

THE CHAIRMAN OF PERSONAL DATA PROTECTION

Warsaw, 23

of December

2019

DECISION

ZKE. 440.9.2019

Based on Article. 104 § 1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2018, item 2096, as amended), art. 160 sec. 1 and 2 of the Act of May 10, 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, page 1 and Journal of Laws UE L 127 of May 23, 2018, page 2), after conducting administrative proceedings regarding the complaint of Mr. KS, for processing by PSA of his personal data, consisting in making them available in terms of name, surname and telephone number to G. Sp. z o.o., the President of the Personal Data Protection Office 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. K. S., hereinafter referred to as the "Complainant", about the processing of his personal data by A. S.A. (currently: "ASA, hereinafter referred to as" Biuro Maklerski ", consisting in providing them, in terms of name and surname and telephone number, to G. Sp. z oo, hereinafter referred to as" G. ". The complainant submitted that in December 2013 received a call from G. - an unknown company. During the telephone conversation, the Complainant was informed that G. had received his personal data (name and surname and telephone number) from the Brokerage House. personal data was disclosed to G. unlawfully by the Brokerage House, the complainant requested a determination whether the Brokerage House breached the provisions on the protection of personal data, "and if so, determine the guilty parties, punish them and compensate me."

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

The complainant is linked to the Brokerage House by an agreement for the provision of brokerage services concluded on [...] April 2010. In connection with its conclusion and for the purpose of its implementation, the Brokerage Office obtained from the Complainant his personal data in the field of first names, last names, date and place of birth, PESEL number, series and number of the identity card, address of residence, correspondence address, NIP number, names of parents, mother's maiden name, telephone number and nationality.

On [...] September 2012, bank A. S.A., whose branch is Biuro Maklerskie, concluded with G. a framework agreement to entrust the performance of activities for the bank to external entities as part of "ad hoc" marketing research and an agreement to entrust data processing. Under these agreements, the Brokerage House commissioned G. to conduct a satisfaction and expectations survey of its clients.

In order to perform the service of testing the satisfaction and expectations of its clients, the Brokerage House provided G. with their personal data, including the complainant's data, in the scope of name, surname, gender, telephone number and client ID.

In December 2013, an employee of G., using the data obtained from the Brokerage House, contacted the Complainant once in order to conduct a survey on the quality of services provided by the Brokerage House and the level of customer satisfaction and expectations.

On [...] December 2013, the Complainant reported by telephone at the Customer Service Point of the Brokerage House that an external entity acting on behalf of the Brokerage House had established a telephone contact with him and asked for a written reply why the Brokerage Office provided this entity with his personal data without his consent.

In the reply to the Complainant in a letter of [...] January 2014 (letter: [...]), the Director of the Brokerage House indicated the basis and purpose for the transfer of his personal data to G. (contract for the survey of customer satisfaction and expectations) and the scope of the data provided. The director of the Brokerage Office explained, inter alia, that "the survey was not aimed at marketing, but was related to the improvement of the quality of services provided by the Brokerage House," that the purpose of the study was not to propose other products or services, but to obtain your assessment of satisfaction with cooperation with The bank, satisfaction with the use of the Bank's products and services as well as declarations regarding the further use of the services and recommending them to other clients "and that" in such a situation, pursuant to Art. 23 of the Act of August 29,

1997 on the Protection of Personal Data, it is possible to process data without the need to obtain separate consent for the processing of personal data. " It also stated that the applicant's data had been duly secured, used "solely for research purposes" and had been destroyed by G. after the examination had been performed.

At present, the complainant's personal data provided to G. by the Brokerage House are not processed by G.; were removed by G. after the client satisfaction survey service commissioned by the Brokerage House - no later than [...] January 2014, that is no later than on the day the Brokerage House submitted a written statement to the Complainant by the Brokerage House. From 2018, G. does not conduct any activity in the field of customer satisfaction and loyalty surveys, due to the takeover by I. Sp. z o.o. G. department dealing with this type of research.

On [...] September 2019, the change of the name of the bank branch of A. S.A. was entered in the Register of Entrepreneurs of the National Court Register. dealing with brokerage activities with: "A. THERE ARE. Branch - [...] "to:" A. THERE ARE. Branch - [...]"

Currently, the Brokerage House is processing the complainant's personal data in order to perform the contract for the provision of brokerage services concluded between him and the complainant, concluded [...] on April 2010.

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., EI / 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.

