

Home »Practice» Opinions of the CPDP for 2018 »Opinion of the CPDP on issues related to“ Multisport ”cards Opinion of the CPDP on issues related to“ Multisport ”cards OPINION OF THE PERSONAL DATA PROTECTION COMMISSION Reg. -949 / 28.11.2018, Sofia, 21.12.2018 SUBJECT: Issues related to Multisport cards. The Commission for Personal Data Protection (CPDP) composed of members: Tsanko Tsolov, Tsvetelin Sofroniev and Veselin Tselkov, at a meeting held on 19.12.2018, considered a letter / ent. № NDMSPO-17-949 / 2018 / by Ms. K.K. - Data Protection Officer in K. Ltd. Mrs. K.K. informs that the company wishes to sign a contract with a company offering monthly "Multisport" cards to their employees to visit at preferential terms of fitness centers, studios, swimming complexes and other sports facilities and activities. "K." Ltd. should provide personal data to its employees wishing to take advantage of the service offered, for the purposes of issuing cards, and they will be deducted monthly amounts of their remuneration. The question posed by Ms. K.K. is whether in the specific case the company offering the service is a processor of personal data and whether the contract concluded between the two companies or in another legal act should regulate the processing of personal data, according to the requirements of Art. 28, § 3 of the General Data Protection Regulation. Legal analysis: Due to the numerous similar inquiries and the prevalence of the service, it is essential to determine the legal relationship between the participants, as well as the grounds for processing personal data of employees using Multisport card service. According to Art. 4, item 7 of the General Data Protection Regulation (Regulation (EU) 2016/679) "controller" means a natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of processing of personal data; where the purposes and means of such processing are determined by Union law or the law of a Member State, the controller or the specific criteria for determining it may be laid down in Union law or in the law of a Member State. The quality of administrator is a direct consequence of the fact that a particular person has chosen to process personal data for their own purposes or for purposes that are regulated by law. In this situation, except where required by law, the controller decides on the need to collect personal data, the categories of personal data, whether they should be changed during processing, where and how this data should be used and for what purpose , whether the data should be disclosed to third parties and what they should be, as well as for how long they will be stored, and when and in what way they will be destroyed. In addition, the Regulation imposes a certain range of obligations on the administrator. It must take appropriate technical and organizational measures relating to data security, taking into account the nature, scope, context and objectives of the data processing, as well as the existing risks to the rights and freedoms of data subjects. In addition, according to the provision of Art. 30, § 1 of Regulation (EU) 2016/679, the administrator shall

maintain a register of the processing activities for which he is responsible. This commitment stems from the principle of accountability and the need for the administrator to be able to demonstrate at all times that he complies with the requirements set out in the Regulation. "Personal data processor" is "a natural or legal person, public authority, agency or body which processes personal data on behalf of the controller" (Article 4, item 8 of Regulation (EU) 2016/679). The main difference between the controller and the processor is that the latter does not act alone, but on behalf of the controller of personal data. Their relations are regulated by a contract, which regulates the subject, the term of the processing, the nature and purpose of the processing, the type of personal data and the obligations and rights of the controller, incl. to carry out inspections (audits). The General Regulation also introduces specific obligations for the data processor, which are not limited to data security. For example, he is obliged to process personal data only on a documentary order from the administrator. In cases where it is necessary to appoint another data processor, this is done only with the express written permission of the controller. Like the administrator, according to Art. 30, § 2 of the General Regulation, the processor also maintains a register of the processing activities for which he is responsible. In addition, for the sake of even greater clarity, the provision of Art. 28, § 10 of the General Regulation explicitly provides that if the processor begins to determine the purposes and means of processing himself, he automatically begins to be considered an administrator. The principle of accountability referred to in Art. 5, § 2 of Regulation (EU) 2016/679, requires participants in trade and civil turnover, taking into account their activities, to determine for themselves what is their legal relationship in relation to personal data processed by them - independent controllers, controllers and processors. the meaning of Art. 28 or joint administrators under Art. 26 of the General Regulation. Their choice should ensure not only formal but also substantive compliance with the requirements of Regulation (EU) 2016/679 and, accordingly, effective protection of the rights of data subjects. Also, it should be borne in mind that the provision of services, which usually exchange personal data between the contracting authority and the contractor, does not automatically lead to a relationship between administrator and processor within the meaning of Art. 28 of the Regulation. The participants in the specific legal relationship are three: - The company offering "Multisport" service; - "K." EOOD in its capacity of employer / controller of personal data; - The employees of "K." Ltd. as users of the service offered. "K." Ltd. is an administrator of personal data on its own basis and processes personal data of its employees for the purposes of the employment relationship with them. As an employer, the company wants to motivate its employees by providing them with the opportunity for physical activity and a healthy lifestyle, which would undoubtedly lead to increased productivity. On the other hand, the company offering the Multisport service is a

