THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 15

September

2021

DECISION

DKE.523.38.2021

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2021, item 735), art. 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 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 Art. 6 sec. 1 lit. c) and lit. f) and art. 57 sec. 1 lit. a) and lit. f) 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 protection of personal data) (Journal of Laws UE L 119 of 04.05.2016, p. 1, as amended by the changes announced in the Journal of Laws UE L 127 of 23.05.2018, p. 2, and in the Journal of Laws UE L 74 of 04/03/2021, page 35), after conducting administrative proceedings regarding the complaint of Mr. A. N. against the processing of his personal data, including processing for marketing purposes by L. Sp. z o.o., the President of the Personal Data Protection Office

refuses to accept the request.

Justification

The President of the Personal Data Protection Office (previously: the Inspector General for Personal Data Protection) received a complaint from Mr. A. N., hereinafter referred to as the Complainant, about the processing of his personal data, including the processing of his personal data for marketing purposes by L. Sp. z o.o., hereinafter also referred to as the Company.

The complainant argued that despite sending a written request to the Company to stop processing his personal data for marketing purposes, the Company still sent him SMSs containing advertising content. Thus, despite the complainant's objection, the Company does not take effective steps to meet his request.

In connection with the events presented in the complaint, the Complainant requested the supervisory authority to stop the processing of his personal data by the Company.

In the course of the investigation, the President of the Personal Data Protection Office established the following factual circumstances that are significant for the resolution of the case:

L. Sp. z o.o. entered into the Register of Entrepreneurs of the National Court Register under KRS number [...], runs, inter alia, activities in the field of health care, service activities related to the improvement of physical condition, as well as the provision of hairdressing services and other treatments.

In a letter of [...] June 2015, addressed to the [...] Department of the Company, the Complainant, exercising his right under Art. 32 sec. 1 point 8 of the Act of August 29, 1997 on the protection of personal data, he objected to the processing of his personal data by the Company for marketing purposes and for the purpose of transferring them to other data administrators. The reason for the objection was to be advertising materials sent by the Company to the Complainant in the form of text messages.

As the Company stated in the written explanations submitted to the President of the Personal Data Protection Office, the complainant's request to stop processing his personal data has never been received at the Company's seat. The personal data of Mr. A. N. was obtained by the Company only on […] June 2016 - and therefore after the date of the above-mentioned objection - in connection with the provision of the sports massage service provided to the Complainant at the Company's facility located in the Hotel […]. The complainant provided the Company with his personal data in the scope of name, surname and date of birth by filling in the Clinic's Client Card […]. At the same time, the Complainant placed his own handwritten signature on a written statement, which showed that he consented to the processing of his personal data by the Company for the purpose of selling the products and services of the Company and entities cooperating with it, and for archiving and conducting marketing activities undertaken by the Company on its own be in collaboration with other actors. Thus, the legal basis for the acquisition and processing of the Complainant's personal data by the Company was art. 23 sec. 1 point 1 of the Act of August 29, 1997 on the protection of personal data.

Currently, the Company processes the complainant's personal data only to the extent resulting from the administrative proceedings conducted by the President of the Personal Data Protection Office. As a party to these proceedings, the Company is the administrator of the Complainant's data contained in the application for the initiating proceedings, as well as in photocopies of files and letters sent by the supervisory body. The legal basis for the processing of the complainant's personal data by the Company is currently art. 6 sec. 1 lit. c) and f) 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 the protection of personal data) (Journal of Laws UE L 119 of 04/05/2016, p. 1, with changes announced in the Journal of Laws of the European Union L 127 of 23/05/2018, p. 2, and in the Journal of Laws of the EU) L 74 of 04/03/2021, p. 35), because this processing is necessary to fulfill the legal obligation incumbent on the Company, as well as for the purposes of the legitimate interests pursued by it. The Complainant's personal data are not processed by the Company in connection with its business activities, i.e. in connection with the performance of contracts for the provision of services, or for marketing purposes. Any media created in this context containing the complainant's personal data were permanently destroyed by the Company.

