

**PRESIDENT
OF THE PERSONAL DATA
PROTECTION OFFICE**

Jan Nowak

Warsaw, 10 November 2021

ZSPR.440.1779.2019.PT.WU

Previous Ref. No.: **ZSPR.440.1662.2019.ZS.MKA**

DECISION

On the basis of Article 105 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (consolidated text: Dz. U. [Journal of Laws] of 2021 item 735), and Article 7 paragraph 1 and 2 of the Act of 10 May 2018 on the personal data protection (consolidated text: Dz. U. [Journal of Laws] of 2019 item 1781) and Article 60 (8) of the 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 (OJ EU L 119 of 04/05/2016, p. 1, OJ EU L 127 of 23/05/2018, p. 2 and OJ EU L 74 of 04/03/2021, p. 35) after having carried administrative proceedings in the case of [REDACTED], residing in [REDACTED] [REDACTED], relating to irregularities in the processing of his personal data by [REDACTED] [REDACTED] based in Budapest, [REDACTED], by failing to comply with the request to erase his personal data, the President of the Personal Data Protection Office

shall discontinue the proceedings.

Justification

The Personal Data Protection Office received a complaint from [REDACTED], residing in [REDACTED], hereinafter referred to as the Complainant, on irregularities in the processing of his personal data by [REDACTED] with its registered office in Budapest [REDACTED], hereinafter referred to as the Company, consisting in failure to comply with the request to erase his personal data.

In the course of the administrative proceedings, the President of the Personal Data Protection Office, hereinafter also referred to as the President of the Office, established the following facts.

1. The Complainant received unwanted marketing messages at his email addresses: [REDACTED], [REDACTED], [REDACTED] and [REDACTED];
2. The Complainant used the "wypisz się/unsubscribe" button in order not to receive further messages;
3. The Complainant also requested by an email to discontinue sending marketing messages to his email addresses;
4. Regarding the cross-border nature of proceedings pursuant to Article 4(23) of the 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 (OJ EU L 119 of 04/05/2016, p. 1, OJ EU L 127 of 23/05/2018, p. 2 and OJ EU L 74 of 04/03/2021, p. 35), hereinafter referred to as: GDPR, pursuant to Article 56(1) GDPR the proceedings has been referred to the lead supervisory authority, which is the Hungarian supervisory authority (Nemzeti Adatvédelmi és Információszabadság Hatóság), hereinafter referred to as the 'Hungarian Supervisory Authority';
5. The Hungarian Supervisory Authority considered itself to be the lead authority on 16 January 2020 based on the fact that the Company has its headquarters in Hungary;
6. The Hungarian Supervisory Authority asked the President of the Office to provide documents certifying that there is a button or a link in the emails sent by the Controller to unsubscribe from the newsletter;
7. On 9 June 2020, the President of the Office asked the Complainant to provide documents confirming that in the emails sent by the Controller there is a button or a link to unsubscribe from receiving the newsletter;
8. The Complainant attached to the letter of 9 June 2020 his e-mail correspondence with the Company confirming that in the emails sent by the Company there is a link to unsubscribe from receiving the newsletter;
9. The President of the Office forwarded to the Hungarian Supervisory Authority the documents which received from the Complainant together with their translation into English;

10. The Hungarian Supervisory Authority informed that it had contacted the Company, which informed that it was not the owner of the domains from which marketing messages are sent to the Complainant;
11. The Hungarian Supervisory Authority issued a draft decision in the case in which it concluded that in relation to the finding that it is not the Company that is sending marketing messages to the Complainant, it is not the lead authority within the meaning of Article 56(1) GDPR and ended the proceedings;
12. The President of the Office did not raise a reasoned objection to the draft decision and agreed with the draft decision prepared by the Hungarian Supervisory Authority;
13. In relation to the dismissal of the Complainant's complaint by the Hungarian Supervisory Authority, the President of the Office, pursuant to Article 60(8) GDPR, as the authority receiving a complaint, is obliged to adopt a decision.

The President of the Office, after reviewing all the evidence gathered, considered the following.

