THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 29

November

2019

DECISION

ZKE.440.14.2019

Based on Article. 104 § 1 of the Act of June 14, 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), art. 160 sec. 1 and 2 of the Act of 10 May 2018 on the Protection of Personal Data (Journal of Laws of 2019, item 1781) in connection with joke. 12 point 2 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 May 4, 2016, p. 1 and Journal of Laws UE L 127 of May 23, 2018, p. 2), after conducting administrative proceedings regarding the complaint of Mr. MC, for the processing of his personal data for marketing purposes by ASA, the President of the Office for Personal Data Protection

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. M. C., hereinafter referred to as "the Complainant", about the processing of his personal data by A. S.A., hereinafter also referred to as "the Bank". The complainant submitted that on […] in March 2014, despite his refusal to consent to marketing contacts by the Bank, an employee of the Bank had twice contacted him by phone in order to present the offer of the Bank's services. In connection with the presented event, the Complainant requested:

removing his personal data from the Bank's marketing database "so that he no longer receives phone calls from the bank for marketing purposes", and

imposing on the Bank "a fine of PLN 50,000 for the benefit of K .: [...] for unlawful use of his data, for which he did not consent".

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

The Bank (previously operating under the name of "B. S.A.") processes the Complainant's personal data obtained in connection with the following agreements between him and the Complainant:

By the agreement of [...] October 2001 for [...],

By the agreement of [...] October 2003 for [...],

By agreement of [...] March 2009 for [...],

By agreement of [...] April 2010 for [...],

By agreement of [...] April 2012 for [...],

By agreement of […] January 2013 for […].

The Bank processes the complainant's personal data obtained in connection with the aforementioned agreements between him and the Complainant for purposes related to their performance.

By concluding with the Bank the Agreement of [...] March 2009 for [...] and the Agreement of [...] January 2013 for [...], the Complainant consented to the processing of his personal data for the purposes of promotion and marketing of entities belonging to the capital group C., other than the Bank.

As at [...] July 2015, i.e. as at the date of the explanations in this case by the Bank's attorney, the Bank noted in its transaction system the complainant's lack of consent to the processing of his personal data for the promotion and marketing of entities belonging to the C capital group ., other than the Bank. As explained by the Bank's attorney, the Complainant's personal data was not used for this purpose.

On […] March 2014, an employee of the Bank contacted the Complainant twice by phone in order to present a marketing offer of the Bank's services.

After the Complainant lodged a complaint with the Office of the Inspector General for Personal Data Protection against the processing of his personal data by the Bank for marketing purposes, and based on the content of this complaint, the Bank - on [...] July 2015 - recorded the Complainant's objection in its transaction system (referred to in Article 32 (1) (8) in connection with Article 23 (1) (5) and Article 23 (4) (1) of the Act of August 29, 1997 on the protection of personal data [Journal of Laws of of 2016, item 922, as amended], hereinafter referred to as "uodo 1997"), for the processing of his personal data for the

purpose of direct marketing of the Bank's own products and services.

At present, the Complainant's personal data are not processed by the Bank, neither for the purposes of marketing its own products and services, nor for the purposes of marketing the products and services of entities belonging to the C capital group, other than the Bank.

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

On the date of entry into force of the Act of May 10, 2018 on the protection of personal data (Journal of Laws of 2019, item 1781), hereinafter referred to as "u.o.d.o. 2018 ", ie on May 25, 2018, the Office of the Inspector General for Personal Data Protection became 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 Office for Personal Data Protection, on the basis of u.o.d.o. 1997, in accordance with the principles set out in the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), hereinafter referred to as "the Code of Administrative Procedure". All actions taken by the Inspector General for Personal Data Protection before May 25, 2018 remain effective (Article 160 (1-3) of the Act on Personal Data Protection Act 2018).

Pursuant to Art. 57 sec. 1 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 (general regulation on the protection of personal data) (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 "Regulation 2016/679", without prejudice to other tasks determined pursuant to this regulation, each supervisory authority on its territory monitors and enforces the application of this regulation (point a) and deals with complaints brought by the data subject or by a data subject empowered by him, in accordance with Art. 80 by Regulation 2016/679 - the entity, organization or association, to the extent appropriate, conducts proceedings on these complaints and informs the complainant about the progress and results of these proceedings within a reasonable time (point f).

It should be noted here that the President of the Personal Data Protection Office, when issuing an administrative decision, is obliged to decide on the basis of the actual state of affairs at the time of issuing this 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 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., El / 2012). Also the Supreme Administrative Court - in the judgment of May 7, 2008 in case no. Act I OSK 761/07 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 as at the date of issuing the decision on the matter and whether it is done in a legal manner".

