In case 6619 / 2016

ANSWER

No. 3194

Sofia, 13.03.2018

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria - Fifth Department, in a court session on the twentieth of November two thousand and seventeen, composed of:

CHAIRMAN:

HEALTH SHUMENSKA

MEMBERS:

GALINA KARAGYOZOVA

JULIA KOVACHEVA

to secretary

Valeria Georgieva Georgieva

and with participation

to the prosecutor

Marinela Toteva

listened to what was reported

by the judge

JULIA KOVACHEVA

by adm. case no

6619/2016

The proceedings are under Art. 208 of the Administrative Procedure Code.

It was formed on a cassation appeal of the Commission for the Protection of Personal Data against decision No. 2350 of 11.04.2016 under Adm. case No. 9337/2014 of the Administrative Court - Sofia-city. It presents arguments for the incorrectness of the judicial act due to its issuance in violation of the substantive law and unreasonableness and requests its

annulment.

The defendant in the cassation appeal - [company], through its legal representative, expresses the opinion that the appealed decision is correct and there are no cassation grounds for its cancellation.

The defendant N.H.G. submits an opinion that the cassation appeal is well-founded. States that it maintains its objections to [company's] challenge to the decision of the Commission for the Protection of Personal Data made before the court of first instance.

The prosecutor from the Supreme Administrative Prosecutor's Office gives a reasoned conclusion that the cassation appeal is groundless.

The Supreme Administrative Court, composition of the fifth department, finds that the cassation appeal was filed within the legal term and by the proper party, which is why it is procedurally admissible. In order to rule on its merits, I accept the following:

With the appealed decision, the Administrative Court - Sofia-city canceled, on the appeal of N.H.G., the silent refusal of the Commission for the Protection of Personal Data to rule on his appeal, ent. No. Ж-836 of 24.07.2014. The decision in this part has not been appealed and has entered into force.

With the decision, the court also annulled, on the appeal of [company], decision No. Ж-836/28.04.2015 of the Commission for the Protection of Personal Data, whereby:

1. Considers as a well-founded complaint Reg. No. Ж-836 dated 24.07.2014 of N.H.G. against [company] due to violation of the principles of collecting personal data for specific purposes, relevancy and non-exceeding the purposes for which the same are processed, as well as the lack of admissibility of the processing of personal data carried out with the mandatory expression of agreement with the General Terms and Conditions of a document for receiving a money transfer prepared by [company], which is why the provision of art. 2, para. 2, items 2 and 3 and Art. 4, para. 1 ЗЗЛД.

2. Issue a mandatory order to [company] to delete the clause "Protection of personal data" from the document for receiving a money transfer in relation to third parties who are not clients of the company within a period of one month from receiving the decision, for which to notify the commission.

The court accepted the following from a factual and legal point of view:

The administrative proceedings before the Commission for the Protection of Personal Data were initiated on the basis of a

complaint by N.H.G., in which he presented complaints about violations committed by [company] related to the processing of personal data and a request in this regard to give mandatory prescriptions to the controller of personal data to pay him a money transfer and to stop his practice of paying money transfers against the written consent of their recipient for the use of personal data, according to the General Terms and Conditions of "[company]".

In his complaint, NG informed the commission that on 09.06.2014 he visited [company] in order to receive a money transfer in the amount of EUR 50 from Germany through [company]. The bank employee refused to pay the amount, as he did not receive written consent from the person to the General Terms and Conditions of [company] for the processing of his personal data "in various countries, including those outside the European Union and those with weaker legal protection than that regulated in the Republic Bulgaria, as well as to be used for marketing research".

[company] ([company], [company]) is a licensed payment institution for the execution of money transfers registered in Austria.

According to the written evidence presented in the case - an agency contract between [company] and [company], instructions for working with money transfers in Bulgaria for agents of [company] and a form containing the General Terms and Conditions of [company], including h. for the protection of personal data, [company] acts in the capacity of a contractor under an agency contract when providing the money transfer service. The bank acts in this capacity both when sending ordered transfers through [company]'s system and when paying out received transfers to their recipients.