After reviewing all the evidence gathered in the case, the President of the Personal Data Protection Office, hereinafter also referred to as: the President of the Personal Data Protection Office, considered the following.

On the date of entry into force 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. 2018 ", ie on May 25, 2018, the Office of the Inspector General for Personal Data Protection became the Office for Personal Data Protection. Proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before May 25, 2018, are conducted by the President of the Personal Data Protection Office, pursuant to the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, . item 922, as amended), hereinafter referred to as: "u.o.d.o. 1997 "- in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2021, item 735), hereinafter referred to as" the Code of Administrative Procedure ". All actions taken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective (Article 160 (1-3) of the Act on Personal Data Protection, 2018).

At the same time, from May 25, 2018, 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 the Directive 95/46 / WE (Journal of Laws UE L 119 of 04/05/2016, p. 1 as amended), hereinafter referred to as "Regulation 2016/679".

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

It should also be pointed out here that the President of the Personal Data Protection Office, when issuing an administrative decision, is obliged to decide on the basis of the facts existing at the time of issuing this decision. As the doctrine points out, “the public administration body assesses the facts of the case according to the moment of issuing the administrative decision. This rule also applies to the assessment of the legal status of the case, which means that a public administration authority issues an administrative decision based on the provisions of law in force at the time of its issuance (...). Settlement in administrative proceedings consists in applying the applicable law to the established factual state of an administrative case. In this way, the public administration body realizes the goal of administrative proceedings, which is the implementation of the binding legal norm in the field of administrative and legal relations, when such relations require it "(Commentary to the Act of June 14, 1960, Code of Administrative Procedure, M. Jaśkowska, A . Wróbel, Lex., El / 2012). Also the Supreme Administrative Court - in the judgment of May 7, 2008 in case no. Act I OSK 761/07 stated that: "when examining (...) the legality of the processing of personal data, GIODO is obliged to determine whether the data of a specific entity are processed on the date of issuing the decision on the matter and whether it is done in a lawful manner" .

Bearing in mind the above, the President of the Personal Data Protection Office (UODO), on the basis of the evidence collected in this case, assessed the processing of the Complainant's personal data in the context of the provisions of Regulation 2016/679, as well as the provisions of u.o.d.o. in force on the date of filing the complaint. 1997.

Pursuant to the wording of Art. 23 sec. 1 u.o.d.o. 1997, applicable in the period covered by the complaint, the processing of personal data was permissible when: the data subject has consented to it, unless it was the deletion of data relating to him (point 1), it was necessary to exercise the right or fulfill an obligation resulting from a legal provision (point 2), it was necessary for the performance of the contract when the data subject was a party to it or when it was necessary to take action before concluding the contract at the request of the data subject (point 3), it was necessary for the performance of legally defined tasks carried out for the public good (point 4) or it was necessary to fulfill legally justified purposes pursued by data controllers or data recipients, and the processing did not violate the rights and freedoms of the data subject (point 5). The provision of art. 23 sec. 4 u.o.d.o. 1997 provided that for the "legally justified purpose" referred to in Art. 23 sec. 1 point 5, in particular, direct marketing of the controller's own products or services.

Art. 32 sec. 1 point 8 u.o.d.o. 1997 granted the data subject the right to object to the processing of his personal data in the

cases specified in art. 23 sec. 1 points 4 and 5. This means that the data subject could object to the data controller against the processing of their personal data for marketing purposes. At the same time, at the disposal of Art. 32 sec. 3 u.o.d.o. 1997, after such objection was noted, further processing of the contested data was unacceptable.

