

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 09

March

2020

DECISION

ZSPR. 421.19.2019

Based on Article. 104 § 1 of the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2020, item 256) and art. 7 section 1 and section 2, art. 60, art. 101, art. 103 of the Personal Data Protection Act of May 10, 2018 (Journal of Laws of 2019, item 1781) in connection with Art. 31, art. 58 section 1 lit. e and lit. f in connection with Art. 83 sec. 1-3 and art. 83 sec. 5 lit. e Regulation of the European Parliament and the EU Council 2016/679 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 04/05/2016, p. 1, as amended), following the procedure initiated ex officio in the case of Vis Consulting Sp. z o.o. in liquidation with its seat in Katowice at ul. Zygmunta Krasiński 29 lok. 9 President of the Personal Data Protection Office, finding that Vis Consulting Sp. z o.o. in liquidation with its seat in Katowice at ul. Zygmunta Krasiński 29 lok. 9, the provisions of art. 31 and art. 58 sec. 1 lit. e and lit. f of the general regulation on data protection, by not providing access to personal data and other information and premises, preventing the President of the Personal Data Protection Office from carrying out control activities necessary for the performance of his tasks, imposes on Vis Consulting Sp. z o.o. in liquidation with its seat in Katowice at ul. Zygmunta Krasiński 29 lok. 9 a fine in the amount of PLN 20,000 (in words: twenty thousand zlotys), which is the equivalent of EUR 4,673.56, according to the average EUR exchange rate announced by the National Bank of Poland in the exchange rate table as of January 28, 2020.

Justification

Based on Article. 58 sec. 1 lit. b, lit. e and lit. f of the Regulation of the European Parliament and of the EU Council 2016/679 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 04/05/2016, p. 1 and Journal of Laws UE L 127 of 23/05/2018, p. 2), hereinafter referred to as Regulation 2016/679, the President of the Office for Personal Data Protection planned to conduct in Vis Consulting Sp. z o.o. with headquarters in Katowice at ul. Zygmunta

Krasiński 29 lok. 9 (hereinafter also referred to as the "Company") to control the compliance of data processing with the provisions on the protection of personal data. The inspection was to be carried out from July 29, 2019 to August 2, 2019.

By letter of [...] July 2019 (ref. [...]), the Office for Personal Data Protection via Poczta Polska notified the Company about the date and scope of the planned inspection. The letter was delivered on [...] July 2019 to the address of the seat of Vis Consulting Sp. z o.o. (Katowice, ul. Zygmunta Krasińskiego 29/9), indicated in the National Court Register.

On [...] July 2019, in order to carry out inspection activities (inspection reference ZSPR.421.19.2019), the inspectors went to the place indicated in the National Court Register as the address of the Company, but the persons representing the Company were not there. On the spot, it turned out that the Office [...] (hereinafter referred to as "the Office") operated by [...] was located at that address. As agreed, the company sublets a business premises located in Katowice at ul. Zygmunta Krasiński 29 lok. 9 on the so-called "Virtual office". Only an employee of the Office was found in the premises in question. After presenting the purpose of the inspectors' arrival to this person, an employee of the Office, after checking the content of the e-mail, in order to determine whether there was any message from the Company in this regard, informed that the Office received a letter of [...] July 2019 from the Company signed by Mr. Paweł Kępka - President of the Management Board. The letter stated that the Company terminated the lease agreement for premises no. 9 located in Katowice at ul. Zygmunt Krasińskiego 29 and that from [...] July 2019, under the above-mentioned this entity will not conduct business at the address. A copy of the letter was submitted to the controlling party.

In addition, an employee of the Office informed the inspectors that after receiving the letter of [...] July 2019 from the Office for Personal Data Protection, regarding the notification about the planned inspection in the Company, the content of the letter in question was sent to the Company in the form of a scan. In order to document the findings referred to above, the inspectors prepared an official memo on [...] July 2019.

In connection with the situation, the inspectors asked an employee of the Office to contact the Company to determine whether the inspection activities could be carried out. However, it was not possible to establish contact with the Company. Therefore, the inspector asked for a telephone number to the Company. An employee of the Bureau stated that only upon a written request of the President of the Personal Data Protection Office, he could provide information on this entity (including a telephone number). The inspectors left a telephone number for contact. On the same day, around 2 p.m., the inspector was phoned by a man who introduced himself as an "attorney [...]" and informed that he was contacting the Company on behalf of

the Company, but he did not know if the inspection could be carried out. In the course of the conversation, the above-mentioned the person undertook to endeavor by [...] July 2019 to determine whether the inspection could take place. At the same time, on [...] July 2019, an application from the President of the Office for Personal Data Protection was sent to the e-mail address of the Office for a copy of the rental agreement for the premises in question and for contact information to be provided to the Company.

