

Warsaw, day 22

July

2022

Decision

DKE.561.1.2022

Based on Article. 104 § 1 of the Act of June 14, 1960 Code of Administrative Procedure (i.e. Journal of Laws of 2021, item 735, as amended) in connection with Art. 7 and art. 60 of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2019, item 1781) and pursuant to art. 58 sec. 2 lit. b) Regulation of the European Parliament and of the EU Council 2016/679 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 Directive 95/46 / EC (general regulations on data protection ) (Journal of the EU L 119 of 04.05.2016, p. 1, as amended), after conducting administrative proceedings to impose an administrative fine on S. S.A., President of the Office for Personal Data Protection

admonishes S. S.A. for violation of the provisions of art. 58 sec. 1 lit. a) and e) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons 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) (Official Journal EU L 119 of 04.05.2016, p. 1, as amended), consisting in failure to provide access to information necessary for the President of the Office for Personal Data Protection to perform his tasks in the proceedings [...].

Justification

Facts

1. In the proceedings conducted by the President of the UODO, reference number [...] taken on the basis of a complaint by M. S., in a letter of February [...] 2020, delivered [...] February 2020, the President of the UODO summoned S. S.A. (hereinafter also referred to as the "Company") to respond to the content of the complaint and provide explanations in the case, within 7 days from the date of delivery of the letter.

2. Due to the Company's lack of response to the above-mentioned request, in a letter of [...] November 2020, delivered [...] November 2020, the President of the UODO again called on the Company to submit explanations in the case, within 7 days from the date of delivery of the letter. The content of the letter contained an instruction that the lack of an exhaustive response

to the summons may result in the imposition of an administrative fine on the Company pursuant to Art. 83 sec. 5) letter e) in connection with joke. 58 sec. 1 lit. a) 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 the EU L 119 of 04.05.2016, p. 1, as amended) (hereinafter also referred to as "GDPR"). The letter also contained an instruction that if an authorized employee or attorney submits explanations on behalf of the Company, an appropriate power of attorney should be sent entitling that person to act on behalf of the Company in the proceedings and the fee for the power of attorney granted should be paid.

3. On [...] January 2021, the Office received a letter, the header and content of which indicated that its sender was O. S.A. The letter did not contain the name and surname of the person who prepared it or the legible signature of that person. The letter indicated that "S. ARE. is represented by O.S.A." - which information had no legal significance, not only due to the inability to determine the author of the letter, but also due to the fact that O. S.A., as a legal person, cannot be a legal representative of a party in administrative proceedings - because pursuant to Art. 33 § 1 of the Code of Administrative Procedure, only a natural person with full legal capacity may be a party's proxy in proceedings pending before the President of the UODO.

4. By letter of February [...] 2021, delivered [...] February 2021, the President of the UODO again summoned S. S.A. to submit explanations in the case within 7 days from the date of delivery of the letter. The content of the letter indicated that the letter received by the authority on [...] January from O. S.A., as an entity not being a party to the proceedings, will be disregarded. The letter also contained an instruction that pursuant to Art. 33 § 1 of the Code of Administrative Procedure, only a natural person with full legal capacity may be a party's proxy in proceedings pending before the President of the UODO. The content of the letter also includes an instruction that if explanations are submitted on behalf of the Company by an authorized employee or proxy, an appropriate power of attorney should be sent entitling that person to act on behalf of the Company in the proceedings and the fee for the power of attorney granted should be paid.

5. Due to the lack of response by the Company to the above-mentioned request, in a letter of [...] April 2021, delivered [...] on May 2021, the President of the UODO again called on the Company to submit explanations in the case, within 7 days from the date of delivery of the letter. The content of the letter contained an instruction that the lack of an exhaustive response to the summons may result in the imposition of an administrative fine on the Company pursuant to Art. 83 sec. 4) letter a) or Art. 83

sec. 5) letter e) in connection with joke. 58 sec. 1 lit. a) GDPR. The letter also contained an instruction that if an authorized employee or attorney submits explanations on behalf of the Company, an appropriate power of attorney should be sent entitling that person to act on behalf of the Company in the proceedings and the fee for the power of attorney granted should be paid.

6. On [...] May 2021, the Office received a letter from O. S.A.. The letter and the explanations contained therein were again omitted by the authority - due to the fact that O. S.A. is not a party to the case and as a legal person could not be a representative of S. S.A. in administrative proceedings.