The Complainant indicated in the complaint that the company [REDACTED] [REDACTED] with its registered office in Budapest, at [REDACTED], as a defendant. The President of the Office, acting as a public authority, is bound by the content of the complaint and the scope of the party's request.

It should be pointed out that the President of the Office, when issuing an administrative decision, is obliged to decide on the basis of the facts existing at the time of the adoption of that decision. As stated in the legal doctrine, "the public authority shall assess the facts of the case at the time when the administrative decision was adopted. This rule also applies to the assessment of the legal status of the case, which means that the public authority issues an administrative decision on the basis of the legal provisions in force at the time of its adoption (...). Adjudication in administrative proceedings consists of applying the law to the established facts of an administrative case. In this way the public authority pursues the purpose of administrative proceedings, which is to implement a binding legal norm in administrative-legal relations, when these relations require it" (Commentary to the statute of 14 June 1960, Code of Administrative Procedure, M. Jaśkowska, A. Wróbel, Lex., el/2012). Furthermore, in the judgment of 7 May 2008 in the case Ref. No. I OSK 761/07, the Polish Supreme Administrative Court stated that "when examining the lawfulness of personal data processing, the GIODO is obliged to determine whether, on the date of issuing a decision in the case, data of a particular entity are processed and whether this is done in a lawful manner".

The decisive factor for the decision to be issued in this case is the fact that the Company does not process the Complainant's personal data and is not the Controller of the domains from which the Complainant receives unwanted marketing messages.

Under these circumstances, the present proceedings are subject to discontinuation pursuant to Article 105 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (consolidated text: Dz. U. [Journal of Laws] of 2021 item 735), hereinafter referred to as Kpa, due to the fact they have become devoid of purpose. Under that provision, where the proceedings have for any reason become devoid of purpose in whole or in part, the public authority is to issue a decision to discontinue the proceedings in whole or in part, respectively. The wording of that provision leaves no doubt that, if the proceedings is found to be devoid of purpose, the authority conducting the proceedings mandatorily discontinues them. At the same time, the literature on the subject-matter indicates that the administrative procedure devoid of purpose, as provided for in Article 105(1) of the Code of Administrative Procedure, means that there is no element of a substantive legal relationship and, therefore, no decision can be taken to settle the case by deciding on the merits of the case (B. Adamiak, J. Borkowski 'Code of Administrative Procedure. Commentary' 7th edition, C.H. Beck, Warsaw 2005, p. 485). The same position was taken by the Provincial Administrative Court in Cracow in its judgment of 27 February 2008 (III SA/Kr 762/2007): "Proceedings shall become devoid of purpose if one of the elements of the substantive relationship is absent, which means that the case cannot be settled by a decision on the merits".

The assessment carried out by the President of the Office shall in each case examine the validity of referring to a particular entity a decision corresponding to the content of Article 58(2) GDPR, which is intended to restore the lawful state of the processing of data - is therefore justified and necessary only insofar as the processing of personal data in question exists.

In this factual and legal state, the President of the Personal Data Protection Office adjudicated as in the operative part.

Under the authority of the President
of the Personal Data Protection Office

[REDACTED]

[REDACTED]

This decision is a final decision. Based on Article 7 para. 2 of the Act of 10 May 2018 on the Protection of Personal Data (consolidated text: Dz. U. [Journal of Laws] of 2019, item 1781) and in connection with Article 13 § 2, Article 53 § 1 and Article 54 of the Act of 30 August 2002 Law on proceedings before administrative courts (consolidated text: Dz. U. [Journal of Laws] of 2019, item 2325), the party has the right to bring a complaint to the Wojewódzki Sąd Administracyjny w Warszawie [Voivodeship Administrative Court in Warsaw] against this decision, within 30 days from the date of delivery of this decision, through the President of the Personal Data Protection Office (address: Urząd Ochrony Danych Osobowych, ul. Stawki 2, 00-193 Warszawa). The fee for the complaint is PLN 200. 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 of assistance may be granted upon application by a party submitted prior to the initiation of the proceedings or in the course of the proceedings. This application is exempt from court fees.