On [...] July 2019, the inspectors again went to the address of the Company, but also on that day no representatives of the Company were found. Therefore, the control activities did not take place. An employee of the Office provided the inspectors with a copy of the sublet agreement for the premises in question. At. 11, the inspectors were called by a person who introduced himself as "an attorney [...]" and informed them that the inspection would not take place.

In connection with the above, in a letter of [...] August 2019, ref. personal. Above the correspondence was returned with the annotation "address out of date".

Based on the financial statements for the period from January 1, 2018 to December 31, 2018 (available on the website of the Ministry of Justice at the address: ekrs.ms.gov.pl), it was established that in the above-mentioned in the period, the amount of the Company's net revenues from sales and equivalent amounted to PLN 426,261.14.

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

According to the information contained in the National Court Register, on July 30, 2019, a resolution was adopted to dissolve the Company and put it into liquidation. On August 23, 2019, the District Court Katowice - Wschód, 8th Commercial Division, made an entry in the National Court Register on the liquidation of the Company. Since then, the company has been operating under the name of Vis Consulting Sp. z o.o. in liquidation.

Pursuant to Art. 57 sec. 1 lit. and Regulation 2016/679, each supervisory authority in its area monitors and enforces the application of Regulation 2016/679. Moreover, pursuant to Art. 58 sec. 1 lit. e and lit. f of Regulation 2016/679, the supervisory authority has the right to access all the premises of the controller and the processor, including the equipment and means for data processing, in accordance with the procedures specified in EU law or in the law of a Member State. It should be pointed out that pursuant to Art. 58 sec. 6 of Regulation 2016/679, each Member State may provide in its regulations that its supervisory authority shall have, in addition to the powers specified in para. 1, 2 and 3, also other powers. According to Art. 31

of Regulation 2016/679, the controller and the processor, and - where applicable - their representatives, upon request, cooperate with the supervisory authority in the performance of its tasks.

Based on Article. 78 sec. 1 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781), hereinafter referred to as the "Act", the President of the Office for Personal Data Protection inspects compliance with the provisions on the protection of personal data. Pursuant to Art. 79 sec. 1 point 1 of the Act, the inspection is carried out by an employee of the Office authorized by the President of the Office.

According to Art. 84 sec. 1 of the Act, the inspector has the right to: a) enter the land and buildings, premises or other rooms between 6.00 and 22.00; b) access documents and information directly related to the scope of the inspection; c) conducting inspections of places, objects, devices, carriers and IT or teleinformation systems used for data processing; d) demand a written or oral explanation and question a person as a witness to the extent necessary to establish the facts; e) commission the preparation of expert opinions and opinions.

Significant in this case is the fact that the President of the Personal Data Protection Office planned an inspection in the Company in connection with the findings that were made during the inspection carried out at V. Sp. z o.o. sp. k. with its seat in [...]. In the course of the control carried out in the above-mentioned the entity was found to be engaged in telemarketing activities. In connection with this activity, it processes personal data (landline and mobile phone numbers) using the ICT system provided by the Company. The system in question is used on the basis of a cooperation agreement in the field of outsourcing of telemarketing services. The contract was concluded with the Company on [...] February 2017. The important issue is that V. Sp. z o.o. sp. k. does not have its own database, and all telephone connections are generated solely by the IT system provided by the Company.

The content of the agreement indicates, inter alia, that the Company has a technical solution - an ICT system in the form of a computer program, the use of which allows for making telephone calls to landline and mobile numbers according to the location criterion. Moreover, the agreement also indicates that the functionality of the system in question prevents V. Sp. z o.o. sp. k. access to any information, including the dialed telephone number. In addition, in this contract, the Company declares that in the event of using any personal data for the purposes of performing the above-mentioned the contract will be administered by "the above-mentioned data in accordance with the applicable provisions of Polish law ". In § 3 point 2 of the above-mentioned the agreement contains the following provision: "VIS declares that in the event of any third party claims

against V. [...] related to the functionality of the SYSTEM [...], it releases V. from this liability to the extent permitted by applicable law and undertakes cover all costs related to the protection of V. against such claims ”.

Due to the fact that V. Sp. z o.o. sp.k. does not have access to personal data processed in this system (i.e. to information about dialed telephone numbers), the President of the Personal Data Protection Office considered it necessary to carry out control activities also in the Company (i.e. in the entity which, on the basis of an agreement I consider myself the data controller). The purpose of the inspection was to examine the lawfulness of the processing of personal data using the system in question.

The inability to conduct an inspection in the Company made it difficult for the President of the Personal Data Protection Office to examine the process of personal data processing by V. Sp. z o.o. sp. k.