company whose main purpose is to generate commercial profit, and it is also a controller of personal data on its own. The main characteristic of the relationship administrator - processor of personal data is that the latter processes the data only by order of the controller / arg. Art. 28, § 3, b. "A" in conjunction with Art. 29 of the General Regulation. In the relationship between the two companies, they process personal data for different purposes, store them for different periods, transfer them to different recipients, apply different technical and organizational protection measures, etc. In this line of thought it can be concluded that the intended characteristics for processing personal data are not unified, therefore they can not be subject to negotiation and assignment by an administrator to a processor within the meaning of Art. 28, § 3 of Regulation (EU) 2016/679. In the present case, the legal relationship between "K." Ltd. and the company offering "Multisport" service is between two independent administrators of personal data. The processing of personal data is admissible when there are grounds for legality within the meaning of Art. 6, as well as in compliance with the principles for processing, proclaimed in art. 5 of the General Regulation. "K." EOOD in its capacity of employer, transmitting personal data to its employees to the company offering the "Multisport" service, performs an action of additional processing of personal data for purposes other than the original (for the purposes of the employment relationship). In view of the fact that the Multisport service is an optional acquisition for employees, it is most logical to use "consent" within the meaning of Art. 6, § 1, b. "A" in conjunction with Art. 4, item 11 of the General Regulation. In this case, the employees have a real and free choice, as well as the opportunity to refuse the service, without this leading to adverse consequences for them within the employment relationship / arg. rec. 42, last sentence of the General Regulation. The contractual basis should not be applicable in view of the fact that the employees (data subjects) are not a party to the contract between the employer and the company offering the Multisport service. Moreover, in these contractual relations, they have the direct right to demand the fulfillment of the agreement in their favor, but not to demand termination or amendment of the contract, therefore they are not part of the process of voluntary declaration (consent) to conclude and determine the conditions of the contract, including with regard to the processing of personal data. In addition, the provision of Art. 272 of the Labor Code (LC), resp. Art. 72 of the Civil Servant Act (CSA), according to which without the consent of the employee no deductions can be made from his salary except for the exhaustively listed cases, which do not include the deduction for "Multisport" card. Different deviations are possible depending on the regulation of the contractual relationship between the company offering the Multisport service and the employer, and the payment of the price of the service can be distributed between employer and employee or borne entirely by the employee or employer. It is permissible for users of the service to be

third parties, e.g. spouses and children of the employee. Their personal data should also be processed by consent. In connection with the above, K. EOOD should observe the characteristics of the consent referred to in Art. 4, item 11 and also to fulfill its obligation to provide information within the meaning of Art. 13 and Art. 14 of Regulation (EU) 2016/679. In view of the above and on the grounds of Art. 58, § 3, b. "B" of Regulation (EU) 2016/679, the Commission for Personal Data Protection states the following

OPINION:

1. "K." EOOD, in its capacity of administrator of personal data, may provide personal data to its employees of the company offering the service "Multisport" card, with the express consent of them within the meaning of Art. 6, § 1, b. "A" in conjunction with Art. 4, item 11 of Regulation (EU) 2016/679.
2. It is permissible for users of the service to be third parties, e.g. spouses and children of the employee, and their personal data should also be subject to consent as a basis for the lawfulness of the processing.
3. In so far as "K." Ltd. and the company offering "Multisport" service, process personal data for different purposes, store them for different periods, transmit them to different recipients, apply various technical and organizational protection measures, etc., they are independent administrators of personal data, respectively do not fall into the hypothesis of relations administrator - processor within the meaning of Art. 28 of the General Regulation.
4. When processing personal data, both companies should strictly observe their obligation to provide information under Art. 13 and Art. 14, in accordance with the requirements of art. 12 of Regulation (EU) 2016/679.

MEMBERS:

Tsanko Tsolov

Tsvetelin Sofroniev / p /

Veselin Tselkov / p /

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