The Commission for the Protection of Personal Data, in the grounds of the appealed decision No. Ж-836/28.04.2015, accepted that [company] violated the principles of collecting personal data for specific purposes, relevance and non-exceeding the purposes for which they were process, requiring a mandatory expression of agreement with the General Terms and Conditions of [company]. The Commission has also accepted that there is no basis for the admissibility of the processing of the personal data of NG. The hypotheses that allow the processing of personal data in the absence of the consent of the relevant person are exhaustively specified in Art. 4, para. 1, items 1, 3, 4, 5, 6 and 7 of the Labor Code, none of them being present in this case.

In conclusion, the Commission has indicated that: "The content of the General Terms and Conditions of [company] could be commented on, in terms of volume and relevance, in relation to natural persons, in their capacity as subjects who chose to use the services of [company] as a result of contractual relations, but not in relation to third parties who have not expressed a desire to acquire the status of "client" of [company].

In light of these considerations, the Commission found the complaint with Reg. No. Ж-836 dated 24.07.2014 of N.H.G. to be justified and issued a mandatory order to [company] to delete the clause "Protection of personal data" from the document for receiving a money transfer in respect of third parties who are not clients of the company within one month of receiving the decision.

The court, after discussing the presented factual and legal circumstances, accepted that the capacity in which an entity processes personal data - as an administrator or processor, is established after a specific study of the relationship between the entity and the processed personal data. If the subject himself determines the purposes and means for this processing, then the hypothesis of Art. 3, para. 1 of the GDPR and the entity has the legal status of an administrator. In the event that the same person processes personal data, but does not determine the purposes and means of this processing himself, but processes the data in accordance with the purposes and means determined by another entity, which is a personal data controller, then it has the status of a personal data processor in the sense of § 1, item 3 of the Labor Code.

In view of the quality of the bank as a processor of personal data, the court indicated that the requirements for admissibility of the processing of personal data under Art. 4, para. 1 GDPR are applicable to the controller of personal data, but not to processors who act on behalf of the controller of personal data.

The Commission for Personal Data Protection incorrectly qualified [company] as a personal data controller and accordingly reached an erroneous conclusion of the bank's liability due to unlawful processing of personal data.

With these considerations in mind, the court ruled the appealed result.

Dissatisfied with the decision, the cassation appellant argues that [company] is registered as a personal data controller with identification number [number], with three registered registers - "Shareholders", "Clients and non-clients", "Staff". It finds the court's conclusion incorrect that the requirements for the admissibility of the processing of personal data established in the norm of Art. 4, para. 1 GDPR are applicable to the administrators of personal data, not to the processors of personal data. He claims that the clauses of the contract between the bank and the company concluded under the rules of the Law on Obligations and Contracts cannot eliminate the rules of the special law - the Law on Personal Data Protection. The conditions for admissibility of the processing of personal data, regulated in Art. 4, para. 1, items 1 - 7 of the GDPR are mandatory and apply to all subjects processing personal data, regardless of their capacity - "personal data administrator", "personal data processor", as well as "any person acting under the direction of the administrator or the processor, who has access to personal

data", according to Art. 24, para. 6 ЗЗЛД Therefore, the assessee claims the annulment of the appealed judicial act due to its issuance in the incorrect application of the substantive law.

The defendant in the cassation appeal [company] finds it correct to distinguish the legal figure of the administrator of personal data from that of the person who processes the data on assignment from the administrator. Maintains that under the agency contract, in cases where clients receive money sent through the system of [company], the bank, in its capacity as a representative of the company, conforms its activities to the requirements, including on processing the personal data provided to it by the same. It states that the Personal Data Protection Act does not assign independent obligations to the person who is engaged to process personal data on behalf of the personal data administrator, and all obligations in this regard are for the personal data administrator. For this reason, the sanctions for unlawful reversal of personal data should be for the administrator of personal data, and not for the data processor. He claims that the fact that the bank is registered as a personal data administrator is irrelevant for solving the disputed issue in the case, because in the discussed case, it does not act as such, but as a processor of personal data according to the definition of § 1, item 3 of the Personal Data Protection Act. Given these considerations, he considers that the appealed decision should be upheld.

The defendant in cassation, N.H.G., maintains that the decisive factor for the outcome of the dispute is the answer to the question: "When a legal entity appears simultaneously in two capacities - administrator of personal data and processor of personal data, should it comply with the requirements of the Law for the protection of personal data, regardless of which of the two capacities it operates with the personal data. According to the defendant, the decision is incorrect and should be reversed, confirming the conclusions of the Commission for the Protection of Personal Data in its decision.