7. By letter of [...] October 2021, delivered [...] October 2021, the President of the UODO again summoned the company S. S.A. to submit explanations in the case within 7 days from the date of delivery of the letter. The content of the letter indicated that the explanations submitted in the letter received by the authority on [...] May 2021 from O. S.A., as an entity not being a party to the proceedings, will be disregarded. The letter again contained an instruction that pursuant to Art. 33 § 1 of the Code of Administrative Procedure, only a natural person with full legal capacity may be a party's proxy in proceedings pending before the President of the UODO. The content of the letter also includes an instruction that if explanations are submitted on behalf of the Company by an authorized employee or proxy, an appropriate power of attorney should be sent entitling that person to act on behalf of the Company in the proceedings and the fee for the power of attorney granted should be paid. At the same time, the President of the UODO informed that in the absence of an exhaustive response to the request, he would consider imposing on S. S.A. an administrative fine of up to EUR 20,000,000 or 4% of its total annual worldwide turnover from the previous financial year, with the higher amount applicable - pursuant to Art. 83 sec. 4 lit. a) or Art. 83 sec. 5 lit. e) GDPR.

8. On [...] October 2021, the Office received a letter from O. S.A. once again. Again, this letter and the explanations contained therein were omitted by the authority due to the fact that O. S.A. is not a party to the case and as a legal person it could not be a representative of S. S.A. in administrative proceedings

9. Power of attorney to act by O. S.A. for S. S.A., constituting an attachment to the letter of O. S.A., which was received by the authority [...] on May 2021, constituted a power of attorney to perform substantive legal acts within the meaning of the Civil Code. This type of document is not a power of attorney to replace the Company in administrative proceedings. The company ignored the instruction of the President of the UODO given twice (in letters of [...] February 2021 and [...] October 2021) as to the conditions for the effective appointment of a proxy in administrative proceedings pursuant to Art. 33 § 1 of the Code of

Administrative Procedure, which can only be a natural person as a proxy. This is evidenced by the fact that letters to the President of the UODO on behalf of S. S.A. was still managed by O. S.A., which is not a party to the case and, as a legal person, cannot act as an attorney of S. S.A. in administrative proceedings. For the reasons indicated above, letters from O. S.A. did not cause legal effects for S. S.A. in the proceedings [...] - it could not therefore be assumed that S. S.A. provided the President of the UODO with the required explanations.

10. In view of the above, by letter of [...] January 2022 (delivered [...] on January 2022), the President of the Office for Personal Data Protection initiated these proceedings regarding the imposition of an administrative fine for violation of art. 58 sec. 1 lit. a) and e) of the GDPR due to failure to provide access to personal data and information necessary for the President of the UODO to perform his tasks. In this letter, the authority also summoned S. S.A. to present the Company's financial statements for 2020 or - in the absence thereof - a statement on the amount of turnover and the financial result achieved by the Company in 2020 - in order to determine the basis for the administrative fine herein. In addition, the content of the letter contains an instruction that if S. S.A. will provide in writing - within 7 days from the date of delivery of information on the initiation of the proceedings - exhaustive explanations in the proceedings with reference number [...] and will justify the earlier lack of response to the summons, this circumstance may have a mitigating effect on the amount of the administrative fine imposed in these proceedings or may lead to a waiver of its imposition.

11. On [...] January 2022, the authority received a letter from the Company's attorney in which responses were provided to the requests of the President of the UODO in the proceedings with reference number [...]. The company regretted that the earlier letters that reached the authority were not signed by the attorney. The reasons for this process error were listed, e.g. the fact that the employee preparing the response to the request of the President of the UODO focused on the substantive content, but did not refer to the issue of the correct authorization (due to the incidental nature of the President of the UODO's address to the Company and the employee's lack of experience in this area). The explanations also emphasized that the situation took place during the COVID-19 pandemic, when many companies and organizations worked in the so-called standby mode. remote or hybrid work - which undoubtedly contributed to the inability to properly discuss the content of the instruction addressed to the Company. In the content of the letter, it was indicated that the Company is taking steps to explain the situation and to prevent similar events from occurring in the future. Considering the submission of explanations in the case and the fact that the Company's previous letters, despite the fact that they were not signed by an attorney who was a natural

person, contained substantive content, the Company's attorney requested withdrawal from imposing an administrative fine on the Company.

#### Legal assessment

12. After getting acquainted with all the evidence collected in the case, the President of the Office for Personal Data Protection considered the following.

13. According to art. 57 sec. 1 lit. a) GDPR, the President of the UODO - as a supervisory authority within the meaning of art. 51 of the GDPR - monitors and enforces the application of the GDPR on its territory. As part of his competence, the President of the UODO considers, among others: complaints lodged by data subjects, conducts investigations into these complaints to the appropriate extent and informs the complainant about the progress and results of these proceedings within a reasonable time (Article 57(1)(f)). In order to enable the implementation of such tasks, the President of the UODO is entitled to a number of tasks specified in art. 58 sec. 1 of the GDPR, the rights in the field of conducted proceedings, including the right to order the administrator and the processor to provide all information needed to perform its tasks (Article 58(1)(a) and the right to obtain from the administrator and the processor access to any personal data and all information necessary to perform its tasks (Article 58(1)(e)).

