without human intervention, for purposes directly commercial promotion of products or services and for any kind of advertising purposes, is allowed only if the subscriber expressly consents in advance". The Authority with Directive 2/2011 on electronic consent describes in detail the conditions and ways to legally obtain consent by electronic means for them purposes of the above provision. Unique exception to the download obligation prior consent constitutes, according to par. 3 of the same article, the case where email contact details legally acquired, in the context of the sale of products or services or otherwise transaction and are used to directly promote similar ones products or services of the supplier or to serve similar purposes, even when the recipient of the message has not given his prior consent, provided that he is provided with in a clear and distinct way the possibility to object, in an easy way and

free of charge, in the collection and use of his electronic data and this when collecting contact details, as well as in each message, to case the user had not initially objected to this use.

4. Therefore, for the processing of personal data to be lawful for the sending promotional SMS messages as part of its purpose promotion of products and services must either have the previous one consent of the data subject, based on article 11 par. 1 of Law 3471/2006 or that the conditions defined in article 11 are met par. 3 of Law 3471/2006, so that it appears that the processing is necessary for the purposes of the legal interests pursued by the controller processing.

5. The controller, in document No. C/EIS/1177/12-2-2019 submitted to the Authority in response to the complaint under consideration, is invoked the exception of article 11 par. 3 of Law 3471/2006 for the mission advertising messages to its customers without their consent, per

5 intervals and specifically whenever he wishes to them to inform about the current offers. According to the above answering document, the complainant was a former client of the responsible processing, i.e. he was a registered member of it, and for this reason the controller's address and phone number are on file him, as well as his other clients, past and present. However the person in charge processing does not explicitly and clearly state in his above answer with which properly informed the complainant, as the data subject, during the stage of collecting his personal data, that the telephone the number would be used for the purpose of promoting products and

services as well as how he was provided with the possibility of counter-ordering, also during the collection stage. In addition, from advertising messages sent by the controller to the complainant and which were presented to the Authority by the complainant, it appears that no they provided no reference to the possibility and method of counter-ordering in receiving advertising messages.

6. Despite invoking the exception of article 11 par. 3 of Law 3471/2006, the controller had already sent, on 5/24/2018, all of his clientele, including the complainant, message that asked for their consent in order to send them advertisements messages. Therefore, legal basis of the processing of personal data of the controller's customers, to whom it was sent above message, for sending advertising messages constitutes the their consent. In this case, although the complainant did not consented to the relevant message as he did not choose the one provided link (gdpryes), the controller was sending him advertising messages.

7. The controller continued to send advertising messages to complainant despite his repeated counter actions. Even if cannot, from the data in the case file in question, be established that the complainant, objected in a telephone manner, however expressed objection in writing by sending a message to the email address info@igiosomatigi.gr, for which he had no information that it was disabled, as claimed by the controller

6

during the examination of the case in question and furthermore stated his objection

by visiting the gdprno link.

8. Based on the above, a violation of Law 3471/2006 is established because o

controller sent advertising messages

to the complainant's telephone number, even though the complainant did not provide one

his consent in the 24/5/2018 message, in which he was asked to

consent in order to be informed about the offers of the person in charge

processing and despite the anti-order actions it took. Receiving

taking into account the seriousness of the infringement and the fact that there was no further complaint

against the data controller, the Authority deems it necessary to address

strict warning to the data controller, based on article 21 par. 1

subsection a) of Law 2472/1997, since, in accordance with Article 3 par. 1 and 2 of

Law 3471/2006, Law 2472/1997 and not Law 2472/1997 apply in this case

General Data Protection Regulation (EU) 2016/679.

FOR THOSE REASONS

The Authority issues a strict warning to the controller:

- To send advertising messages to his customers who were

recipients of the message from 24/5/2018, with which consent was requested

them, only if they have provided this consent.

- To ensure that it sends messages to the rest of its customers based on

of the exception of article 11 par. 3 of Law 3471/2006, so that all

the conditions set out in this article, namely appropriate information against

the stage of collecting the personal data for its purpose

processing and providing the possibility of opposition both during this stage and

and in every message, in a clear and distinct way.

- To ensure that it immediately stops sending advertisements

messages to those who express an objection and to operate without any problems

e-mail address, through which the
possibility for data subjects to object.

7

The Deputy President

The Secretary

George Batzalexis

Irini Papageorgopoulou

8