

STATE DATA PROTECTION INSPECTORATE

DECISION ON 25 SEPTEMBER 2020 COMPLAINT OF [REDACTED]

___ May 2021 No 3R- (2.13-1.)
Vilnius

The State Data Protection Inspectorate (hereinafter referred to as the “Inspectorate”) received 25 September 2020 complaint of [REDACTED] (hereinafter referred to as the “applicant”) lodged by the Latvian supervisory authority through the Internal Market Information System of the European Commission (received by the Inspectorate on 10 February 2021, reg. No 1R-942(2.13.Mr) (hereinafter referred to as the “complaint”).

The applicant states in the complaint that if ones wants to receive a gift voucher on the website [REDACTED], one must consent to receipt of direct marketing notifications.

Having examined the applicant’s complaint, the Inspectorate, within its competence,

has determined the following:

[REDACTED] (hereinafter referred to as the “Company”) in its 4 March 2021 response (received by the Inspectorate on 5 March 2021, reg. No 1R-1629(2.13.Mr) and 8 March 2021, reg. No 1R- 1710(2.13.Mr) stated that during the period from 1 August 2020 to 30 September 2020) it carried out a sales promotion on its website [REDACTED] during which it invited the customers to register and receive a discount voucher for the amount of EUR 50 for purchase in [REDACTED] stores. The conditions of the proposal and the registration form in which the following information: name, surname (optional), telephone number, e-mail address, was collected and a consent to subscription of news and proposals of [REDACTED] was laid down, were provided in the registration page. The customer’s consent to subscription of news was necessary, since the Company did not request for a separate consent of the person to taking part in the sales promotion and receipt of a discount voucher for EUR 50 by e-mail. The Company followed paragraph 1 of Article 69 of the of the Law on Electronic Communications (hereinafter referred to as the “LEC”) which provides for that the use of electronic communications services, including electronic mail, for the purposes of direct marketing may only be allowed in respect of subscribers or registered users of electronic communications services who have given their prior consent; therefore, it considered that sending of a discount voucher (marketing product) is deemed to be equivalent to sending of marketing notifications allowed only subject to a prior consent of the customer. It has noted that a discount voucher for EUR 50 is valid only the purchases for the amount higher than EUR 300 are made, the proposal was relevant to the targeted customers who were planning to purchase goods for the amount higher than EUR 300 in [REDACTED] stores; thus, they had to know about the range of the goods offered by [REDACTED] and the sales promotions, since operation of [REDACTED] stores was restricted due to COVID-19 pandemic and it was really difficult for the customers to visit the stores (it was recommended for the persons to refrain from visits to the shopping centres and stores other than food stores at the national level). The Company sought to provide the customers who mainly took part in the sales promotion with the intention to use the discount voucher with relevant information without infringing the requirements provided for in paragraph 1 of Article 69 of the LEC. A customer who received an e-mail with a discount voucher for the amount of EUR 50 was enabled to unsubscribe newsletters at the bottom of the e-mail at the same moment. The Company considers that the consent of the participants of the sales promotion to subscription to news and proposals of [REDACTED] is not considered as forced or inextricably connected with other conditions of the sales promotion because the discount voucher was sent by e-mail, without requesting any other consent of the customer to sending of the voucher. On the basis of the afore-mentioned consent, the Company was entitled to send a marketing product, i.e.

the discount voucher, to the customer. The Company has acknowledged that evaluation of the registration form may create an impression that the consent to personal data processing may be considered as mandatory remuneration for provision of the service (discount). The company sought to protect itself and its customers and sent the marketing product (discount voucher for the amount of EUR 50) to them only with the customer's consent to receiving the Company's information on sales promotions, news and other proposals of [REDACTED], i.e. consent to processing his/her personal data for direct marketing purposes. It has pointed out that the Company suspended the aforementioned sales promotion and is not planning to continue it in the future.

Pursuant to paragraph 1 of Article 2 of the Republic of Lithuania Law on Legal Protection of Personal Data (hereinafter referred to as the "LLPPD"), direct marketing shall mean an activity intended for offering goods or services to individuals by post, telephone or any other direct means and/or for obtaining their opinion about the offered goods or services.

In the light of the afore-mentioned definition, the condition of the form of registration at the Company for receipt of the discount voucher "I wish to receive news about the products, services and proposals of [REDACTED] in which I may be interested by e-mail. I know that I may unsubscribe from such newsletters at any time." is definitely associated with the activities aimed at offering goods or services by mail, telephone or other direct means, i.e. with direct marketing. Thus, the aforementioned activities are subject to the Law on Electronic Communications paragraph 1 of Article 69 of which provides for that the use of electronic communications services, including electronic mail, for the purposes of direct marketing may only be allowed in respect of subscribers or registered users of electronic communications services who have given their prior consent.