The evidence collected in the case indicates that the actions taken by the persons representing the Company definitely prove the lack of cooperation with the President of the Office for Personal Data Protection.

In order to confirm the above position, the following circumstances should be recalled:

- 1) after receiving information about the planned inspection of the President of the Personal Data Protection Office (letter of [...] July 2019), on [...] July 2019 (two days before the planned inspection begins), the Company sent a request to the lessor to terminate the contract lease for premises located in Katowice at ul. Zygmunta Krasiński 29 lok. 9 (the address of the Company indicated in the National Court Register);
- 2) both on [...] July 2019 and [...] July 2019, the Company prevented the inspection activities as no person authorized to represent the Company was found at the address of the Company during the inspection;
- 3) On July 30, 2019, a resolution was adopted to dissolve the Company and start liquidation proceedings (this information is included in the National Court Register).

To sum up, it should be stated that the actions of the Company referred to above undoubtedly prove that it does not fulfill the obligations related to the processing of personal data or at least intentionally avoids being inspected by the supervisory authority, which is the President of the Personal Data Protection Office. Thus, it should be considered that by preventing the President of the Personal Data Protection Office from carrying out the inspection, the Company violated Art. 31 in connection with Art. 58 sec. 1 lit. e and lit. f of the Regulation 2016/679. It should be pointed out that pursuant to Art. 31 of Regulation 2016/679, the controller and the processor, and - where applicable - their representatives, upon request, cooperate with the

supervisory authority in the performance of its tasks. The obligation to cooperate is, inter alia, to provide the supervisory body with the possibility of obtaining from the controller (and the processor) access to all personal data and all information necessary for the supervisory body to perform its tasks (Article 58 (1) (e) of Regulation 2016/679), access to any premises of the controller and the processor, including equipment and means for data processing, in accordance with the procedures set out in EU law or in the law of a Member State (Article 58 (1) (f) of Regulation 2016/679). This obligation of the administrator to cooperate is correlated with the tasks of the supervisory authority set out in Art. 57 of the Regulation 2016/679 and the powers resulting from Art. 58 of the Regulation 2016/679.

The President of the Personal Data Protection Office, acting pursuant to art. 108 sec. 1 of the Act on the Protection of Personal Data, he notified the District Prosecutor's Office in [...] of the suspicion of committing an offense consisting in preventing the control activities by the Company. On [...] January 2020, the Office for Personal Data Protection received a notification (file reference [...]) of the District Prosecutor's Office [...] [...] about the sending of a bill of indictment against [...] [...], accused of committing the crime under Art. . 108 of the Act on the Protection of Personal Data.

In addition, bearing in mind the above findings, the President of the Office for Personal Data Protection, exercising his right specified in art. 83 of the Regulation 2016/679, states that in the case under consideration there were conditions for imposing an administrative fine on the Company.

Pursuant to art. 83 sec. 2 of Regulation 2016/679, administrative fines are imposed depending on the circumstances of each individual case.

Pursuant to Art. 83 of Regulation 2016/679 - setting out the general conditions for imposing administrative fines - each supervisory authority shall ensure that the administrative fines referred to in para. 4, 5 and 6 were effective, proportionate and dissuasive in each individual case (paragraph 1). Pursuant to Art. 83 sec. 2 lit. b of the Regulation 2016/679, the authority, when deciding whether to impose an administrative fine and determining its amount, pays due attention in each individual case to the intentional or unintentional nature of the infringement.

Pursuant to Art. 83 sec. 2 lit. k of Regulation 2016/679, the authority, when deciding whether to impose an administrative fine and determining its amount, pays due attention in each individual case to any other aggravating or mitigating factors applicable to the circumstances of the case, such as achieved directly or indirectly in connection with the breach of benefits. financial losses or losses avoided.

The President of the Personal Data Protection Office, deciding to impose an administrative fine on the Company and determining its amount, in accordance with Art. 83 par. 2 lit. a-k of Regulation 2016/679, took into account the following aggravating circumstances:

1. The breach found in this case is of considerable importance and serious nature, as the lack of cooperation between the Company and the President of the Personal Data Protection Office made it impossible for this authority to control compliance with the provisions on the protection of personal data by the Company. The company's action is reprehensible. By its omission, the company prevented the President of the Personal Data Protection Office from making very important findings (regarding the legality of personal data processing), the results of which would undoubtedly have a significant impact on the assessment of evidence collected in the course of another inspection, which was carried out by the President of the Office for Personal Data Protection in V. Sp. z o.o. sp. k. (nature, severity and duration of the infringement).
2. The company consciously prevented the inspection, and thus prevented the President of the Personal Data Protection Office from performing its statutory tasks under Art. 58 sec. 1 lit. e and lit. f of the Regulation 2016/679. The situation raises the suspicion that the fact that the Company prevented the inspection was aimed at preventing the President of the Personal Data Protection Office from collecting evidence confirming the unlawful processing of personal data by the Company (intentional or unintentional nature of the breach).

