

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, on 30

September

2020

DECISION

ZKE.440.32.2019

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), art. 160 sec. 1 and 2 of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781) in connection with joke. 12 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 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 4 May 2016, p. 1 and Journal of personal data by U. Sp. z o.o. - President of the Personal Data Protection Office
refuses to accept the request.

JUSTIFICATION

The Office of the Inspector General for Personal Data Protection (currently the Office for Personal Data Protection) received a complaint from Mr. Z. D., hereinafter also referred to as the Complainant, about the processing of his personal data by U. Sp. z o.o., hereinafter also referred to as the Operator.

Mr. Z. D. indicated that the Operator processes his personal data (including e-mail address) in order to provide telecommunications services. In addition, as a telecommunications operator, he processes the personal data of Mr. Z. D. for marketing purposes, despite the fact that he did not consent to the processing of data for such purposes.

In the formulated request addressed to the President of the Office, the Complainant indicated that he requested the Operator to remove deficiencies in the processing of personal data by:

- 1) fulfillment of the information obligation in relation to Mr. Z. D. resulting from the provisions on the protection of personal data,
- 2) cessation of the processing of personal data for marketing purposes without the consent of Mr.Z. D.

Based on the evidence gathered in the case at hand, the following facts were established.

1. As indicated by the Operator, on [...] June 2014, a service agreement was signed with Mr. Z. D. (Subscriber Agreement).

Due to its signing, the Complainant did not consent to the processing of personal data for marketing, promotional and advertising purposes of various types of goods and services provided by other entities sent by e-mail, automatic calling system or other means of electronic communication. However, the information obligation resulting from Art. 24 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended), the operator implemented in the "regulations for the provision of services by U. Sp. z o.o. "

2. On [...] February 2015, Mr. Z. D. lodged an objection to the Operator against the processing of his personal data for marketing purposes.

3. As the Operator explained, from [...] February 2015 no marketing offers were directed to the Complainant.

4. By letter of [...] February 2015, ref. No. [...] The operator informed Mr. Z. D. about taking into account his objection to data processing for marketing purposes, ensuring that his data will no longer be used for this purpose. In the above-mentioned in writing, he also fulfilled the information obligation referred to in Art. 24 of the Act of August 29, 1997 on the Protection of Personal Data.

5. The Operator attached a copy of the letter of [...] February 2015, ref. No. [...] addressed to the Complainant, together with the proof of posting it.

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

On May 25, 2018, the provisions of the Act of May 10, 2018 on the Protection of Personal Data (Journal of Laws, item 1000, as amended), hereinafter referred to as "u.o.d.o.", entered into force.

Pursuant to Art. 160 sec. 1-3 of the Act, proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before the date of entry into force of this Act, are conducted by the President of the Personal Data Protection Office on the basis of the Act of August 29, 1997 on the Protection of Personal Data (Journal U. of 2016, item 922, as amended), in accordance with the principles set out in the Act of June 14, 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), hereinafter referred to as "kpa ". At the same time, the activities performed in the proceedings initiated and not completed before the effective date of the provisions of the Act on

From May 25, 2018, also 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 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".

Taking into account the above, it should be stated that the present proceedings, initiated and not completed before May 25, 2018, are conducted on the basis of the Act of August 29, 1997 on the protection of personal data (with regard to the provisions governing the administrative procedure) and on the basis of the Regulation 2016/679 (in the scope determining the legality of the processing of personal data). The method of conducting proceedings in cases initiated and not completed before the date of entry into force of new regulations on the protection of personal data, resulting from the provisions of law, correlates with the well-established position of the doctrine, according to which "a 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 the public administration authority issues an administrative decision on the basis of the provisions of law in force at the time of its issuance "(Commentary to the Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws No. 00.98.1071) M. Jaśkowska, A. Wróbel, Lex., El / 2012).

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.

It should be emphasized that under the applicable provisions, the processing of personal data is lawful when the data controller has at least one of the provisions set out in art. 6 sec. 1 of Regulation 2016/679, the material conditions for the processing of personal data. According to the above-mentioned of the 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 of 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; f) processing is necessary for the purposes of the legitimate interests

pursued by the administrator or by a third party, except where these interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require protection of personal data, in particular when the data subject is a child. Pursuant to Art. 57 sec. 1 of Regulation 2016/679 GDPR, without prejudice to other tasks set out under this Regulation, each supervisory authority on its territory monitors and enforces the application of this Regulation (point a) and considers complaints brought by the data subject, or by the entity, organization or an association in accordance with Art. 80, to the extent appropriate, conducts proceedings on these complaints and informs the complainant about the progress and the results of these proceedings within a reasonable time, in particular if it is necessary to continue investigations or coordinate actions with another supervisory authority (point f).

It should be noted here that the President of the Office, when issuing an administrative decision, is obliged to make a decision based on the actual state of affairs at the time of issuing the decision. As the doctrine quotes: "a 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 implements the goal of administrative proceedings, which is the implementation of the applicable 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., EI / 2012). Also in the judgment of May 7, 2008 in the case no. act I OSK 761/07, the Supreme Administrative Court 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 and whether it is done in a manner consistent with law ". It is undisputed that the Operator processed the Complainant's personal data for marketing purposes, but this state has already ceased [...] February 2015. Therefore, it should be noted that at the moment the Operator does not process the Complainant's personal data in a manner questioned by him in the complaint . Currently, the Operator processes the complainant's personal data only for the purpose of providing the subscription service. In this factual and legal state, the President of the Personal Data Protection Office resolved as in the sentence. 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 of the case, 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 fee for the complaint is PLN 200. The party has the right to apply for the right to assistance, including exemption from court costs.

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