

# THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, day 29

October

2019

## DECISION

ZKE.440.93.2019

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 Personal Data Protection Act of May 10, 2018 (Journal of Laws of 2019, item 1781) and art. 12 point 2, art. 22, art. 23 sec. 1 point 1, point 3 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended, and of 2018, item 138), in connection with Art. 6 sec. lit. a, b 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 EU L 119 of 04/05/2016, p. 1 and EU Official Journal L 127 of 23/05/2018, p. 2), after conducting administrative proceedings regarding the complaint of Ms ED about irregularities in the processing of her personal data for the purposes of marketing by ASA, the President of the Personal Data Protection Office refuses to accept the request.

## JUSTIFICATION

The President of the Personal Data Protection Office (formerly the Inspector General for Personal Data Protection) received a complaint from Ms E. D. (hereinafter referred to as: the Complainant) about irregularities in the processing of her personal data for marketing purposes by A. S.A. (hereinafter: the Bank) consisting in the processing of personal data without a legal basis. In connection with the above, the complainant applied for an order that the deficiencies in the processing of personal data be remedied.

In the course of the administrative procedure conducted in this case, the President of the Personal Data Protection Office (hereinafter: "the President of the Personal Data Protection Office") determined the following.

1. The Bank obtained personal data directly from the complainant on [...] January 2012 in connection with the performance of activities leading to the conclusion of contract no. [...]. The complainant signed with the Bank the so-called Contract [...]

2. The Bank explained that it was processing the complainant's personal data in connection with contract [...] no. [...], which was opened on [...] March 2013, and brokerage accounts. The legal basis for the processing was Art. 23 sec. 1 point 3 of the Act of August 29, 1997 on the Protection of Personal Data (Journal of Laws of 2016, item 922, as amended, and of 2018, item 138, hereinafter: "the Act"), currently pursuant to Art. 6 lit. b of the Regulation 2016/679.

3. The Bank processed the complainant's personal data for marketing purposes on the basis of the consent expressed in the agreement of [...] January 2012, ie pursuant to Art. 23 section 1 point 1 of the Act.

4. The complainant withdrew her consent to the processing of her personal data for marketing purposes on [...] February 2018. The Bank's employee contacted the Complainant on [...] February 2018 in order to present the bank's offer. The complainant complained to the Bank about being contacted by phone for marketing purposes, despite the objection raised. Her personal data was in the database currently used for the advertising campaign, from which customers were selected for contact via the machine. The Bank explained that, after telephone contact with the Complainant, it had removed her personal data from the ongoing marketing campaign.

5. According to the Bank's statement, an objection to the processing of the complainant's personal data for marketing purposes is currently recorded in the Bank's system, therefore her personal data will not be used for subsequent marketing campaigns. From [...] February 2018, the Bank ceased to process the complainant's personal data for marketing purposes.

In these facts, the President of the Personal Data Protection Office 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 2019, item 1781), 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, 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 "the Code of Administrative Procedure". 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 this procedure, initiated and not completed before May 25, 2018, is conducted on the basis of the Act of August 29, 1997 on the protection of personal data (in the scope relating to the provisions governing the administrative procedure) and on the basis of 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 the 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 "the public administration body assesses the actual state 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., EI / 2012).

In the judgment of May 7, 2008 in the case file ref. 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 on the matter and whether it is done in a lawful manner" .

In the light of the provisions of Regulation 2016/679, the processing of personal data is authorized when any of the conditions listed in art. 6 sec. 1 of Regulation 2016/679 (previously Article 23 (1) of the Act). These conditions apply to all forms of data processing listed in art. 4 point 2 of the Regulation 2016/679. These conditions are also equal to each other, which means that for the legality of the data processing process, it is sufficient to meet one of them.

With regard to the complainant's request to examine the lawfulness of the processing of her personal data, it should be noted that the legal basis for the processing of the complainant's personal data for marketing purposes by the Bank until the withdrawal was the consent contained in the contract. This premise is expressed in Art. 6 (1) (a) a of the Regulation 2016/679 (previously Article 23 (1) (1) of the Act). Pursuant to Opinion 6/2014 on the concept of the legitimate interests of the data controller under Article 7 of Directive 95/46 / EC, in the case of direct marketing carried out using automated calling systems, the legal basis for the processing of personal data is in principle consent.

The decisive factor for the resolution of this case is the fact that the violation of direct marketing towards the complainant after

her consent was withdrawn was quickly removed. The Bank ceased to process the complainant's personal data for marketing purposes.

Taking into account the above, it should be considered that there was no basis for the decision ordering the restoration of legal status by the President of the Personal Data Protection Office, it is reasonable to issue a decision refusing to fulfill the request of the data subject.

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 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 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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