Referring the above-mentioned provisions to the facts of the present case, it should be stated that in the legal state in force at the time the complaint concerned, the consent of the data subject was only one of several spontaneous - listed in Art. 23 sec. 1 u.o.d.o. 1997 - the basis for the processing of personal data. Irrespective of the consent of the data subject (Article 23 (1) (1) of the Personal Data Protection Act, the basis for the processing of personal data by the controller was the premise for the implementation of legally justified goals of the data controller, provided that the implementation of these goals does not violate the rights and freedoms of the data subject. they concern (Art. 23 (1) (5) of the Act on the Personal Data Protection Act 1997). In the present case, the processing of the complainant's personal data by the Brokerage House for marketing purposes (including entrusting the processing - pursuant to Art.31 of the Act on the Personal Data Protection Act - to a third party in order to conduct a customer satisfaction survey by that entity), had a basis (independent - independent of the consent Of the complainant) in this very provision - Art. 23 sec. 1 point 5 u.o.d.o. 1997. As expressis verbis art. 23 sec. 4 u.o.d.o. 1997, the legitimate aim pursued by the personal data administrator should be considered, in particular, direct marketing of his own products or services.

At this point, it should be noted that - contrary to the position expressed in the letter of [...] January 2014 addressed to the Complainant by the Brokerage House - the activities of the Brokerage House (commissioned by G. to conduct a study) aimed at creating a diagnosis of customer satisfaction and loyalty , determining their needs and expectations related to the services provided or offered, indicating the strengths and weaknesses of the Brokerage House and its services, etc., should be considered an activity falling within the definition of "marketing of own products and services" referred to in Art. 23 sec. 4 u.o.d.o. 1997. It should be emphasized that the entity responsible for such processing of the complainant's data is not G. but the Brokerage House as the complainant's data administrator.

In order to assess whether the activities of the Brokerage House constituted marketing activities, and not only "related to the improvement of the quality of [...] services provided", to which the Brokerage House was authorized under the contract

between it and the client, the specificity of marketing should be discussed. Its definition indicates activities aimed at determining the possibility of selling a product, taking into account the existing or potential needs of buyers in the short or long term and the related possibilities of distribution, advertising, production planning, market research (see the entry "marketing" in: PWN Encyclopedia - www.encyklopedia.pwn.pl). As part of marketing, we can distinguish many issues, such as: finding and assessing market opportunities that lead to meeting the needs of specific recipients (buyers) and precisely determining these needs, developing a product (service) and distribution strategy based on this knowledge, or preparing an appropriate price and promotion strategy. Service marketing is therefore a system of integrated activities of a service company on the market, including identification, shaping, and then satisfying needs in a way that ensures customer satisfaction and the implementation of their own economic goals. Therefore, shaping a higher level of service, which should meet more needs, provide more value to the client, influences building a competitive advantage of such a company and is a form of marketing.

Understanding customer attitudes towards the service offer facilitates the work of customer service personnel. First of all, it enables the adjustment of activities to the requirements of buyers. The measurement of customer satisfaction is an assessment of the service that a company provides to its customers and at the same time is a measure of the success of its staff activities. In modern business relations, where the importance of emotions is very important, knowing the level of customer satisfaction becomes the supplier's responsibility, and caring for a high satisfaction rate is a necessary condition for maintaining a leading position on the market. Wherever there are business relationships between the enterprise and other market participants, the problem of satisfaction surveys arises. In conditions when it is more and more difficult to find innovative and effective activities in the framework of classic marketing tools, the company faces the need to care for a high level of customer satisfaction. The satisfaction survey is therefore helpful in determining the company's strategy and increasing influence and market share. For many, the control of consumer satisfaction has become a permanent element of marketing research (see Research on the attitudes and satisfaction of institutional customers with the level of service offered, Mariola Wysz-Cieszyńska, Interdepartmental Doctoral Study, AE Kraków, November 2002).

In the light of the above considerations, it should be concluded that the activities of the Brokerage House questioned by the Complainant undoubtedly constituted marketing of its own services and as such was allowed without the Complainant's consent - pursuant to Art. 23 sec. 1 point 5 u.o.d.o. 1997 - due to the legitimate aim of the administrator, until the Complainant raises an objection referred to in Art. 32 sec. 1 point 8 u.o.d.o. 1997, and with the proviso that it does not violate the rights and

freedoms of the applicant. Stating that the Brokerage House had a basis to process the complainant's personal data for marketing purposes, it should be concluded that it could - pursuant to Art. 31 u.o.d.o. 1997 - without the consent of the Complainant, entrust this type of processing (in connection with and for the purpose of the performance of an appropriate service contract) to another entity. The above-mentioned provision states that the controller may process data to another entity, under a written contract (section 1), while the entity referred to in section 1, may process data only to the extent and for the purpose provided for in the contract (section 2). A characteristic feature of the entrustment agreement is that the data controller does not have to personally perform activities related to the processing of personal data. For this purpose, it may use the services of specialized external entities, commissioning them to perform either the entire processing of personal data, or only certain activities (e.g. collection or storage), or processing limited to a specific purpose (as in the present case). In such a situation, we are dealing with data processing on behalf of the administrator, within the limits indicated in the data processing agreement, and not for the personal purposes of the data processor, but for the purposes of the data administrator.