14. Violation of the provisions of art. 58 sec. 1 lit. a) and e) of the GDPR referred to above, consisting in the controller's or processor's failure to provide access to data and information, is subject to - in accordance with art. 83 section 5 letter e) in fine of the GDPR - 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.

15. The President of the UODO has a number of rights specified in Art. 58 sec. 2 corrective powers, including issuing reminders to the administrator or processor in the event of violation of the provisions of the GDPR by processing operations. The President of the UODO, acting pursuant to art. 58 sec. 2 lit. b) of the GDPR may consider it justified to issue a warning to the Company regarding the identified violation of the provisions of art. 58 sec. 1 lit. a) and e) GDPR. Pursuant to Recital 148 of the GDPR, in order to make enforcement of the Regulation more effective, sanctions should be imposed for its violation, including administrative fines - in addition to or instead of appropriate measures imposed by the supervisory authority under this Regulation. If the infringement is minor, the fine may be replaced by a warning. However, due attention should be paid to the nature, gravity and duration of the infringement, whether the infringement was intentional, the actions taken to minimize the

damage, the degree of responsibility or any significant previous infringements, the manner in which the supervisory authority found out of the infringement, compliance with the measures imposed on the controller or processor, the application of codes of conduct and any other aggravating or mitigating factors.

16. Referring the above-mentioned provisions of the GDPR to the facts established in this case, it should be stated that the Company, as the administrator of personal data being a party to the proceedings with reference number [...] by failing to respond to requests for explanations, violated the provisions of Article [...] 58 sec. 1 lit. a) and e) of the GDPR by failing to provide the President of the UODO with access to information necessary to perform his tasks.

17. The President of the UODO repeatedly called on the Company to provide explanations, repeatedly instructing about the shortcomings of formal letters that were delivered to the authority in response to the summons. These instructions were omitted by the Company, and subsequent letters submitted in the case contained the same formal deficiencies and could not be considered explanations from the Company. Therefore, the lack of explanations made it necessary to initiate these proceedings with reference number DKE.561.1.2022 regarding the imposition of an administrative fine on the Company.

18. As a result of the initiation of these proceedings, the Company started cooperation with the President of the UODO by sending detailed explanations in the proceedings [...], which allowed the President of the UODO to conduct further proceedings in the case.

19. In the opinion of the President of the UODO, the justification for the lack of response to his requests in the proceedings presented by the Company's attorney does not remove the Company's responsibility as the data controller. At the same time, however, it should be recognized that this explanation is plausible. In the opinion of the President of the UODO, the Company's lack of reaction to the instructions regarding the formal deficiencies of the letters could be caused by - mentioned in the letter of the Company's attorney (point 11 of the justification for the decision) - the lack of experience of the employee preparing the answers for the authority, as well as problems in organizing substantive work and exchanging information in the Company, caused, among others, by effects of the COVID-19 epidemic.

20. In the facts in question, apart from the lack of response to requests for clarification, which was supplemented by the Company as a result of the initiation of these proceedings, no other indications were found indicating the Company's lack of will to cooperate with the President of the UODO. In addition, it should be noted that the Company took responsibility for the infringement and provided financial documents that would make it easier for the President of the UODO to assess a possible

administrative fine. These circumstances of the case allow us to conclude that the Company's lack of reaction to the instructions of the President of the UODO in the proceedings with reference number [...] was not intentional.

21. In connection with the above, acting pursuant to art. 58 sec. 2 lit. b) of the GDPR, according to which each supervisory authority has the right to issue a reminder to the controller or processor in the event of violation of the provisions of this regulation by processing operations, the President of the UODO considers it justified to grant S. S.A. a reminder regarding the violation of the provisions of art. 58 sec. 1 lit. a) and e) GDPR.

22. The admissibility of replacing a fine with a reminder is also justified by recital 148 of the GDPR, which states that sanctions, including administrative fines, should be imposed "to make enforcement of the provisions of this Regulation more effective".

The President of the UODO decided that in the case in question, in the light of the criteria set out in Art. 83 sec. 2 of the GDPR, a reminder will be sufficient.

23. It should be noted, however, that in the event of a similar event in the future, each reminder issued by the President of the UODO against the Company will be taken into account when assessing the grounds for a possible imposition of an administrative penalty, in accordance with the principles set out in Art. 83 sec. 2 GDPR.

24. In this factual and legal situation, the President of the UODO decided as in the operative part of this decision.

The decision is final. The party has the right to lodge a complaint against the decision to 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 permanent entry fee of PLN 200 should be made 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 2022, item 329, as amended). The party (natural person, legal person, other organizational unit without legal personality) has the right to apply for the right to assistance, which includes exemption from court costs and the appointment of a lawyer, legal advisor, tax advisor or patent attorney. The right to assistance may be granted at the request of a party submitted before the initiation of the proceedings or in the course of the proceedings. The application is free of court fees.

Print article

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