Pursuant to the wording of Art. 23 sec. 1 u.o.d.o. 1997, applicable in the period covered by the Complainant's complaint, the processing of personal data was permissible when: the data subject consents to it, unless it concerns the deletion of data relating to him (point 1), it is necessary to exercise the right or fulfillment of the obligation resulting from a legal provision (point 2), it is necessary to perform the contract when the data subject is its party or when it is necessary to take action before concluding the contract at the request of the data subject (point 3) is necessary for the performance of legally defined tasks carried out for the public good (point 4), it is necessary to fulfill legally justified purposes pursued by data administrators or data recipients, and the processing does not violate the rights and freedoms of the data subject (point 5). The provision of art. 23 sec. 4 u.o.d.o. 1997 provided that for the legally justified purpose referred to in Art. 23 sec. 1 point 5, it shall be considered, in particular, direct marketing of the controller's own products or services.

Art. 32 sec. 1 point 8 u.o.d.o. 1997 granted the data subject the right to object to the processing of his personal data in the cases specified in art. 23 sec. 1 points 4 and 5. This means that the data subject could object to the data controller against the processing of their personal data for marketing purposes. At the same time, at the disposal of Art. 32 sec. 3 u.o.d.o. 1997, after such objection was noted, further processing of the contested data was unacceptable.

Pursuant to the provisions currently in force (from May 25, 2018, i.e. from the date of application of the provisions of Regulation 2016/679), the processing of personal data is lawful if the data controller has at least one of the provisions of Art. 6 sec. 1 of Regulation 2016/679, the material premises for the processing of personal data. According to the above-mentioned 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 controller 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.

In the light of recital 47 of Regulation 2016/679, for actions performed in the legitimate interest referred to in art. 6 sec. 1 lit. f), it is necessary to recognize, inter alia, the processing of personal data for the purposes of direct marketing.

On the other hand, the provisions of Art. 6 sec. 1-3 of Regulation 2016/679, analogically to the previously applicable regulation of art. 32 sec. 1 point 8 and art. 32 sec. 3 u.o.d.o. 1997, provide for the right of the data subject to object to the processing of his personal data for the purposes of direct marketing of the administrator, resulting in inadmissibility of further processing for this purpose.

In the present case, the Bank's obligation resulting from the above-mentioned regulations was therefore to appropriately record in its IT systems and databases information about the Complainant's objection to the processing of his personal data for the purposes of marketing the Bank's own services and about the complainant's lack of consent to the processing of his personal data for the purposes of marketing other than the Bank of entities belonging to the C capital group, and, consequently, will cease to process its personal data for these purposes.

As it was established in the present case, the complainant's lack of consent to the processing of his personal data for the purposes of marketing services of entities belonging to the C capital group other than the Bank was noted by the Bank no later than [...] July 2015, i.e. the date of submitting explanations in this case by the Bank's representative.

On the other hand, the Complainant's objection to the processing of his personal data for the purposes of marketing the Bank's own services was recorded in the Bank's transaction system - as a result of the delivery of a complaint submitted by the Complainant in the present case, treated by the Bank as a statement of objection referred to in Art. 32 sec. 1 point 8 u.o.d.o. 1997 - on [...] July 2015, and from that date the Bank ceased processing of the Complainant's personal data.

In the absence of a prior and effectively raised objection by the Complainant, the Bank's contact with him for the purpose of marketing of the Bank's own services on [...] March 2014 should be considered admissible in the light of the provisions on the protection of personal data to pursue the Bank's legitimate interest.

Summing up, it should be stated that the complainant's personal data were not unlawfully processed by the Bank. In the actual state at the time of issuing this decision, the Complainant's personal data are not processed by the Bank for the purposes of marketing its own products and services, or for the purposes of marketing the products and services of entities belonging to the C capital group, other than the Bank. Therefore, there are no grounds for the President of the Personal Data Protection Office to use any of the remedial powers provided for in Art. 58 sec. 2 of the Regulation 2016/679. The condition for issuing the order addressed to the Bank, referred to in this provision, is the determination of the infringement of the provisions on the protection of personal data at the date of the decision.

Referring to the Complainant's request to impose a financial penalty on the Bank for the unlawful use of his personal data, it should be stated that it is unfounded due to - firstly - the Bank's finding that the Bank did not violate the provisions on the protection of personal data in this case, and - secondly - there was no legal basis for imposing such a sanction existing on the date of the event which is the subject of the complaint. Before May 25, 2018, i.e. before the date of application of the provisions of the GDPR, violations of the provisions on the protection of personal data were not threatened with administrative financial sanctions falling within the competence of the Inspector General for Personal Data Protection.

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 Civil Procedure of the decision, the party has the right to submit 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 Personal Data Protection 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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