In accordance with the current legal status (i.e. from May 25, 2018, when the provisions of Regulation 2016/679 began to apply), the processing of personal data is lawful when the data controller has at least one of the provisions referred to in art. 6 sec. 1 of Regulation 2016/679, the material premises for the processing of personal data. According to the aforementioned provision, the processing of personal data is lawful only if one of the following conditions is met: a) the data subject has consented to the processing of his personal data for one or more specific purposes; b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; c) processing is necessary to fulfill the legal obligation incumbent on the controller; d) processing is necessary to protect the vital interests of the data subject or another natural person; e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Recital 40 of Regulation 2016/679 emphasizes that in order for data processing to be lawful, it should be based on the consent of the data subject or on another justified basis provided for by law or in a regulation or in another legal act of the European Union or in law. of the Member State referred to in this Regulation, including it must comply with the legal obligation to which the controller is subject or with the agreement to which the data subject is a party, or in order to take steps at the request of the data subject they concern, before concluding the contract.

In the light of recital 47 of Regulation 2016/679, for actions performed in the legitimate interest referred to in art. 6 sec. 1 lit. f), it is necessary to recognize, inter alia, the processing of personal data for the purposes of direct marketing.

On the other hand, the provisions of Art. 6 sec. 1-3 of the Regulation 2016/679, analogously to the previously applicable regulation of art. 32 sec. 1 point 8 and art. 32 sec. 3 u.o.d.o. 1997, provide for the right of the data subject to object to the processing of his personal data for the purposes of direct marketing of the administrator, resulting in inadmissibility of further processing for this purpose.

Referring the above-mentioned provisions to the facts of the present case, it should be stated that the Company came into

possession of the Complainant's personal data and processed them in a lawful manner. Based on the evidence collected in this case, there is no doubt as to its truthfulness, it should be stated that the Company obtained the personal data of Mr. A. N. and processed them on the basis of the consent given by the Complainant. As it results from the written explanations of the Company, as well as the accompanying evidence in the form of a copy of the Clinic's Client Card [...], filled in by the Complainant's own hand, the Complainant provided the Company with his personal data in the field of name, surname and date of birth on [...] June 2016 - in connection with the intention to use the sports massage service provided by the Company. However, there is no evidence that the Company processed the Complainant's personal data before that date. Although the Complainant raised in his complaint to the President of the Personal Data Protection Office dated [...] July 2015 that the Company uses his personal data for marketing purposes, sending SMS advertising messages to his mobile phone number, no the way did not make it plausible. In particular, the Complainant did not attach to the complaint a printout of these messages, nor even quoted their content. Moreover, there is no information about the telephone number from which the content in question was to be sent to the complainant, therefore it was impossible to verify the validity of the allegations made by the complainant.

Based on the explanations of the Company, consistent with the evidence presented by it, the supervisory body took the position that the legal basis for obtaining data identifying the Complainant was Art. 23 sec. 1 point 1 u.o.d.o. 1997. The complainant, wishing to use the services provided by the Company, made available to it basic information about him. At the same time, as it results from the documentation attached to the file, the Complainant was instructed on the voluntary provision of data and his rights, including the right to access personal data, correct it and the possibility of making it available to entities cooperating with the Company.

Moreover, the President of the Personal Data Protection Office found unfounded the allegation of unlawful processing of the Complainant's personal data by the Company for marketing purposes. As previously indicated, the Complainant did not prove that the Company actually directed any advertising material to him before [...] June 2016. Moreover, as it was established in the case, the Complainant's written objection of [...] June 2015, addressed he never reached the […] Department of the Company. The reason for the above may be the fact that the complainant sent the letter to the following address: […]. However, this address is not (and has never been) disclosed in the National Court Register as the address of the Company's registered office. For the above reasons, the Complainant's objection should be considered ineffective. After [...] June 2016,

the Company had a written consent of the Complainant, who approved the use of his personal data by the Company for the sale of its own products and services and for the sale of its own products and services, and for the purpose of archiving and conducting marketing activities undertaken by the Company independently be in collaboration with other actors. Thus, the Company was fully empowered to perform this type of activity.