Article 4(11) 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 Data Protection Regulation) (hereinafter referred to as the "GDPR") sets forth the definition of the consent of the data subject, i.e. any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

Article 5(1)(a) of the GDPR provides for that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency').

Article 7(2) of the GDPR sets forth that If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding. Recital 43 of the Preamble to the GDPR provides for that consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case.

The Company has pointed out that, in this case, sending of the discount voucher (marketing product) is deemed to be equivalent to sending of marketing notices which is allowed only subject to a prior consent of the customer.

The Inspectorate agrees that so that the Company could send a discount voucher to a person, his/her consent was necessary for the Company; nevertheless, it should be pointed out that, in the case in question, in order to receive a discount voucher, the applicant had to give her consent not only to receipt of the notification with which the voucher was sent but also to receipt of other (different) direct marketing notifications. In the case in question, the condition of the form of registration at the Company for receipt of the discount voucher was such from which the applicant could infer that her electronic communication contacts (e-mail address) would be processed only for the purposes of sending the discount voucher and the explanation of the Company suggests that the consent was mandatory and was collected not only for sending of a discount voucher. The Company also states that the discount voucher for the amount of EUR 50 was valid only the purchase amounted to EUR 300, the proposal was relevant to the targeted customers who were planning to purchase goods for the amount higher than EUR 300 in [REDACTED] stores; thus, they had to know about the range of the goods offered by [REDACTED] and the sales promotions, since operation of [REDACTED] stores was restricted

due to COVID-19 pandemic and it was really difficult for the customers to visit the stores (it was recommended for the persons to refrain from visits to the shopping centres and stores other than food stores at the national level). A customer who received an e-mail with a discount voucher for the amount of EUR 50 was enabled to unsubscribe newsletters at the bottom of the e-mail at the same moment.

The Inspectorate has noted that, in the case in question, the Company did not allow persons to give a separate consent to processing of personal data for direct marketing purposes by sending information on goods and proposals. If a person wishes to receive a discount voucher from [REDACTED], he/she must give his/her consent to processing of personal data for direct marketing purposes (not only for the purposes of receipt of the discount voucher) and only then he/she could withdraw his/her consent what calls into question the voluntary principle because the consent to processing of personal data for direct marketing purposes must be confirmed by the data subject by an active action, for example, marking by a "tick" etc. allowing the data subject to express his/her will to consent or dissent to processing of his/her personal data for direct marketing purposes. In the case in question, the Company's arguments that the discount voucher was valid only if the purchase for the amount higher than EUR 300 was made, the proposal was relevant to the targeted customers who were planning to purchase goods for the amount higher than EUR 300 in [REDACTED] stores; thus, they had to know about the range of the goods offered by [REDACTED] and the sales promotions, since operation of [REDACTED] stores was restricted due to COVID-19 pandemic, is not relevant, since a person may voluntarily visit the Company's website and familiarise himself/herself with the offered range without separate proposals of the Company.

In the given case, by allowing persons to receive the discount voucher only subject to consent to receiving direct marketing notifications of products, services and proposals, the Company improperly complied with Article 5(1)(a) and Article (7)(2) of the GDPR and, following Article 58(2)(b) of the GDPR, a reprimand should be issued to the Company. According to the Inspectorate, in this case, imposition of other sanctions would not be proportionate.

Please note that, following Article 60(3) of the GDPR, on 12 May 2021 the draft decision on the applicant's complaint was uploaded through the Internal Market Information System of the European Commission and addressed to the Latvian supervisory authority so that it could express its opinion. The Latvian supervisory authority has failed to provide objections to the draft decision within the time limit set forth in Article 60(4) of the GDPR; therefore, following Article 60(6) of the GDPR, the Latvian supervisory authority is deemed to have accepted the decision.

In the light of the above and following subparagraph 1 of paragraph 1 of Article 31, subparagraph 1 of paragraph 2 of Article 31 of the LLPPD, Article 58(2)(b) of the GDPR, the Inspectorate

has decided the following:

1. To declare the complaint reasonable.
2. To issue a reprimand to the Company.
3. To notify the applicant of the decision taken through the Latvian supervisory authority and the Company.

This decision may be appealed against to Vilnius Regional Administrative Court (address: Žygimantų g. 2, Vilnius) in accordance with the procedure established in the Republic of Lithuania Law on Administrative Proceedings within one month from the date of service thereof.

Director