THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 12

of December

2018

DECISION

ZSPR.440.195.2018

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096) and art. 160 sec. 1 and 2 of the Personal Data Protection Act of May 10, 2018 (Journal of Laws of 2018, item 1000, as amended) and art. 18 sec. 1 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922 and of 2018, item 138), in connection with Art. 6 sec. 1 lit. c of 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 (Journal UE L 119 of 04/05/2016, p. 1 and EU Official Journal L 127 of 23/05/2018, p. 2), in connection with Art. 105 paragraph. 4 and art. 105a paragraph. 1 and 3 of the Banking Law Act of August 29, 1997 (i.e. Journal of Laws of 2017, item 1876, as amended), following administrative proceedings regarding the complaint of Mr. T. W., represented by Mrs. A. G. from Kancelaria Sp. z o.o., for the processing of his personal data by Bank S.A., and their transfer to B. S.A., President of the Office for Personal Data Protection,

orders Bank S.A. to cease processing personal data of Mr. T. W., regarding account number (...) in the B. S.A. system processed on the basis of art. 105a paragraph. 3 of the Banking Law.

Justification

The Office of the Inspector General for Personal Data Protection received a complaint from Mr T. W., hereinafter referred to as the Complainant, represented by Ms A. G. from Kancelaria Sp z o.o., about the processing of his personal data by Bank S.A., hereinafter referred to as the Bank, and their transfer to B. S.A., hereinafter referred to as B.

In the complaint, the complainant pointed out that the Bank did not meet the requirements entitling it to start processing its personal data in database B. in connection with the debt resulting from the obligation on [...] June 2008, because the Bank did not meet all the conditions of Art. 105a paragraph. 3 of the Banking Law of August 29, 1997 (Journal of Laws of 2016, item 1988, as amended), hereinafter referred to as the Banking Law, i.e. the Bank never notified the Complainant about the

intention to process his personal data without his consent in the database of B.

In the course of the proceedings conducted in this case, the President of the Personal Data Protection Office established the following facts.

The Complainant's personal data was collected by the Bank in connection with its cash loan agreement of [...] June 2008 and is currently processed [...] for archiving purposes and for creditworthiness assessment and credit risk analysis.

The Bank provided the complainant's personal data to database B. (on [...] July 2008) in the scope of name, surname, series and number of the identity document, PESEL number, address of residence and information on the loan account maintained (including the date of opening the account, timeliness and history of debt repayment). These data were transferred to the above database based on art. 105 paragraph. 4 in conjunction joke. 105a paragraph. 3 of the Banking Law, due to the delay in payment of the liability of […] June 2008 amounting to 60 days. On […] April 2010, the Bank initiated, in the IT system servicing the loan account, sending the Complainant, to the correspondence address provided by him, a written notification of the intention to process his personal data in database B. after the expiry of the obligation. The notification was sent by the Bank by regular mail to the address provided by the Complainant on [...] April 2010. The above letter has not been returned to the Bank and the liability has still not been repaid.

As confirmation of sending the above-mentioned correspondence to the Complainant, the Bank sent a printout from the customer service system concerning the Complainant, showing the automatic initiation of a letter on [...] April 2010, the content of which corresponds to the requirements specified in Art. 105a paragraph. 3 of the Banking Law and the letter of [...] April 2010, generated from the system, which was to be sent to the Complainant.

Due to the continuing arrears in repayment of the liability, the Bank terminated the Complainant's agreement on [...] June 2010.

After the unsuccessful bailiff enforcement for the Bank on [...] October 2013, the bailiff proceedings were discontinued.

The bank resold the ownership of the debt in question to the securitization fund, which was recorded in database B as [...], ie [...] December 2014, which is the same as the expiry date of the obligation.

The complainant's data are currently being processed in database B. on the basis of the premise specified in Art. 105a paragraph. 3 of the Banking Law. The cessation of the processing of the Complainant's personal data for the above purpose in B. will take place within a maximum of 5 years from the date of expiry of the obligation, i.e. by [...] December 2019.

In connection with the above, the Inspector General for Personal Data Protection weighed the following.