Finally, irrespective of the above, it should be pointed out that currently - that is, in the factual state at the time of issuing this decision - the Company processes the Complainant's personal data only for the purpose of fulfilling its legal obligations, and also for the purposes of the legitimate interests pursued by the Company , and therefore only for the purposes of participation in this administrative procedure conducted by the President of the Office for Personal Data Protection. The legal basis for the processing of the complainant's personal data by the Company is therefore Art. 6 sec. 1 lit. c) and lit. f) Regulation 2016/679. Taking into account the will of the Complainant, which is manifested in the complaint initiating these proceedings, the Company ceased to process the data of Mr. A. N. in connection with its business activities, i.e. in connection with the performance of contracts for the provision of services and for marketing purposes. All media produced in this context containing the complainant's personal data (including the original Clinic's Client Card [...], a copy of which was submitted by the Company to the President of the Personal Data Protection Office for inclusion in the evidence material of the case) were permanently destroyed.

Due to the above, there are no grounds for the supervisory authority to take any further actions as regards the complainant's requests mentioned in the complaint submitted by him. Further conducting by the President of the Personal Data Protection Office administrative proceedings, initiated by a complaint about irregularities in the processing of the Complainant's personal data by the Company, aimed at issuing an administrative decision pursuant to art. 18 sec. 1 of the 1997 Act is unfounded. According to the wording of the above-mentioned of the provision, in the event of a breach of the provisions on the protection of personal data, the President of the Personal Data Protection Office ex officio or at the request of the person concerned, by way of an administrative decision, orders the restoration of the legal status, in particular: removal of deficiencies (1), supplementation, updating, rectification, disclosure or non-disclosure of personal data (2), application of additional security measures for the collected personal data (3), suspension of the transfer of personal data to a third country (4), data protection or transfer to other entities (5) or deletion of personal data (6) . From the wording of Art. 18 sec. 1 of the 1997 Act, and at the same time from the definition of an administrative decision - as an act decisive in a ruling manner about the rights and

obligations of the parties to the proceedings in the factual and legal status established and up-to-date at the time of its issuance - it follows that the personal data protection authority does not assess past events, no continued at the time of adjudication. The decision of the President of the Personal Data Protection Office (UODO) is an instrument to restore lawfulness in the data processing process carried out at the time of issuing the decision.

Taking into account the above, it should be stated that there are currently no grounds for formulating an order referred to in Art. 18 sec. 1 of the Act, because the Complainant's personal data are no longer processed by the Company for marketing purposes, but only for the purpose of fulfilling its legal obligations, which is in line with applicable law and does not require the Complainant's consent. Due to the above, the administrative proceedings in the present case should have been concluded with a decision refusing to grant the applicant's request.

On the other hand, the President of the Personal Data Protection Office points out that the possible regulation on the grounds that the Complainant may seek legal protection and pursue his claims is the Civil Code of 23 April 1964 (Journal of Laws of 2019, item 1145), hereinafter referred to as "the Civil Code. ". According to the content of Art. 23 of the Civil Code Regardless of the protection provided for in other regulations, personal rights of a person, including the right to privacy, remain under the protection of civil law. The provision of Art. 24 of the Civil Code guarantees the person whose personal rights has been endangered with the right to request to refrain from acting violating the personal rights, and in the event of an already committed violation of the request, that the person who committed the infringement will complete the actions necessary to remove its effects. At the same time, pursuant to Art. 448 of the Civil Code, in the event of violation of a personal interest, the court may award an appropriate amount to the person whose interest has been violated as compensation for the harm suffered, or, upon his request, order an appropriate amount of money for the social purpose indicated by him, regardless of other measures needed to remove the effects of the violation. Therefore, if, in the opinion of the Complainant, there has been a breach of his personal rights by processing his personal data and sending marketing information without any legal basis, he may pursue his claims in this respect by way of a civil action brought before the locally competent common court.

In this factual and legal state, the President of the Personal Data Protection Office resolved as at the outset.

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, 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 entry fee for the complaint is PLN 200. The party has the right to apply for the right of assistance, including exemption from court costs.

2021-11-02