

A P O F A S H 52/2021 Athens, 08-12-2021 Prot. No.: 2824 The Personal Data Protection Authority met, at the invitation of its President, in a regular meeting via teleconference on Wednesday 23.06.2021 at 09:00, in order to examine the case mentioned in the present history. The President of the Authority, Konstantinos Menudakos, and the regular members of the Authority Spyridon Vlachopoulos, Konstantinos Lambrinoudakis, as rapporteur, and Charalambos Anthopoulos were present. Present without the right to vote were the auditor Georgia Panagopoulou, specialist IT scientist, as assistant rapporteur and Irini Papageorgopoulou, employee of the administrative affairs department, as secretary. The Authority took into account the following: Seventeen (17) complaints were submitted to the Authority, using the Authority's special form, regarding the making of illegal telephone calls with the aim of promoting products or services of the company ZENITH - Gas Supply Company of Thessaloniki, Thessaly A. E.. The Authority informed the ZENITH company about this and received its answers, as follows: Regarding the complaint with no. prot. C/EIS/7278/22-10-2020 the answer with no. first C/EIS/8799/22-12-2020, regarding the complaint with no. prot. C/EIS/7685/10-11-2020 the answer with no. prot. C/EIS/8864/28-12-2020, regarding the complaint with no. prot. C/EIS/7758/11-11-2020 the answer with no. prot. C/EIS/8825/23-12-2020, regarding the complaint with no. prot. G/EIS/7522/3-11-2020 the answer with no. prot. C/EIS/8824/23-12-2020, regarding the complaint with no. prot. G/EIS/6788/7-10-2020 the answer with no. prot. G/EIS/8823/23-12-2020, regarding complaint no. prot. C/EIS/503/19-01-2021 and the complaint with no. prot. C/EIS/505/20-01-2021 the answer with no. prot. C/EIS/1728/10-03-2021, regarding the complaint with no. prot. C/EIS/601/25-01-2021 the answer with no. prot. C/EIS/1749/11-03-2021, regarding the complaint with no. prot. C/EIS/646/25-01-2021 the answer with no. prot. C/EIS/1747/11-03-2021, regarding complaint no. prot. C/EIS/692/27-01-2021 the answer with no. prot. C/EIS/1751/11-03-2021, regarding the complaint with no. prot. C/EIS/131/08-01-2021 the answer with no. prot. C/EIS/1721/10-03-2021, regarding the complaint with no. prot. C/EIS/1015/10-02-2021 and the complaint with no. prot. C/EIS/1391/26-02-2021 the answer with no. prot. C/EIS/1890/17-03-2021, regarding the complaint with no. prot. C/EIS/752/29-01-2021 the answer with no. prot. C/EIS/1753/17-03-2021 and regarding the complaints with no. prot. G/EIS/1340/24-02-2021, G/EIS/244/13-01-2021, G/EIS/998/09-02-2021 the answer with no. prot. C/EIS/1951/19-3-2021. For the above complaints, the main points included in ZENITH's responses are summarized as follows: ZENITH makes, both itself and through external partners, telephone calls to

prospective customers in order to inform them about its new products, any discounts and privileges. ZENITH holds the position of data controller, and the external partners (call centers) hold the position of processors of the subjects' personal data on behalf of ZENITH during the exercise of the above activity. In this context, ZENITH's communication with the complainants through One Way Private Company, in its capacity as the processor, is included. ZENITH, when choosing its partners, who assist it in promoting products and services, uses strict criteria, binds the processor with a special contract, as required by regular checks/inspections, in order to comply with the conditions of the relevant legislation. ZENITH has contracted with One Way of the GDPR, and is conducting to establish whether article 28 2 Private Company and, in addition, has signed with the company, as the processor, a private personal data processing agreement in which the context of the processing is described of the subjects' personal data and its obligations in relation to matters of compliance with the relevant legislative framework. In addition, ZENITH systematically follows procedures for the periodic control of companies performing, on its behalf, the processing (call centers), such as the partner in question, in the context of the relevant provisions of Article 28 of the GDPR, which control focuses on compliance with the of their obligations arising both from the existing personal data protection legislation and from the contract signed with the company. Furthermore, a team of ZENITH, with the assistance of its data protection officer, went to the premises of the partner company on 13-02-2020 and conducted an on-site inspection of compliance with the current legislation and the contract, the results of which were positive. It has given explicit guidelines to its employees on how to handle requests related to the processing of personal data of both its customers and prospective customers, it has already carried out and continues to regularly organize training seminars for its employees and employees of its partners in order to familiarize them with the new legislative framework on personal data protection, and provides the appropriate tools, files and instructions to prevent illegal calls. ZENITH forwarded the complaints to One Way Private Company and included its written explanations in its response documents. For the above complaints, the main points of the written explanations of One Way Private Company are the following: One Way Private Company strictly observes the existing legislation, and in this case the proper monitoring of those registered in the register of Article 11 of Law 3471/2006 telephone numbers, and constantly makes every effort to comply with its obligations, taking into account that it has taken organizational measures to ensure the 3 guarantees required for its compliance with the conditions of legality when carrying out promotional and other actions, having not only appropriate and documented procedures in accordance with international standards (ISO), but also having given written and detailed instructions to its staff for the strict observance of the procedure for maintaining the