Referring to the condition of the Complainant's lack of objection to the processing of his personal data for marketing purposes, it should be stated that only the effective submission of such objection results - in the light of art. 32 sec. 3 u.o.d.o. 1997 - inadmissibility of processing for marketing purposes the data questioned by it. In the absence of a prior, effectively raised objection against the Complainant, the fact that G. (on behalf of the Brokerage House) made a one-time contact with him for marketing purposes in December 2013 should be considered admissible in the light of the provisions on the protection of personal data, the implementation of the legitimate interest of the Brokerage House. The Complainant's objection to the processing of his data for marketing purposes could possibly be considered as his on [...] December 2013, a telephone notification at the Customer Service Point of the Brokerage House that G. had contacted him and submitted a request for clarification of this situation. However, the assessment of whether this application constituted an effective objection to the processing of the Complainant's data for marketing purposes is irrelevant to the resolution of this case, as after [...] December 2013, the Complainant's personal data were not processed by the Brokerage House for marketing purposes, G. did not establish any further contacts with the Complainant as part of the research commissioned by the Brokerage House, and the Complainant's data was deleted by G. after the Brokerage House's customer satisfaction survey commissioned, that is no later than [...] January 2014.

Referring to the reservation that the implementation of the legitimate purpose of the administrator (in this case - the marketing

purpose) may not violate the rights and freedoms of the data subject (Article 23 (1) (5) of the Act). The Brokerage's own marketing purpose in this case does not infringe the rights and freedoms of the complainant. First, the activities of the Brokerage House were closely related to the contractual relationship between the parties and concerned the marketing of services that the Complainant used or which - in the justified opinion of the Brokerage House - could be interested. Secondly, it was possible that as a result of the customer satisfaction and expectations survey carried out by the Brokerage House, the quality of services used by the Complainant could actually improve. Thirdly, the study conducted by G. (one-time telephone contact during which the Complainant was informed about the purpose of the survey, about the data of the entity performing the survey and the entity commissioning the survey) only marginally entered the sphere of privacy of the Complainant. Such an encroachment on the complainant's privacy does not constitute grounds for stating that they outweigh the justified interests of the Brokerage House. As it is assumed in the literature on the subject - following the solutions adopted in Directive 95/46 / EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Journal WE L 281 of 23 November 1995, p. 31, as amended; Official Journal of the EU, Polish special edition, chapter 13, vol. 15, p. 355, as the administrator's goal should not be placed so much on the "inviolability" of the rights and freedoms of the data subject, but rather on requiring that they do not outweigh the legitimate interests of the administrator (Act on the protection of personal data. Commentary, Arwid Mednis, Warsaw 1999, p. 68, cf. also: Janusz Barta, Paweł Fajgielski and Ryszard Markiewicz, commentary on Article 23 in: Personal data protection. Commentary, VI edition. LEX, 2015).

Currently, that is, in the factual state at the time of issuing this decision, the Complainant's personal data are processed by the Brokerage House in order to perform the brokerage services agreement between him and the Complainant concluded on [...] April 2010. In the current legal status, such processing is based on legal in Art. 6 sec. 1 lit. b) Regulation 2016/679. According to the indicated provision, the processing of personal data is lawful, inter alia, in a situation where such processing is necessary for the performance of a contract to which the data subject is a party, or to take action at the request of the data subject, prior to entering into a contract.

Summing up, it should be stated that the complainant's personal data were not unlawfully processed by the Brokerage House. Their processing for marketing purposes (by entrusting them to G. and their one-off use by G. to conduct customer satisfaction and expectations surveys) was permissible without the Complainant's consent, but also in the absence of his objection, based

on the premise of the legitimate purpose of the administrator (Article 23 (1) (5) of the Act on Personal Data Protection Act 1997). However, in the actual state at the time of issuing this decision, the complainant's personal data are not processed by the Brokerage House for marketing purposes. 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 Brokerage House, referred to in this provision, is the existence of a breach of the provisions on the protection of personal data at the date of the decision.

Referring to the Complainant's request to determine the persons guilty of infringement of the provisions on the protection of personal data, punish them and award the Complainant with "compensation" in this respect, it should be stated that it is unfounded in connection with - firstly - the fact that the Brokerage House did not find the breach in the present case provisions on the protection of personal data and - secondly - the lack of competence of the President of the Office for Personal Data Protection to impose sanctions (disciplinary, criminal, administrative and other) on persons responsible for the violation of the provisions on the protection of personal data (or "guilty" of this violation), and to rule on damages (or "redress") to persons whose data has been unlawfully used. It should also be pointed out that on the date of the event constituting the subject of the complaint (before May 25, 2018, i.e. before the date of application of the provisions of Regulation 2016/679), violations of the provisions on the protection of personal data were not threatened with administrative financial sanctions currently within the competence of the President of the Office 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 entry fee for the complaint is PLN 200. The party has the right to apply for the right to assistance, including exemption from court costs.

2021-05-10