The Supreme Administrative Court, having assessed the arguments and objections of the parties and the collected evidence in the case, finds that the cassation appeal is unfounded, for the following reasons:

The court has correctly established the facts of the case and, based on their accurate analysis, has reached correct legal conclusions.

In the Representation Agreement concluded between [company] and [company], it is stipulated that the bank offers, as a representative of the company, money transfer services within the country, according to the terms of the same.

Section 8 of the agency agreement stipulates that all transaction-related information shall be owned exclusively by [firm], which shall have the right to use it in ways permitted by law, and the representative - [firm] shall not use the information and not

transfer it to a third party without prior written consent from [company].

In item 8.5, the protection of the personal data of customers who use the money transfer service is regulated, as in item 8.5.5. it is expressly stated that [firm] includes in the sample customer forms used to offer the money transfer service information regarding customer access rights, rectification and objection, and other customer information required by applicable customer protection laws .

The reading of item 8.5.5. indicates that in the event that changes need to be made to the customer forms due to legal requirements, the representative will notify [firm] in writing. The discretion of whether to change the forms is left to [firm]. According to the contract, it is the obligation of [company] to provide samples of the forms necessary when offering the money transfer service, and the representative does not change the forms without prior written approval from [company] - item 12.3 of the contract.

In the written statement submitted by [company] dated 18.05.2015, on the occasion of the decision of the Personal Data Protection Commission, to [company], the company confirms that the bank is acting as a representative of [company]. [company] is a personal data controller "established" in Austria for the purposes of Art. 4, para. 1 of Directive 95/46/EC and is applicable to and subject to the rules of the Austrian Federal Data Protection Act 2000 ("DSG 2000"). It states that only [company] determines the purposes and the manner in which personal data is processed, which is why it is the controller of personal data for the purposes of Art. 2, b."b" of the Directive.

In view of the established contractual rights and obligations of the parties under the Representation Agreement, the court reasonably concluded that in its relations with the persons who use the money transfer service of [company], [company] has the capacity of a personal data administrator, and [company] - of a personal data processor as defined in § 1, item 3 of the LLPA.

According to the legal definition of § 1, item 3 of the Personal Data Protection Act, "personal data processor" is a natural or legal person, state authority or local self-government body that processes personal data on behalf of the personal data administrator.

In accordance with the requirements of Art. 24, para. 4 of the GDPR, the relationship between the administrator and the processor of personal data is regulated by a written contract, which defines the scope of obligations assigned by the administrator of personal data to the processor and his rights. According to this agreement, [company] does not have the right

to change [company]'s Terms and Conditions, which customers must accept in order to receive the money transfer service.

The responsibility for compliance with legal requirements when processing personal data rests with the personal data controller. In case of violation of the relevant legal rules by the personal data controller, any natural person can refer to the Commission for the Protection of Personal Data or protect their rights in court under the order of Chapter Seven "Appeal against the actions of the personal data controller" of the Protection Act of personal data.

In Art. 24, para. 2 of the GDPR explicitly states that in cases where data processing is not carried out by the administrator, he is obliged to designate a data processor and provide sufficient guarantees for their protection.

The processor of personal data, as well as any person acting under the direction of the administrator or the processor, who has access to personal data, may process them only on the instructions of the administrator, unless otherwise provided by law - Art. 24, para. 6 ЗЗЛД

In this factual and legal situation, the court's conclusion must be shared that since [company], in providing the money transfer service under the representation agreement with [company], acts as an agent and has the capacity of processing personal data, the commission incorrectly attributed to him the duties of a personal data administrator when processing the data of customers using this service.

It is unfoundedly maintained in the cassation appeal that, after the bank is registered as a personal data administrator, in each processing of personal data of individuals, it acts and should be responsible only in this capacity, without taking into account the existing factual and legal circumstances, the power of which has the quality and acts as a processor of personal data. The legislator has clearly distinguished the two legal figures and the volume of rights and obligations with which they are charged. There is no legal obstacle to the same legal entity acting in different situations as a controller of personal data and as a processor of personal data, with the resulting consequences in each of them. In the case discussed, the bank provides the money transfer service in its capacity as a processor of personal data and is liable in that capacity, not as a controller of personal data.