It should be noted that on the date of entry into force of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2018, item 1000, as amended), i.e. May 25, 2018, the Office of the Inspector General for Data Protection Personal Data has become the Office for Personal Data Protection. Proceedings conducted by the Inspector General for Personal Data Protection, initiated and not completed before May 25, 2018, are conducted by the President of the Personal Data Protection Office, pursuant to the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item . 922 and of 2018, item 138), hereinafter referred to as the Act, 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), hereinafter referred to as the Administrative Procedure Code. All activities undertaken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective. From May 25, 2018, the provisions of 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 the repeal of Directive 95/46 / WE (Journal of Laws UE L 119 of May 4, 2016, p. 1 and Journal of Laws UE L 127 of May 23, 2018, p. 2), hereinafter referred to as GDPR.

When issuing an administrative decision, the President of the Office is obliged to decide on the basis of the actual state of affairs at the time of issuing the decision. As the doctrine points out, “the 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 (...). Settlement in administrative proceedings consists in applying the applicable law to the established factual status of an administrative case. In this way, the public administration body implements the goal of administrative proceedings, which is the implementation of the binding 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 (Journal of Laws 00.98) 1071) M. Jaśkowska, A. Wróbel, Lex., El / 2012).

The GDPR lays down provisions on the protection of natural persons with regard to the processing of personal data and the provisions on the free movement of personal data, and protects the fundamental rights and freedoms of natural persons, in particular their right to the protection of personal data (Article 1 (1) and (2) of the GDPR). This issue was adequately regulated by Art. 2 clause 1 of the act. In the light of the provisions of the aforementioned legal act, the processing of personal data is authorized when any of the conditions listed in art. 6 sec. 1 GDPR (previously Article 23 (1) of the Act). These conditions apply

to all forms of data processing listed in art. 4 point 2 of the GDPR (Article 7 point 2 of the Act), including in particular their disclosure. They are also equal to each other, which means that for the legality of the data processing process, it is enough to meet one of them. On the other hand, in accordance with Art. 6 sec. 1 GDPR (previously Article 23 (1) (2) of the Act), the processing of personal data is permissible when it is necessary to fulfill the legal obligation incumbent on the administrator. Thus, the consent to the processing of data referred to in art. 6 sec. 1 lit. a GDPR (previously Article 23 (1) (1) of the Act) is not the only premise legalizing the processing of personal data.

The legal act containing detailed regulations regarding the processing of personal data of bank customers is primarily the Banking Law. The assessment of the legality of the processing of the Complainant's personal data by the Bank and also by B. must therefore be made in conjunction with the provisions of the Banking Law. The legal basis for the processing of the complainant's personal data by B. is art. 6 sec. 1 c of the GDPR, i.e. processing is necessary to fulfill the legal obligation incumbent on the controller.

Regarding the processing of the Complainant's personal data by both the Bank and B., it should be noted that B. is an institution established pursuant to Art. 105 paragraph. 4 of the Banking Law, which stipulates that banks may, together with banking chambers of commerce, establish institutions authorized to collect, process and make available to: banks information constituting banking secrecy to the extent that this information is needed in connection with the performance of banking activities and in connection with with the use of internal methods and other methods and models referred to in Part Three of Regulation No 575/2013, to other institutions statutorily authorized to provide loans with information constituting banking secrecy to the extent that such information is necessary in connection with granting loans, cash loans , bank guarantees and sureties (point 2), credit institutions with information constituting banking secrecy to the extent necessary to assess the consumer's creditworthiness, as referred to in Art. 9 of the Act of 12 May 2011 on consumer credit (point 3), loan institutions and entities referred to in art. 59d of the Act of 12 May 2011 on consumer credit on the basis of reciprocity, information constituting respectively banking secrets and information provided by loan institutions and entities referred to in art. 59d of the Act of 12 May 2011 on consumer credit, to the extent necessary to assess the consumer's creditworthiness, as referred to in art. 9 of this Act and the credit risk analysis (point 4).