register of article 11 of Law 3471/2006. The final list (electronic file) of telephone numbers to which calls are to be made in the name and on behalf of the provider is created after first excluding by automated process the telephone numbers to which it is not allowed, according to the current legislation, to make calls within the defined as upper range. This exception is made by using two (2) more files as follows: (I) Electronic file with the telephone numbers registered in the register of article 11 of Law 3471/2006. This file is received electronically from all major telecommunications providers on a monthly basis. (II) An electronic record of the telephone numbers registered in the objection register maintained by One Way Private Company. After the telephone numbers stored in the above two files are excluded by an automated process from the numbering range specified by the provider, the electronic file with the remaining telephone numbers from the numbering range specified above is entered into the dialer, which then begins to calls these numbers. The dialer forwards the calls made in this way to the company's promotional (sales) employees, and thus the product/service promotion process actually begins. One Way Private Company identified in the logs it maintains, the calls from its call center to the complainants (missed and answered). From a further check he carried out, on the dates the above telephone calls were made, indeed the telephone numbers mentioned in the complaints were registered in the article 11 register. However, the making of the individual calls was in no way due to fraud, bad intent or deliberate non-observance of One Way Private Company's statutory obligations, but in purely systemic error. Company 4 has already immediately taken the required remedial actions to avoid any further harassment of the complainants for the purpose of advertising, promotion or other actions and has also included their telephone numbers in the register of objections that it maintains, and no calls have been made to these telephone numbers from now on numbers. The Authority then invited ZENITH and One Way Private Company with no. prot. C/EXE/874/18-03-2021, C/EXE/873/18-03-2021 summons to the Plenary meeting on 3/31/2021. Appeared on behalf of ZENITH were: A, Director ..., Antonios Broumas with AMDSA and Konstantinos Panagos with AMDSA One Way Private Company was represented by B, responsible for the operation of the specific advertising campaign and C, Responsible for D, its Data Protection Officer, was also present at the meeting company, in order to provide clarifications. After the meeting, documents with no. prot. C/EIS/2637/19-04-2021, C/EIS/2653/19-04-2021 memoranda from ZENITH and One Way Private Company respectively. In no. prot. C/EIS/2637/19-04-2021 memorandum ZENITH adds that due to human error by employees of One Way Private Company, the problem of non-exclusion of subscribers who have joined the article 11 registry from the "cold lists" was caused telephone numbers. The company is not at fault since both contractually and by acting appropriately after receiving the Authority's letters,

it acted as it should as a data controller. In no. prot. C/EIS/2653/19-04-2021 memorandum One Way Private Company identifies the systemic error, i.e. that due to an employee's omission the process of excluding the subscribers who have been added to the article 11 register from the "cold lists" was not carried out phone numbers called by the dialer. The issue did not concern all lists but a small number of them. The time period during which this omission occurred is 28/11/2020 until 18/12/2020 and 20/12/2020 until 3/2/2021. The number of numbers called by One Way Private Company on behalf of 5 ZENITH during the months of November and December were 851,972 and 732,322 respectively. The calls answered were 408,041 and 343,303 respectively. Soon after the error was discovered, the process of de-listing numbers in the Article 11 register was automated, so that a similar error could not occur in the future. The Authority, after examining the elements of the file, after hearing the rapporteur and the clarifications from the assistant rapporteur, who was present without the right to vote and left after the discussion of the case and before the conference and decision-making, following a thorough discussion ,