In the context of the above, the conclusion of the deciding court should be accepted as correct and justified, that in the discussed case [company] is not a controller of personal data and cannot be the addressee of the mandatory prescription given by the commission to delete the clause "Protection of personal data data" from the form for receiving a money transfer in relation to third parties who are not customers of the company.

The cassation appellant finds that there is none of the hypotheses that allow the processing of personal data in the absence of the consent of the relevant person, exhaustively specified in Art. 4, para. 1, item 1, 3 - 7 of the GDPR, and the obligations to comply with these requirements are for both the personal data administrator and the personal data processor. This argument also does not find support in the normative framework and cannot be shared.

The considerations of the court are correct, that the requirements for admissibility of the processing of personal data, when there is no consent of the person, established in the norm of Art. 4, para. 1, items 1, 3 - 7 of the GDPR, are applicable to the administrator of personal data, but not to the processor of personal data acting on his behalf. In addition, it should be stated that the money transfer service can only be carried out if each of the sending and receiving parties agrees to the General Terms and Conditions of [company], otherwise it does not acquire the status of a client of the company and, accordingly, its personal data are not processed without her consent.

The understanding regarding compliance with the principles under Art. 2, para. 2, items 2 and 3 of the GDPR: item 2. - to be collected for specific, precisely defined and legal purposes and not to be further processed in a manner incompatible with these purposes; additional processing of personal data for historical, statistical or scientific purposes is permissible, provided that the administrator ensures adequate protection, ensuring that the data is not processed for other purposes, except for the cases expressly provided for in this law; item 3. - be relevant, related to and not exceeding the purposes for which they are processed, which, according to the commission, are violated by [company]:

In Art. 3 of the Labor Code expressly stipulates that the administrator ensures compliance with the requirements of Art. 2, para. 2 ЗЗЛД

It should be pointed out here that the reasons for the Commission's decision did not discuss compliance with the principles under Art. 2, para. 2, items 2 and 3 of the Labor Code in the light of Art. 3 of the GDPR, accordingly, the functions, responsibilities and rights of the personal data controller are not distinguished from those of the personal data processor on his behalf.

The provision of Art. 24, para. 6 of the LLPA, which the commission refers to in the cassation appeal, actually says that the processor of personal data can process them only on the instructions of the administrator, unless otherwise provided by law. In this case, the law does not provide otherwise, and the bank, in its capacity as a representative, processed the personal data of the customers of the money transfer service according to the contractual clauses. Inaccurately and incorrectly in its decision,

the commission discusses the General Terms and Conditions published in the form that is filled out by the customers of the money transfer service of [company] as the General Terms and Conditions of the bank and accordingly draws erroneous legal conclusions about the responsibility of the bank as a personal data administrator for their content.

The Personal Data Act does not provide for independent obligations for the personal data processor, and accordingly, the failure to fulfill such obligations is not a reason to be the addressee of the commission's mandatory prescriptions. All obligations regarding the lawful collection, processing and storage of data are assigned to the administrator, and it is the administrator, in case of non-compliance, who may be the addressee of mandatory prescriptions, be obliged to remedy the committed violations within a time limit and be subject to an administrative penalty, according to Art. . 38, para. 2 ЗЗЛД

In view of the above, the appealed decision of the Administrative Court - Sofia-city is correct, there are no cassation grounds for its annulment, which is why it should be left in force.

In view of the outcome of the dispute before the cassation instance, the Commission for the Protection of Personal Data should pay the defendant [company] the costs incurred before the same in the amount of BGN 150.

We are led by the above, the Supreme Administrative Court, Fifth Department,

RESOLVE:

REMAINS IN FORCE decision No. 2350 of 11.04.2016 by adm. case No. 9337/2014 of the Administrative Court - Sofia-city

ORDERS that the Commission for the Protection of Personal Data pay to [company] the administrative expenses incurred before the present instance in the amount of BGN 150.

The decision is not subject to appeal.

True to the original,

CHAIRMAN:

/p/ Zdravka Shumenska

Secretary:

MEMBERS:

/p/ Galina Karagyozova

/p/ Yulia Kovacheva