Pursuant to Art. 105a paragraph. 1 of the Banking Law, processing by banks, other institutions legally authorized to grant loans, loan institutions and entities referred to in art. 59d of the Act of 12 May 2011 on consumer credit, as well as institutions

established pursuant to art. 105 paragraph. 4 (eg B.), information constituting banking secrecy and information provided by loan institutions and entities referred to in Art. 59d of the Act of 12 May 2011 on consumer credit, with regard to natural persons, may be performed, subject to Art. 104, 105 and art. 106 - 106d, for the purpose of creditworthiness assessment and credit risk analysis. According to Art. 105a paragraph. 3 of the Banking Law, banks, institutions and entities referred to in para. 1, may process information constituting banking secrecy and information provided by loan institutions and entities referred to in art. 59d of the Act of 12 May 2011 on consumer credit, concerning natural persons after the expiry of the obligation resulting from the contract concluded with a bank, other institution authorized by law to grant loans, a loan institution or an entity referred to in art. 59d of the Act of 12 May 2011 on consumer credit, without the consent of the person to whom the information relates, when the person has not fulfilled the obligation or has been in delay of more than 60 days in fulfilling the service under the contract concluded with the bank, another institution legally authorized to provide loans, a loan institution or an entity referred to in art. 59d of the Act of 12 May 2011 on consumer credit, and after these circumstances at least 30 days have elapsed since the person was informed by the bank, other institution authorized by law to grant loans, a loan institution or an entity referred to in art. 59d of the Act of 12 May 2011 on consumer credit, on the intention to process this information without its consent.

In the light of the cited provisions, it should be emphasized once again that although the Complainant's obligation under the cash loan agreement concluded on [...] June 2008 towards the Bank expired, however, according to the collected evidence regarding the repayment of the debt, the Complainant was delayed for a longer period. than 60 days in the case of the above-mentioned obligations. It is important, however, in the above case that the Bank did not fulfill the obligation specified in Art. 105a, point 3 of the Banking Law, i.e. he did not effectively inform him about the intention to process banking secrecy information relating to him, without his consent after the expiry of the obligation resulting from the above-mentioned the contract. It should be stated that the mere fact that the Complainant did not perform the obligation or was late with its performance for at least 60 days, does not authorize the Bank to process his data under the conditions specified in Art. 105a paragraph. 3 of the Banking Law. The moment from which the sixty-day period, when the consumer is allowed to delay the performance of the obligation, is to be counted, is the date of performance of the obligation. Only after the lapse of 60 days does the 30-day period in which the institution is still waiting for the performance of the client's obligation begin to run. However, the 30-day period does not run ex lege, but only from the moment when the consumer is effectively informed by the

institution about the intention to process. Ultimately, it is the ineffective expiry of 30 days from the date of notification that constitutes the fulfillment of the prerequisites of art. 105a paragraph. 3 of the Banking Law. Therefore, it follows that the Bank, while processing the Complainant's data under the conditions specified in the above-mentioned provision, must indicate that the Complainant was informed of the intention to process them without his consent. It should be noted that although there is no obligation to send such correspondence by registered mail, in the present state of facts the Bank has no proof that such correspondence in the scope of the above-mentioned the obligation was ever successfully served on the Complainant. The provision of art. 105a paragraph. 3 of the Banking Law Act expressly requires "informing" the data subject "about the intention to process banking secrecy information relating to him, without his consent", which in turn means that in order to process the Customer's data under the conditions specified in the above-mentioned provision, the Bank must have evidence that the data subject has been informed of the intention to process them without their consent. A copy of the Bank's letter of [...] April 2010, concerning the intention to process the Complainant's personal data with regard to information constituting banking secrecy, without his consent, after the expiry of the obligation, cannot be considered such evidence. Also, as such evidence, the authority cannot accept a printout from the banking system regarding the dispatch of correspondence.