The other conditions for the assessment of an administrative fine specified in Art. 83 sec. 2 lit. c - k, due to the subject matter of the proceedings, do not apply in the present proceedings. Consequently, they had no influence on the assessment of the infringement and the size of the administrative fine imposed.

When determining the amount of the administrative fine, the President of the Personal Data Protection Office did not find any mitigating circumstances affecting the final penalty.

Determining the amount of the imposed fine also required defining the goals that the fine would allow to achieve. It should be pointed out that the financial penalty imposed on the Company due to the lack of cooperation with the President of the Personal Data Protection Office is repressive (it is to cause the Company to incur a financial penalty for avoiding control) and preventive (it is to prevent the Company from violating the law in the future, but also by other entities). In addition, the financial penalty imposed on the Company is also a deterrent and is related to the prevention of infringements. The penalty is intended to deter both the Company and other entities from repeated infringement.

Moreover, the President of the Personal Data Protection Office undoubtedly cannot accept situations in which entities, by frustrating control activities, prevent the performance of his statutory tasks.

Pursuant to art. 103 of the Act of 10 May 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781), the equivalent of the amounts expressed in euro, referred to in Art. 83 of the Regulation 2016/679, are calculated in PLN according to the average EUR exchange rate announced by the National Bank of Poland in the exchange rate table on January 28 of each year, and if the National Bank of Poland does not announce the average EUR exchange rate on January 28 in a given year - according to the average euro exchange rate announced in the table of exchange rates of the National Bank of Poland that is closest after that date.

In the opinion of the President of the Personal Data Protection Office, the applied fine meets the conditions referred to in Art. 83 sec. 1 of Regulation 2016/679, due to the seriousness of the infringement found under Art. 31 in connection with Art. 58 sec. 1 lit. e and lit. f of Regulation 2016/679, which is undoubtedly the lack of cooperation with the supervisory body in the implementation of its statutory powers, including preventing the conduct of control activities.

Pursuant to these provisions, breach of the administrator's obligation referred to in Art. 31 of Regulation 2016/679, is subject to an administrative fine of up to EUR 10,000,000, and in the case of an enterprise - up to 2% of its total annual worldwide turnover from the previous financial year, with the higher amount being applicable.

The breach of the administrator's obligations referred to in Art. 58 sec. 1 lit. e and lit. f of the Regulation 2016/679, is subject to an administrative fine of up to EUR 20,000,000, and in the case of an enterprise - up to 4% of its total annual global turnover from the previous financial year, with the higher amount applicable, which the President of the Data Protection Office Personal pursuant to art. 83 sec. 3 of Regulation 2016/679 is considered to be the most serious infringement, and the amount of the fine imposed by this decision shall not exceed this amount.

Bearing in mind the above, the President of the Personal Data Protection Office resolved as in the operative part of this decision.

The decision is final. The party 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, via the President of the Office for Personal Data Protection (address: ul. Stawki 2, 00-193 Warsaw). A proportional fee should be filed against the complaint, in accordance with Art. 231 in connection with Art. 233 of the Act of August 30, 2002, Law on proceedings before administrative courts (Journal of Laws of

2018, item 1302, as amended). The party has the right to apply for the right of assistance, which includes exemption from court costs and the appointment of an attorney, legal advisor, tax advisor or patent attorney. The right to assistance may be granted at the request of a party submitted prior to the initiation of the proceedings or in the course of the proceedings. The application is free of court fees.

Pursuant to Art. 105 paragraph. 1 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781), the administrative fine must be paid within 14 days from the date of expiry of the deadline for lodging a complaint to the Provincial Administrative Court, or from on the day the ruling of the administrative court becomes legally binding, to the bank account of the Personal Data Protection Office at NBP O / O Warsaw no. 28 1010 1010 0028 8622 3100 0000. Moreover, pursuant to Art. 105 paragraph. 2 above of the Act, the President of the Personal Data Protection Office may, at the justified request of the punished entity, postpone the date of payment of the administrative fine or divide it into installments. In the event of postponing the payment of the administrative fine or dividing it into installments, the President of the Personal Data Protection Office shall charge interest on the unpaid amount on an annual basis, using a reduced rate of default interest, announced pursuant to Art. 56d of the Act of August 29, 1997 - Tax Ordinance (Journal of Laws of 2019, item 900, as amended), from the day following the date of submitting the application.

Pursuant to Art. 74 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781), the submission of a complaint by a party to the administrative court suspends the execution of the decision on the administrative fine.

2020-03-26