CONSIDERED ACCORDING TO THE LAW 1. The issue of telephone calls, for the purposes of direct promotion of products or services and for any kind of advertising purposes, is regulated in article 11 of Law 3471/2006, which introduces regulations regarding unsolicited communications (see par. 1 and 2). Specifically, in article 11 par. 1 of Law 3471/2006 it is defined that: "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 the purposes of direct commercial promotion of products or services and for any kind of advertising purposes, is allowed only if the subscriber expressly consents in advance", while paragraph 2 of the same article states that: "It is not allowed to make unsolicited communications with human intervention (calls) for the above purposes, as long as the subscriber has declared to the provider of the service available to the public, that he generally does not wish to receive such calls. The body is obliged to register these statements free of charge in a special list of subscribers, which is available to anyone interested". Consequently, telephone calls with human intervention, in view of the above purposes, are allowed, unless the called party has declared that he does not wish them ("opt-out" system). The 6 advertisers, as long as they carry out telephone promotions with human intervention, must receive from all providers updated copies of the registers of article 11 of Law 3471/2006 and ensure that they have available the subscribers' statements made up to thirty days before from making the telephone call (see also Decisions no. 62-67/2016 of the Authority). 2. Furthermore, the telephone number of a natural person is personal data, since it can function as an element of indirect identification of its owner (cf. article 4 par. 1 of Regulation (EU) 2016/679, hereinafter

GDPR), allowing communication with him . 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. 3. Making telephone calls for the purpose of promoting products and services is regulated in principle by article 11 of Law 3471/2006. However, it should be pointed out that, in article 3, paragraph 2 of this law, it is clarified that "Law 2472/1997, as applicable, and the executive laws of article 19 of the Constitution, as applicable, apply to every issue related to the provision of electronic communications services , which is not specifically regulated by this law". Now, after the implementation of the GDPR, any reference to Law 2472/1997, which was issued in compliance with Directive 95/46/EC, is understood as a reference to the GDPR (see also article 94 par. 1 GDPR) . Therefore, for every issue related to the provision of electronic communications services to subscribers or users who are natural persons and which is not specifically regulated in Law 3471/2006, the GDPR applies (see also article 95 GDPR as well as the recital under number 173). 4. In article 4 par. 7 of the GDPR, a data controller is defined as "...the natural or legal person, public authority, agency or other entity that, alone or jointly with others, determines the purposes and manner of personal data processing character...". The processor is defined in the 7th subsequent paragraph of the same article as "the natural or legal person, public authority, agency or other body that processes personal data on behalf of the controller". 5. In Article 28 of the GDPR, which regulates the matters concerning the processor, paragraph 1 provides that when the processing is to be carried out on behalf of a controller, the controller uses only processors who provide sufficient assurances for the implementation of appropriate technical and organizational measures, in such a way that the processing meets the requirements of this regulation and ensures the protection of the rights of the data subject, while in par. 3 it is specified that processing by the processor is governed by a contract or another legal act subject to the law of the Union or the Member State, which binds the processor in relation to the controller and determines the object and duration of the processing, the nature and purpose of the processing, the type of personal data and the categories of data subjects and the obligations and rights of the controller. The said contract or other legal act provides in particular that the processor processes the personal data only on the basis of recorded instructions of the data controller, takes all the required measures pursuant to article 32. 6. Article 32 of the GDPR defines, among other things, that both the controller and the processor implement appropriate technical and organizational measures in order to ensure an appropriate level of security against risks, taking into account the latest developments, the costs of implementation and the nature, scope, context and purposes of the processing,

as well as the risks of different probability of occurrence and severity for the rights and freedoms of natural persons. The controller and the processor shall take measures to ensure that any natural person acting under the supervision of the controller or the processor who has access to personal data processes it only on the instructions of the controller. It follows from these provisions that the responsibility for the observance of appropriate security measures rests with both the controller and the processor and therefore responsibility for a breach of security measures should be apportioned and attributed appropriately. 7. According to the Guidelines of the GDPR Directives 07/2020 on the concepts of controller and processor in the GDPR in paragraph (127) it is stated that the level of instructions provided by the controller to the processor as to the measures to be taken it depends on the specific conditions. In some cases, the controller may provide a clear and detailed description of the security measures to be implemented. In other cases, the controller may describe the minimum security objectives to be achieved, while asking the processor to propose the implementation of specific security measures. In any case, the controller must provide the processor with a description of the processing activities and security objectives (based on the controller's risk assessment), as well as the approval of the measures proposed by the processor. 8. As can be seen from the data in the case file, ZENITH, through contract, commissions One Way Private Company to carry out advertising calls to promote its own products and services. With the contract, the printed instructions and other instructions he provides to One Way Private Company, ZENITH sets a series of specifications, by which it is determined the context of its partner's activities with the aim of satisfying the GDPR requirements described in paragraph 5. ZENITH determines fully the goal of the processing, therefore also its purpose, while also determining the basic features for processing media.