In view of the above, it should be pointed out once again that the above evidence provided to the authority by the Bank only proves that the Complainant was sent the above-mentioned letters of [...] April 2010, however, they do not constitute evidence that the correspondence had been successfully served on the applicant. It should be emphasized that the Bank bears the burden of proving that it informed the Complainant about the intention to process his data without his consent. It should be in the Bank's interest that the information referred to in Art. 105 a sec. 3 of the Banking Law was done in such a way that it will be possible to easily demonstrate effective notification in the event of a dispute. In the opinion of the President of the Personal Data Protection Office, such an interpretation of Art. 105a paragraph. 3 of the Banking Law that it was the natural person (in the present case, the Complainant) that had to prove that he had not been informed about the above-mentioned the intention to process personal data. In the opinion of the authority, on the basis of the above-mentioned of the documents presented, consider that the conditions referred to in Art. 105a paragraph. 3 of the Banking Law have been met. The bank does not have a return receipt or other document confirming the receipt of the above-mentioned correspondence by the complainant. The provision clearly stipulates "informing" and not the mere sending of information about the intention to process personal data after the expiry of the obligation. It should also be emphasized that not always when there are circumstances preventing the

effective delivery of a letter to the addressee, it is returned by Poczta Polska to the Bank. For there are also circumstances that may cause such a letter to be lost during sending. It is an ordinary letter, therefore it is not registered by the Polish Post.

The above position of the authority is based on the judgment of the Provincial Administrative Court in Warsaw of March 15, 2017, file ref. no. II SA / Wa 1695/16. In the opinion of the Court, the following quote: "(...) the computer confirmation in the upper right corner of the letters" POST-STAMPING, Date of posting 2015 - 08 - 07 ", does not constitute a confirmation of sending the letters. Also a screenshot of the computer screen of the above-mentioned application, due to the "encoded" system of data collected there, without in-depth specialist (IT) analysis, does not provide credible evidence that, apart from generating the letters in question, they were in fact sent to the applicant. (...) It is correct to say that no provision of the Banking Law requires that the information obligation referred to in Art. 105a paragraph. 3 of this Act, was carried out using registered mail - registered letters. It should be emphasized, however, that in the event of a dispute, the burden of proof that the letter has been served rests with the party meeting the information obligation. (...) Although in the course of the administrative procedure the adjudicating body assessed the documents presented by the Bank, they do not indicate the Bank's fulfillment of the obligation to provide information (send and not only generate letters) in relation to the complainant ”.

Therefore, if the statement was sent to the addressee by letter or other means of distance communication, the applicant should prove, e.g. by means of a return receipt, that the letter (telegram) was delivered to the addressee. The resulting proof of sending a registered letter is not proof of its delivery to the addressee, but it is a prima facie proof (see S. Rudnicki, S. Dmowski: Commentary to the Civil Code. First Book, Warsaw 2003). The addressee of the statement may rebut this presumption by indicating that he was unable to read the content of the statement. The Supreme Court made a similar opinion in the judgment of February 2, 2005, IV CK 459/04, LEX no. 142068, M. Prawn. 2005/4/181. On the other hand, in the judgment of 17 March 2010, II CSK 454/09, OSNC 2010/10/142, that court stated directly that the presumption of delivery of a registered item, resulting from the proof of posting it, may be rebutted by the addressee by proving that it was not had the opportunity to become acquainted with the declaration of intent contained in it, thus shifting the burden of proof in this regard onto its addressee.

Summarizing the above findings in the present case, it should be emphasized once again that the conditions of Art. 105a section 3 of the Banking Law, pursuant to which the Bank may process information constituting banking secrecy concerning natural persons after the expiry of the obligation resulting from the agreement without their consent. Therefore, the Bank

should be ordered to stop processing the Complainant's personal data in B. for the purposes of creditworthiness assessment and credit risk analysis. Pursuant to Art. 18 sec. 1 point 6 of the Act, the President of the Personal Data Protection Office in the event of a breach of the provisions on the protection of personal data ex officio or at the request of the person concerned, by way of an administrative decision, orders the restoration of the legal status, and in particular the deletion of personal data.

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, from this decision, the party has the right to submit an application for reconsideration of the case within 14 days from the date of delivery of the decision 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 for Personal Data Protection (address: Office for Personal Data Protection, ul. Stawki 2, 00-193 Warsaw). The fee for the complaint is PLN 200. The party has the right to apply for an exemption from court costs or the right to assistance.

2019-03-29