9. In accordance with paragraphs 5 and 6, the data controller and the person performing it processing undertake the implementation of the appropriate measures in order to ensure the appropriate level of security against risks. The

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error in the One Way Private processing application

Company which led to phone calls to subscribers who had

be included in register 11, in violation of article 11 of Law 3471/2006 (see paragraph 1), arose from an omission by its employee and is a result of it lack of an automatic opt-out process for subscribers who have join the register 11.

10. The responsibility for not applying the appropriate measures, in violation of of articles 28 and 32 of the GDPR (see paragraphs 6,7) should be distributed to processing and to the controller. From the evidence of the file it appears that One Way Private Company was responsible for it special application through which those included in are excluded from the dialer register telephone numbers whose exemption obligation was foreseen expressly contractual. Also, its non-automated activation mode exception mechanism as well as liability for the employee's failure to activating it and not controlling it belongs exclusively to One Way Private Company.

11. The responsibility of ZENITH, as data controller, is to provide appropriate tools, principles and guidelines to prevent illegal calls. THE ZENITH's responsibility also concerns the adequacy of control and supervision of One Way Private Company but also the actions taken by ZENITH as soon as he became aware of the complaints. These actions of ZENITH were not sufficient to determine its cause during the control it carried out infringement and to give appropriate special instructions to One Way Private Company, but were only of a general nature.

12. The number of phone calls made to numbers entered in the article 11 register cannot be precisely determined as it is not mentioned in the memorandum of One Way Private Company, although it had requested by the Authority. The quantitative element included in the legend

is the number of phone numbers called by One Way

Private Company on behalf of ZENITH during the months of November and December, which were 851,972 and 732,322 respectively.

13. Regarding the seventeen complaints of natural persons mentioned

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at the beginning of the present for making illegal phone calls with

for the purpose of promoting products or services, which are accepted by

responsible and the processor, the Authority finds that the complaints

these are valid.

14. Based on the above, the Authority considers that there is a case to exercise the v

the article 58 par. 2 of the GDPR corrective powers in relation to

violations found and that, based on the circumstances found,

must be imposed, pursuant to the provision of par. 2 sec. i' of the article

of this, effective, proportionate and dissuasive administrative money

fine according to article 83 of the GDPR both to restore compliance,

as well as a sanction for illegal behavior.

15. Furthermore, the Authority took into account the criteria for measuring the fine which

are defined in article 83 par. 2 of the GDPR, paragraph 5 item a' and b' of

of the same article that apply to the present case and the

Guidelines for the implementation and determination of administrative

of fines for the purposes of the GDPR, as well as its actual data

case under consideration and in particular:

a) the nature of the damage to the called subscriber or user, who while having

declare his opposition to receiving telephone calls from advertising

character, becomes the receiver of telephone harassment without respecting it

right of objection he has expressed

- b) the number of affected persons, which was not specified precisely by One Way Private Company, although requested, and presumed that is important, since the number of calls made for ZENITH account during the period in which the system existed error is over 1.5 million
- c) that it is not personal data of special categories of articles 9 and 10 of the GDPR
- d) that seventeen complaints were submitted to the Authority
- e) that no administrative sanction has been imposed by the Authority in the past to the controller nor to the processor
- f) The fact that the aforementioned violations of the GDPR do not

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it is proved beyond doubt that they are attributable to the fraud of the person responsible processor or the processor

g) According to the information that is publicly available at G.E.M.H., the revenues of One Way Private Company for the year 2019 was 9,055,814.51.

16. The corrective measure of the administrative fine, as it was analyzed in previous consideration, is imposed for the whole offense, in which included are the cases of the complainants who are recipients of the decision.

FOR THOSE REASONS

The Authority imposes on the processor One Way Private Company with based on articles 58 par. 2 item i' and 83 par. 4 item a' and b' GDPR, the effective, proportionate and dissuasive administrative fine which appropriate in the specific case, according to the special circumstances thereof, in the amount of thirty thousand (30,000) euros for violation of article 32 par. 2

and 4 of the GDPR in conjunction with article 28 par. 3, para. c of the GDPR, in relation to the mentioned in paragraphs 9 and 10.

It imposes on the ZENITH controller, the sanction of the reprimand, according to with article 58 par. 2 of the GDPR, for violation of article 28 par. 3 para. c of the GDPR, in relation to what is mentioned in paragraph 11.

The president

The Secretary

Konstantinos Menudakos

Irini Papageorgopoulou